

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTHUR LEE CARTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44127

FILED

JAN 25 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 Arthur Lee Carter's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On December 12, 2003, the district court convicted Carter, pursuant to an Alford¹ plea, of robbery with the use of a deadly weapon, victim 65 years of age or older. The district court sentenced Carter to serve 30 to 90 months in the Nevada State Prison, plus an equal and consecutive term for the deadly weapon enhancement. This court dismissed Carter's untimely appeal from his judgment of conviction and sentence for lack of jurisdiction.²

On July 6, 2004, Carter 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 Carter or to conduct an

¹North Carolina v. Alford, 400 U.S. 25 (1970).

²Carter v. State, Docket No. 43498 (Order Dismissing Appeal, July 12, 2004).

evidentiary hearing. On September 20, 2004, the district court denied Carter's petition. This appeal followed.

Carter raised several claims regarding the voluntariness of his plea. A guilty plea is presumptively valid, and Carter carries the burden of establishing that the plea was not entered knowingly and intelligently.³ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.⁴ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.⁵

First, it appears that Carter claimed that his plea was involuntary because "new changes" to the habitual criminal statute increased his punishment beyond that contemplated in his plea agreement. However, the State agreed to forbear seeking an habitual criminal adjudication in exchange for Carter's guilty plea.⁶ Therefore, habitual criminal status was not implicated in this case. Carter further argued that the deadly weapon enhancement was a separate offense for which he was not advised of the consequences. The deadly weapon enhancement does not constitute a separate offense, but rather an

³Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

⁴State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

⁵Hubbard, 110 Nev. at 675, 877 P.2d at 521.

⁶Also pursuant to the plea agreement, the State agreed to dismiss a charge of burglary while in possession of a deadly weapon.

additional penalty.⁷ Moreover, Carter's claim that he did not understand the consequences of the deadly weapon enhancement is belied by the record.⁸ Carter's signed plea agreement advised him that the district court must sentence him to a term of not less than 2 years and not more than 15 years, plus an equal and consecutive term for the deadly weapon enhancement. Accordingly, we conclude that Carter's plea was not involuntary in this regard.

Second, Carter apparently argued that his plea was involuntary because there was insufficient evidence to support his Alford⁹ plea. However, pursuant to his guilty plea, Carter agreed to relieve the State of its burden of proving that he committed the charged offense beyond a reasonable doubt. "An Alford plea is a guilty plea accompanied by a denial of the facts constituting the offense."¹⁰ Protestations of innocence are constitutionally acceptable when a defendant intelligently concludes that his best interests are served by entering a guilty plea and the record before the district court contains strong evidence of actual guilt.¹¹ An Alford plea is "constitutionally sound if it is knowingly entered for a valid reason, for instance, to avoid the possibility of a harsher penalty."¹²

⁷See NRS 193.165(2).

⁸See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

⁹See North Carolina v. Alford, 400 U.S. 25 (1970).

¹⁰Tiger v. State, 98 Nev. 555, 558, 654 P.2d 1031, 1033 (1982).

¹¹See Lyons v. State, 105 Nev. 317, 323, 775 P.2d 219, 223 (1989).

¹²Tiger, 98 Nev. at 558, 654 P.2d at 1033.

Here, the State made a proffer of the evidence it would have produced at trial, Carter acknowledged that he understood the charge against him and that he desired to enter an Alford plea to avoid a harsher sentence. In his signed plea agreement, Carter acknowledged that he was entering his plea voluntarily with the advice of counsel, that he understood the nature of the offense, that he understood the consequences of his plea, and that he understood his waiver of rights. Carter further acknowledged in the plea agreement that he wished to enter an Alford plea to avoid a harsher penalty. Accordingly, we conclude that Carter failed to demonstrate any deficiency rendering his plea involuntary.

Third, Carter alleged that his plea was involuntary because he was punished more severely for entering an Alford plea and not admitting his guilt. "Imposition of a harsher sentence based upon the defendant's exercise of his constitutional rights is an abuse of discretion and the sentence cannot stand."¹³ However, Carter provided no factual support whatsoever for this claim, and there is no evidence in the record suggesting that the district court sentenced him more harshly because he pleaded guilty pursuant to Alford.¹⁴ Carter's sentence fell within the permissible range of punishment for robbery with the use of a deadly weapon.¹⁵ Accordingly, we conclude that Carter's plea was not involuntary in this regard.

Fourth, Carter alleged that his plea was involuntary because he believed that he would be eligible for parole after two years. However,

¹³Bushnell v. State, 97 Nev. 591, 593, 637 P.2d 529, 531 (1981).

¹⁴See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

¹⁵See NRS 200.380; NRS 193.165.

Carter provided no factual support for this allegation.¹⁶ The plea agreement correctly informed Carter of the possible range of his sentence. Carter's mere subjective belief as to his potential sentence, or hope of leniency, unsupported by any promise from the State or indication by the court, is insufficient to invalidate his guilty plea as involuntary or unknowing.¹⁷ Therefore, we conclude that Carter's plea was not involuntary in this regard.

Finally, Carter claimed that his plea was involuntary because the offense for which he was charged subjected him to double jeopardy. Specifically, Carter argued that he was punished for both battery and robbery because the State used Carter's beating of the victim to substantiate the robbery charge. However, Carter was convicted of the sole charge of robbery with the use of a deadly weapon, victim 65 years or older. He was not charged with or convicted of battery. Therefore, double jeopardy was not implicated in this case.¹⁸ Consequently, we conclude that Carter's plea was not involuntary for this reason.

Carter also alleged 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, Carter must demonstrate that his counsel's performance fell below an objective standard of reasonableness.¹⁹ Further, Carter must demonstrate a reasonable

¹⁶See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

¹⁷See Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975).

¹⁸See Desimone v. State, 111 Nev. 1221, 904 P.2d 1 (1995).

¹⁹See Strickland v. Washington, 466 U.S. 668 (1984).


probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.²⁰

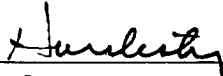
Specifically, Carter argued that his counsel failed to answer his questions regarding his guilty plea and its consequences to his satisfaction. However, Carter did not explain what lingering questions he desired his counsel to answer. As he failed to substantiate his claim, we conclude that Carter did not demonstrate that his counsel was ineffective in advising him about his guilty plea.²¹

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Carter is not entitled to relief and that briefing and oral argument are unwarranted.²² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Becker


_____, J.
Rose


_____, J.
Hardesty

²⁰See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

²¹See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

²²See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Joseph T. Bonaventure, District Judge
Arthur Lee Carter
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk