IN THE SUPREME COURT OF THE STATE OF NEVADA

AFEWORKI H. GHIRMAI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43244

FILED

NOV 24 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On July 3, 2003, the district court convicted appellant, pursuant to an Alford plea,[1] of two counts of attempted sexual assault. Prior to sentencing, appellant filed a motion to withdraw his plea. After conducting a hearing, the district court denied the motion. The district court sentenced appellant to serve two concurrent terms of thirty to one hundred months in the Nevada State Prison.[2] No direct appeal was taken.

On January 22, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

[1]See North Carolina v. Alford, 400 U.S. 25 (1970).

[2]On October 7, 2003, the district court amended the judgment of conviction to include a provision for lifetime supervision.

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State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel or conduct an evidentiary hearing. On May 7, 2004, the district court denied the petition. This appeal followed.

In his petition, appellant asserted that his guilty plea was not entered knowingly and voluntarily due to the ineffective assistance of counsel. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[3] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[4] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[5] To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness.[6] Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have

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[3]Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

[4]Hubbard, 110 Nev. at 675, 877 P.2d at 521.

[5]State v. Freese, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 272, 721 P.2d at 368.

[6]See Strickland v. Washington, 466 U.S. 668, 697 (1984).

insisted on going to trial.[7] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[8]

First, appellant claimed that his counsel was ineffective and his guilty plea was involuntary because he was not provided an interpreter prior to signing the plea agreement or during his plea canvass. Appellant asserted that because he did not have an interpreter when signing the plea agreement or during the plea canvass he was unable to understand the consequences of his plea. Appellant further asserted that, due to a lack of an interpreter, he was unable to adequately assist and fully understand his counsel.

Appellant's claim that there was a language barrier that prevented him from understanding or participating in the proceedings is belied by the record.[9] At the plea canvass, the following exchange took place:

> THE COURT: How many years of school have you completed?
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> THE DEFENDANT: Ten.
>
> THE COURT: In what country were you educated?
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> THE DEFENDANT: Ethiopia.

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[7]See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

[8]See Strickland, 466 U.S. at 697.

[9]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

THE COURT: And how long have you lived in the U.S.?

THE DEFENDANT: Twenty years.

THE COURT: And you speak English very well. Do you read and write English also?

THE DEFENDANT: Yes, ma'am.

Additionally, appellant acknowledged that he had read and understood the plea agreement before signing it and stated that he had no questions regarding the plea agreement. Finally, upon being questioned about why he was entering an Alford plea, appellant responded that he was entering the plea to avoid the risk of going to trial. Thus, we conclude that the district court did not err in denying appellant's claim.[10]

Second, appellant claimed that his counsel was ineffective and his plea was involuntary because his counsel failed to investigate and develop a defense on his behalf. Appellant failed to demonstrate what information would have been discovered with further investigation that would have altered his decision to enter an Alford plea. Appellant received a significant benefit by entry of his plea. In exchange for entering the Alford plea to two counts of attempted sexual assault, appellant avoided two charges of sexual assault and one charge of battery with intent to commit a crime. Appellant faced significantly more time if he

[10]To the extent that appellant raised this issue independently from his ineffective assistance of counsel claim, we conclude that it is waived. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

went to trial and was convicted of all of the charged offenses. Appellant informed the district court during the plea canvass that entry of the plea was in his best interests. We conclude that appellant failed to demonstrate that his counsel was ineffective or his plea was invalid in this regard.

Third, appellant claimed that his counsel was ineffective and his guilty plea was involuntary because his counsel assured him that he would receive probation and would be able to return home. Based upon our review of the record on appeal, we conclude that the district court did not err in denying this claim. The written plea agreement correctly informed appellant of the potential penalty he faced. The written plea agreement further informed appellant that sentencing decisions were left within the district court's discretion. Further, at the hearing on appellant's motion to withdraw his guilty plea, appellant's counsel informed the court that she did not promise appellant that he would receive probation. Appellant's mere subjective belief about his potential sentence, unsupported by any promise from the State or indication by the court, is insufficient to invalidate his guilty plea as unknowing or involuntary.[11] Thus, appellant failed to demonstrate that his counsel was ineffective or his plea was invalid in this regard.

Fourth, appellant claimed that his counsel was ineffective and his guilty plea was involuntary because his counsel never allowed him to read the plea agreement prior to signing it. Appellant's claim is belied by

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[11]Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

the record.[12] At the plea canvass, appellant acknowledged that he had read and understood the plea agreement before signing it. Thus, the district court did not err in denying this claim.

Fifth, appellant claimed that his counsel was ineffective and his guilty plea was involuntary because there was insufficient evidence to convict him of sexual assault. This claim is also belied by the record.[13] During the plea canvass, the State presented numerous facts which, if proven true, would have been sufficient to convict appellant of sexual assault. Further, as discussed above, appellant indicated that the plea was in his best interests. Thus, the district court did not err in denying this claim.

Sixth, appellant claimed that his counsel was ineffective for failing to argue more strongly on his behalf at the hearing on his motion to withdraw his guilty plea. Appellant has failed to identify what additional argument his counsel could have made that would have altered the outcome of the motion to withdraw guilty plea.[14] Thus, the district court did not err in denying this claim.

Finally, appellant claimed that the district court denied him effective assistance of counsel by failing to appoint new counsel and allowing his previous counsel to represent him at the hearing on his

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[12]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

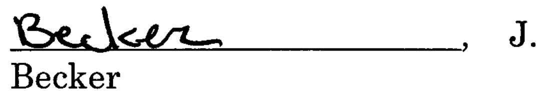
[13]See id.

[14]See id. at 502, 686 P.2d at 225.

motion to withdraw his guilty plea. This claim lacks merit. As previously noted, appellant has failed to demonstrate that his counsel was ineffective. Thus, the district court did not err in declining to appoint new counsel to represent appellant at the motion to withdraw his guilty plea.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[15] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[16]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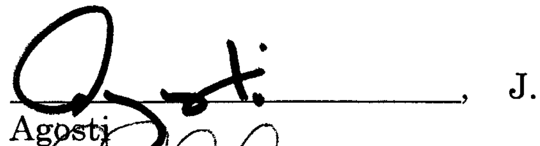
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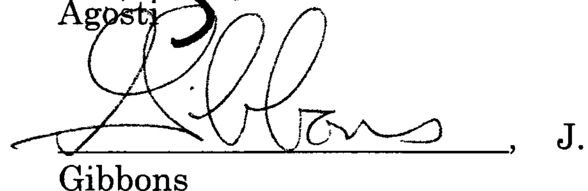
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Gibbons

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[15]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[16]We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted.

cc: Hon. Sally L. Loehrer, District Judge
Afeworki H. Ghirmai
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk