

IN THE SUPREME COURT OF THE STATE OF NEVADA

GALEN L. CLAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43622

FILED

OCT 27 2004

ORDER OF AFFIRMANCE

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

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

On December 30, 2003, the district court convicted Clay, pursuant to a guilty plea, of battery with intent to commit a crime. The district court sentenced Clay to serve a term of 48 to 144 months in the Nevada State Prison. This court affirmed Clay's judgment of conviction and sentence on appeal.¹ The remittitur issued on September 9, 2003.

On January 7, 2003, Clay filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On February 8, 2003, the district court entered an order striking Clay's petition, concluding that it lacked jurisdiction to consider the petition while Clay's direct appeal was pending in this court. On appeal, this court noted that

¹Clay v. State, Docket No. 40698 (Order of Affirmance, August 15, 2003).

the district court did not lack jurisdiction to consider Clay's petition and reversed and remanded the matter to the district court.² Thereafter, the State filed an opposition to Clay's petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Clay or to conduct an evidentiary hearing. On May 26, 2004, the district court denied Clay's petition. This appeal followed.

In his petition, Clay raised several claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a guilty plea, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.³ A petitioner must further establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."⁴ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁵

First, Clay contended that his trial counsel was ineffective for failing to inform him of his right to appeal. However, Clay filed a timely

²Clay v. State, Docket No. 41300 (Order of Reversal and Remand, February 18, 2004).

³See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

⁵Strickland, 466 U.S. at 697.

proper person notice of appeal. Therefore, Clay failed to demonstrate that he was prejudiced in this regard.

Second, Clay argued that his counsel was ineffective for meeting with him only one time prior to sentencing. However, Clay failed to adequately articulate how this impacted his decision to enter a guilty plea or how it affected his sentence.⁶ Consequently, we affirm the order of the district court with respect to this claim.

Third, Clay contended that his trial counsel was ineffective for advising him that he would not receive a fair trial because the victim was white. However, Clay failed to demonstrate that he would not have pleaded guilty and would have insisted on going to trial if his counsel had not given him this flawed advice. We further note that in addition to battery with intent to commit a crime, the State charged Clay with home invasion, attempted murder, battery with the use of a deadly weapon, and assault with a deadly weapon. Clay therefore received a substantial benefit in pleading guilty and avoiding a possible conviction of multiple charged offenses. We therefore affirm the order of the district court with respect to this claim.

Fourth, Clay alleged that his trial counsel was ineffective for failing to assist him in procuring witnesses to testify on his behalf at sentencing. However, Clay failed to provide the names of these witnesses or their expected testimony.⁷ He therefore did not establish that the

⁶See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁷See id.

outcome of his sentencing hearing would have been different if witnesses had testified on his behalf, and the district court did not err in denying the claim.

Fifth, Clay contended that his trial counsel was ineffective for failing to give him the police report and other documents concerning the incident until one month after he entered his guilty plea. Clay argued that the police report and victim's statement contained lies. Clay failed to provide any supporting facts for this allegation,⁸ and we therefore conclude that he did not establish that he would have insisted on going to trial if he had received these documents earlier. Consequently, Clay failed to demonstrate that his counsel was ineffective in this regard.

Sixth, Clay argued that his trial counsel was ineffective for failing to address mistakes in his criminal record contained in the pre-sentence investigation report. However, Clay provided no support whatsoever for this claim.⁹ As such, the district court did not err in denying him relief.

Next, Clay argued that his guilty plea was not knowingly and voluntarily entered. A guilty plea is presumptively valid, and Clay carries the burden of establishing that his plea was not entered knowingly and intelligently.¹⁰ In determining the validity of a guilty plea, this court looks

⁸See id.

⁹See id.

¹⁰See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

to the totality of the circumstances.¹¹ This court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.¹²

First, Clay contended that his guilty plea was not knowingly entered because he was not aware of the constitutional rights he was waiving by pleading guilty. However, the guilty plea agreement—which Clay acknowledged having read, understood, and signed—listed the rights that he was waiving by entering a guilty plea. Therefore, under the totality of the circumstances, Clay failed to demonstrate that his guilty plea was invalid.

Second, Clay claimed that his guilty plea was not knowingly entered because he was not aware of the possible sentence he would receive. We conclude that this claim is without merit. The guilty plea agreement provided that Clay would be sentenced to a minimum term of not less than two years and a maximum term of not more than twenty years. Further, during the oral plea canvass, the district court stated that Clay would be sentenced to a term of between two and twenty years, and Clay answered affirmatively when asked if he understood the negotiations. Because the totality of the circumstances demonstrate that Clay was aware of the sentence he would receive, we affirm the order of the district court with respect to this claim.

¹¹State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

¹²Hubbard, 110 Nev. at 675, 877 P.2d at 521.

Third, Clay argued that his guilty plea was not knowingly entered because the district court failed to ensure that his plea was not the product of coercion. However, the signed guilty plea agreement provided that Clay was "not acting under duress or coercion." Moreover, Clay did not include any specific facts to support a claim that he was coerced into pleading guilty.¹³ Consequently, Clay failed to establish that his plea was not entered knowingly and voluntarily, and the district court did not err in denying him relief.

Fourth, Clay contended that his guilty plea was not knowingly entered because he was not aware that he could have pleaded guilty to a lesser charge of battery constituting domestic violence. However, there is absolutely nothing in the record to suggest that the State would have been willing to allow Clay to plead guilty to battery constituting domestic violence rather than battery with intent to commit a crime. As such, Clay did not establish that his guilty plea was unknowingly entered in this regard.


Lastly, Clay alleged that his guilty plea was unknowingly entered because the State altered the possible sentence he would receive only minutes before Clay entered his guilty plea. A review of the record reveals that the guilty plea agreement initially provided that Clay would receive a sentence of between two and ten years; prior to the entry of Clay's plea, however, the State informed Clay's trial counsel that under the facts of the case, the applicable statute required a sentence of between


¹³See Hargrove, 100 Nev. at 502, 686 P.2d at 225.


two and twenty years.¹⁴ The written guilty plea agreement was then altered to reflect this sentencing range. During the oral plea canvass, Clay was informed of the correct sentence, and he acknowledged that he understood this. Despite the State's delayed alteration of the plea agreement, Clay failed to establish that he was not aware of the consequences of his guilty plea.

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

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

¹⁴See NRS 200.400(3).

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

cc: Hon. Donald M. Mosley, District Judge
Galen L. Clay
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk