

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONELL BRYANT A/K/A DONELL
GEROD BRYANT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43629

FILED

FEB 03 2005

ORDER OF AFFIRMANCE

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

This is an 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; Michael A. Cherry, Judge. Appellant was originally convicted, pursuant to a guilty plea, of two counts of robbery and one count of being an ex-felon in possession of a firearm. The district court sentenced appellant to consecutive prison terms of 35 to 60 months for each count of robbery, and to a concurrent prison term of 12 to 60 months for the count of being an ex-felon in possession of a firearm. The judgment of conviction was entered on March 8, 2001. Appellant did not file a direct appeal.

On June 18, 2003, appellant filed a proper person petition for a writ of habeas corpus. The district court appointed counsel, who filed supplemental points and authorities in support of the petition. After conducting an evidentiary hearing, the district court denied the petition.

Initially, we note that appellant's petition was untimely filed.¹ Because appellant failed to establish good cause for the untimely petition, it is procedurally barred, and we explicitly conclude that the petition should have been denied on that basis.² To the extent that appellant's filing can be construed as a motion to withdraw a guilty plea, we note that his motion is barred by the equitable doctrine of laches.³ Nonetheless, we conclude that the district court correctly determined that appellant's petition lacked merit, and we affirm the district court's ruling on that separate, independent ground.⁴

Appellant first contends that the district court should have allowed him to withdraw his plea because no transcript of the plea canvass exists. In determining the validity of a guilty plea, this court

¹See NRS 34.726(1) (requiring that a petition challenging the validity of the judgment be filed within 1 year of the entry of the judgment of conviction).

²See generally Harris v. Reed, 489 U.S. 255, 263 (1989) (holding that procedural default does not bar federal review of claim on the merits unless state court rendering judgment relied "clearly and expressly" on procedural bar) (citation omitted).

³See Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000).

⁴See Harris, 489 U.S. at 264 n.10 (holding that as long as the state court explicitly invokes a state procedural bar, "a state court need not fear reaching the merits of a federal claim in an alternative holding.").

looks to the totality of the circumstances.⁵ Although a transcript of the plea canvass was unavailable in the instant case, the district judge considered: the record as reconstructed by the parties; the police report; the transcript of appellant's waiver of the preliminary hearing; the court minutes from the entry of the plea; the guilty plea agreement; the presentence investigation report; and the testimony of counsel who represented appellant at the time he entered his plea. Appellant cites no authority for the proposition that the unavailability of a transcript of the plea canvass is sufficient to invalidate the guilty plea. Moreover, we conclude that appellant has failed to meet his burden of showing that his guilty plea was not entered knowingly and voluntarily.⁶ Accordingly, we cannot conclude that the district court clearly abused its discretion in concluding that appellant's plea was validly entered.

Appellant next contends that the district court erroneously found that counsel was not ineffective. In particular, appellant argues that counsel was ineffective for failing to investigate the circumstances of the photographic lineup, appellant's confession, and the fact that appellant was suffering from a gunshot wound at the time of the robbery and would therefore not have been able to participate in the robbery.

⁵State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant v. State, 102 Nev. 268, 271, 721 P.2d 364, 367 (1986).

⁶See Bryant, 102 Nev. at 272, 721 P.2d at 368 (a guilty plea is presumptively valid, and the defendant has the burden to establish that the plea was not entered knowingly and intelligently).

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced the defense.⁷ To establish prejudice where the judgment of conviction is based on a guilty plea, the petitioner must show that but for trial counsel's mistakes, there is a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial.⁸

In the instant case, appellant was positively identified by one of the victims of the robbery, he confessed to the police, and he admitted guilt in the presentence investigation report. Additionally, appellant received a substantial benefit by pleading guilty, because the State dropped one count of robbery, one count of burglary, one count of conspiracy, and one count of grand larceny auto. The State also dropped the deadly weapon enhancements from the remaining two robbery counts. We conclude that appellant has not demonstrated that he would have insisted on going to trial, had counsel conducted a more thorough investigation.


⁷Strickland v. Washington, 466 U.S. 668, 687 (1984); accord Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

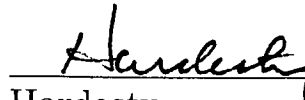
⁸Hill v. Lockhart, 474 U.S. 52, 59 (1985); accord Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, C. J.
Becker


_____, J.
Rose


_____, J.
Hardesty

cc: Hon. Michael A. Cherry, District Judge
J. Chip Siegel, Chtd.
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk