

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES T. BENNETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44115

FILED

FEB 15 2005

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 James T. Bennett's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

On September 10, 2003, the district court convicted Bennett, pursuant to a guilty plea, of robbery (count I), grand larceny auto (count II) and attempted sexual assault (count III). The district court sentenced Bennett to serve a term of 35 to 156 months in the Nevada State Prison for the robbery conviction. The district court also sentenced Bennett to a term of 12 to 48 months for the grand larceny auto conviction and a term of 84 to 210 months for the attempted sexual assault conviction. All sentences were imposed to run concurrently. The district court further ordered that the sentence in this case run consecutively to district court case no. C150868. No direct appeal was taken.

On May 4, 2004, Bennett 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 Bennett or to conduct an evidentiary hearing. On September 13, 2004, the district court denied Bennett's petition. This appeal followed.

Bennett asserted several claims in his petition. Specifically, Bennett claimed that his guilty plea was involuntary because his counsel coerced him into pleading guilty and because of an apparent deterioration in his relationship with counsel. Bennett also contended that the district court erred in failing to investigate conflicts he had with his counsel. A guilty plea is presumptively valid, and Bennett carries the burden of establishing that the plea was not entered knowingly and intelligently.¹ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.² Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.³

Based on our review of the record, we conclude that Bennett failed to demonstrate that his alleged strained relationship with counsel affected the voluntariness of his plea. In fact, the record indicates that

¹Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

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

³Hubbard, 110 Nev. at 675, 877 P.2d at 521.

Bennett ultimately withdrew his complaint against his counsel, announcing that his counsel was "doing a good job." Upon the district court's inquiry, Bennett indicated that he was comfortable with his counsel's continued representation. In addition, Bennett did not demonstrate that his counsel coerced him into pleading guilty. Bennett acknowledged in his signed plea agreement that he was not acting under coercion or duress. Additionally, Bennett acknowledged during the plea canvass that he was pleading guilty of his own free will. Accordingly, we conclude that Bennett failed to establish that his plea was involuntary in this regard.⁴

Bennett also claimed that his counsel was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, Bennett must demonstrate that his counsel's performance fell below an objective standard of reasonableness.⁵ Further, Bennett must demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty

⁴Bennett's claim that the district court erred in refusing to allow him to withdraw his guilty plea was a matter more appropriate for a direct appeal and thus, we conclude that Bennett waived this issue. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

⁵Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

and would have insisted on going to trial.⁶ The district court may dispose of a claim if Bennett makes an insufficient showing on either prong.⁷

First, Bennett asserted that his counsel was ineffective for failing to conduct a thorough and proper investigation of his case. Specifically, he contended that his counsel should have interviewed the victim and compelled her to undergo a psychological examination to determine the truthfulness of her allegations against Bennett. Bennett provided no support, other than his bare allegation, that his counsel did not interview the victim.⁸ The record indicates that counsel thoroughly cross-examined the victim at the preliminary hearing. Further, even assuming that Bennett's counsel did not interview the victim, Bennett did not explain what additional information he believed an interview would have revealed. Additionally, Bennett provided no authority or support whatsoever establishing that his counsel could compel the victim to undergo a psychological evaluation or that such an evaluation, even if conducted, would have been helpful to his defense. Accordingly, we conclude that Bennett failed to demonstrate that his counsel was ineffective in this regard.

⁶See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁷See Strickland, 466 U.S. at 697.

⁸See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Second, Bennett argued that his counsel was ineffective for failing to file a motion to withdraw his guilty plea after sentencing. Bennett asserted that he should have been allowed to withdraw his guilty plea because his counsel had advised him that he would be sentenced to a term of two to twenty years, and thus be eligible for parole after two years. At sentencing, the district court informed Bennett that he was required to serve seven years before being eligible for parole. Bennett then announced that he wished to withdraw his plea. Counsel advised the district court of his intent to file a motion to withdraw Bennett's guilty plea. However, the record indicates that no such motion was filed.

We conclude that Bennett suffered no prejudice from counsel's failure to file a motion to withdraw his guilty plea. Bennett was properly advised of the possible range of punishment in his plea agreement, which Bennett acknowledged that he read and understood. A district court may set aside a judgment of conviction and permit a defendant to withdraw his guilty plea after sentencing to correct a manifest injustice.⁹ Bennett's mere subjective belief as to his potential sentence, or hope of leniency, unsupported by a promise from State or indication by the court, is insufficient to invalidate his guilty plea as involuntary or unknowing.¹⁰ Therefore, Bennett failed to articulate a basis upon which to withdraw his plea. Moreover, Bennett received a substantial benefit by pleading guilty


⁹See NRS 176.165.


¹⁰See Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975).

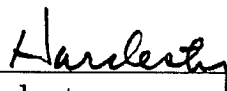
to three charges, rather than facing the possibility of a conviction of all charged counts.¹¹ Accordingly, we conclude that Bennett failed to demonstrate that his counsel was ineffective for failing to file a motion to withdraw his guilty plea.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Bennett is not entitled to relief and that briefing and oral argument are unwarranted.¹² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

¹¹Bennett was charged with first-degree kidnapping with the use of a deadly weapon, robbery with the use of a deadly weapon, grand larceny auto with the use of a deadly weapon and two counts of sexual assault with the use of a deadly weapon.

¹²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Valorie Vega, District Judge
James T. Bennett
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk