

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE DOMINGO GOMEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43908

FILED

MAY 19 2005

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

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

On February 23, 2004, the district court convicted Gomez, pursuant to a guilty plea, of possession of a stolen vehicle (count I), trafficking in a controlled substance (count II), possession of a controlled substance (count III), child abuse and neglect (count IV), battery on an officer (gross misdemeanor) (count V), and failure to stop on signal of police officer (count VI). The district court sentenced Gomez to serve a term of 48 to 156 months in the Nevada State Prison for count II, a consecutive term of 28 to 72 months for count VI, and lesser concurrent terms for the remaining counts. Gomez did not file a direct appeal.

On June 9, 2004, Gomez filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Gomez or to conduct an evidentiary hearing. On September 2, 2004, the district court denied Gomez's petition. This appeal followed.

In his petition, Gomez 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.¹ 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."² The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.³

First, Gomez contended that his trial counsel was ineffective for failing to visit or call him. Gomez alleged that he called his attorney numerous times, but was only able to speak with him briefly in court. However, Gomez failed to articulate how he was prejudiced by his counsel's failure to visit or call him.⁴ Therefore, the district court did not err in denying this claim.

Second, Gomez claimed that his trial counsel was ineffective for failing to object to the violation of his right to a speedy trial. A review of the record reveals that Gomez was arraigned and invoked his right to a trial within 60 days on August 20, 2003.⁵ Gomez's trial commenced on October 20, 2003, and he entered his guilty plea the following day.

¹See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

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

³Strickland, 466 U.S. at 697.

⁴See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁵See NRS 178.556(1).

Therefore, the record belies any claim that Gomez's right to a trial within 60 days of arraignment was violated.⁶

Further, to the extent that Gomez argued that his Sixth Amendment right to a speedy trial was violated by the three and a half month delay between the entry of his guilty plea and sentencing, we reject this contention. Assuming the Sixth Amendment applies to sentencing,⁷ Gomez failed to demonstrate that the delay was unnecessarily long or that he was prejudiced in any way by the delay.⁸ Therefore, Gomez did not establish that his counsel acted unreasonably in allowing his sentencing hearing to occur several months after the entry of his plea. Consequently, we affirm the district court's denial of this claim.⁹

Third, Gomez alleged that his trial counsel was ineffective for failing to advise him of a plea offer by the State. Gomez specifically

⁶See Hargrove v. State, 100 Nev. at 503, 686 P.2d at 225.

⁷See Prince v. State, 118 Nev. 634, 640, 55 P.3d 947, 951 (2002).

⁸See Barker v. Wingo, 407 U.S. 514, 530 (1972) (holding that the following four factors should be examined when evaluating whether a defendant's Sixth Amendment right to a speedy trial has been violated: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant").

⁹Gomez additionally raised a speedy trial claim independently from his ineffective assistance of counsel claim. By entering a guilty plea, Gomez waived all errors that occurred prior to the entry of his plea. See Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975). Further, to the extent that Gomez argued that the delay in sentencing violated his right to a speedy trial, we note that this claim is outside the scope of a post-conviction petition for a writ of habeas corpus when the conviction is the result of a guilty plea. See NRS 34.810(1)(a).

argued that the State offered to dismiss the remaining charges against him if he pleaded guilty to one count of drug trafficking.

Gomez is entitled to an evidentiary hearing if he raises a claim, which if true, would entitle him to relief, and if his claim is not belied by the record.¹⁰ We conclude that Gomez provided sufficient facts to warrant an evidentiary hearing on this claim. Therefore, we reverse the district court's order in part and remand the matter for an evidentiary hearing to determine whether the State made a pre-trial plea offer, and if so, whether Gomez's trial counsel was ineffective for failing to fully and adequately communicate the offer to him.

Fourth, Gomez contended that his trial counsel was ineffective for failing to file a motion to withdraw his guilty plea. However, Gomez did not demonstrate that his counsel was aware of his desire to withdraw his guilty plea, or that there existed a reasonable basis on which to withdraw his plea.¹¹ As such, the district court did not err in denying this claim.

Next, Gomez claimed that his guilty plea was not entered knowingly and voluntarily.¹² A guilty plea is presumptively valid, and Gomez carries the burden of establishing that his plea was not entered

¹⁰See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

¹¹See NRS 176.165.

¹²To the extent that Gomez raised any of the following claims in the context of ineffective assistance of counsel, we conclude that for the reasons discussed below, he failed to establish that his counsel was ineffective. See Strickland, 466 U.S. 668.

knowingly and intelligently.¹³ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.¹⁴ We will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.¹⁵

First, Gomez contended that his guilty plea was not entered knowingly because he does not speak fluent English and an interpreter was not present throughout the proceedings. However, the record reveals that a court interpreter was present during all of the court proceedings at which Gomez was in attendance. During the plea canvass, Gomez answered affirmatively when asked by the district court whether the guilty plea agreement had been translated into Spanish, and he acknowledged that he understood the terms of the plea agreement. Therefore, the district court did not err in denying this claim.

Second, Gomez claimed that his guilty plea was unknowingly entered because he was not aware of the maximum sentence he could receive if he pleaded guilty. However, the written guilty plea agreement—which Gomez acknowledged was translated into Spanish—provided the minimum and maximum sentence Gomez could receive on each of the six counts, and further informed Gomez that his sentences could be run consecutively. Additionally, the district court informed Gomez of the possible penalty for each count to which he was pleading guilty and Gomez

¹³Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).


¹⁴State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

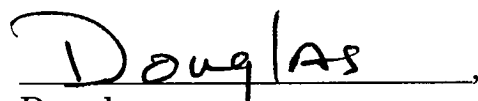
¹⁵Hubbard, 110 Nev. at 675, 877 P.2d at 521.

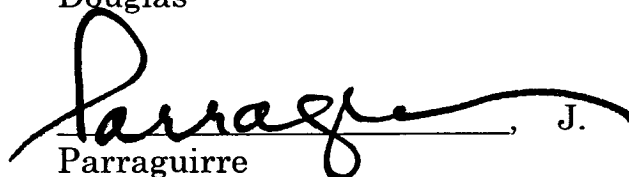
stated that he understood. Consequently, Gomez failed to establish that he was not aware of the maximum sentence he could receive if he pleaded guilty.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.¹⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹⁷


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

¹⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁷We have reviewed all documents that Gomez has submitted in proper person to the clerk of this court in this matter, and conclude that he is only entitled to the relief described herein. To the extent that Gomez has attempted to present claims or facts in those submissions that were not previously presented in the proceedings below, we have declined to consider them in the first instance. This order constitutes our final disposition of this appeal. Any subsequent appeal from an order of the district court denying Gomez's ineffective assistance of counsel claim shall be docketed as a new matter.

cc: Hon. David Wall, District Judge
Jose Domingo Gomez
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk