

IN THE SUPREME COURT OF THE STATE OF NEVADA


PAUL BRANDON LEWIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43341

FILED

FEB 15 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying appellant Paul Lewis' post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On November 5, 2002, the State charged Lewis by information with seven counts of embezzlement and nine counts of theft. Pursuant to plea negotiations, Lewis subsequently agreed to plead guilty to the seven embezzlement counts in exchange for the State's agreement to dismiss the remaining nine counts of theft. Lewis signed a written agreement and was thoroughly canvassed by the district court. The district court accepted the plea and thereafter sentenced Lewis to serve five consecutive prison terms of 22 to 96 months and two concurrent prison terms of 22 to 96 months. The district court also imposed fines totaling \$7,000 and ordered Lewis to pay restitution in the amount of \$834,697.06. The written judgment of conviction was entered on August 5, 2003. Lewis did not file a direct appeal.

On March 29, 2004, however, Lewis filed a proper person post-conviction petition for a writ of habeas corpus. The district court declined to appoint counsel or to conduct an evidentiary hearing, and on April 20, 2004, it entered an order denying Lewis' petition, finding that Lewis' claims were either directly belied by the record or were

inappropriately presented in a post-conviction habeas petition. The district court subsequently appointed counsel to assist Lewis with this appeal.

In his petition below, Lewis claimed that: (1) the State and his attorney breached their promise that he would receive concurrent sentences in exchange for his guilty plea; (2) the State violated the plea agreement when it informed the district court at sentencing of Lewis' previous arrest for embezzlement; (3) his attorney was ineffective for informing the district court that he was guilty,¹ for failing to "remove all inappropriate or deceptive procedures that would allow" the district court to impose consecutive sentences, and for not objecting to the State's failure to keep its promise that the sentences would run concurrently, and (4) the district court erred when it allowed the State to breach a promise that induced his guilty plea and failed to notify him during sentencing of his rights to appeal and withdraw his plea.² As noted, the district court found that these claims were directly repelled by the record and dismissed the petition.

On appeal, Lewis contends that the district court erred in denying his petition without an evidentiary hearing. Specifically, he contends that the district court should have construed his petition as a challenge to the validity of his guilty plea, and therefore, he argues, the district court abused its discretion by failing to review the entire record,

¹This allegation of ineffective assistance is without merit because appellant himself solemnly admitted his guilt.

²Lewis also claimed that the attorneys fees charged by his retained counsel were unreasonable. The district court correctly found that this claim was inappropriately raised in a post-conviction habeas petition.

including the transcript of the plea canvass, by not ordering the State to file a response or an answer, and by determining that an evidentiary hearing was unnecessary. We disagree.

Contrary to his contention on appeal, Lewis' petition below did not directly attack the validity of the plea. Rather, the claims asserted in his petition specifically alleged that he received ineffective assistance of counsel and that the plea agreement was breached. These claims were premised on the factual allegation that he was promised he would receive concurrent sentences in exchange for his guilty plea and that the State would not inform the court at sentencing that he had previously been charged with embezzlement.

Moreover, because these claims were directly repelled by the record, the district court was neither required to conduct an evidentiary hearing on the claims or to direct the State to respond to the petition. "A post-conviction habeas petitioner is entitled to an evidentiary hearing 'only if he supports his claims with specific factual allegations that if true would entitle him to relief.' However, if the record belies the petitioner's factual allegations, the petitioner is not entitled to an evidentiary hearing."³

Here, the district court correctly found that the record directly belied Lewis' factual allegations that he was promised concurrent sentences and that the State had agreed not to inform the court at sentencing of prior embezzlement charges against Lewis. Specifically, in the written guilty plea agreement he signed, Lewis agreed that the

³Means v. State, 120 Nev. ___, ___, 103 P.3d 25, 35 (2004) (quoting Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004)).

district court would not be bound at sentencing by any agreement of the parties, that the matter of sentencing was to be determined solely by the district court, that the sentences on each count "may be concurrent or consecutive to each other," that the State would be "free to argue for an appropriate sentence," that the State reserved "the right to present arguments, facts, and/or witnesses at sentencing in support of the plea agreement," and that "any other cases charged or uncharged which are either to be dismissed or not pursued by the State may be considered by the Court at sentencing." Where, as here, a petitioner's claims are directly repelled by the record, there is no statutory impediment to dismissal of the petition without first obtaining an answer from the State or conducting an evidentiary hearing.⁴


We also reject Lewis contention on appeal that the district court erred by not reviewing the transcript of the plea canvass. Under the circumstances of this case, the district court might well have relied on an independent recollection of the plea canvass and recalled that its customary canvass elicited no unusual or problematic responses from Lewis regarding the terms of the plea agreement. Moreover, the State subsequently obtained and submitted to this court in a separate appendix the actual transcript of the plea canvass. Our review of the transcript


⁴NRS 34.745(1)(a) and (b) provide that a district court judge shall either order the State to file a response to a first post-conviction petition or "[t]ake other action that the judge . . . deems appropriate." (Emphasis added.) See also Collins v. State, 91 Nev. 571, 540 P.2d 93 (1975)(where record repelled allegations that defense counsel had promised defendant probation and that prosecutor had breached plea agreement, the district court properly denied petition for post-conviction relief without an evidentiary hearing).

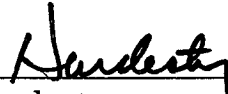
reveals that in response to questions from the district court, Lewis acknowledged that he understood that the district court did not have to follow sentencing recommendations made by the attorneys and that the district court had the authority to require him to serve the sentences consecutively or to run the sentences concurrently. Even assuming that the district court should have reviewed the transcript before denying Lewis' petition, we conclude that Lewis cannot demonstrate that he was prejudiced by the district court's failure to do so.

Having considered Lewis' contentions on appeal and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Steven P. Elliott, District Judge
Scott W. Edwards
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk