IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRT WILLIAM BASSETT,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Respondent.

No. 44566

FILED

JUN 2 0 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

On April 29, 2003, the district court convicted appellant Kirt Bassett, pursuant to a guilty plea, of first-degree murder. The district court sentenced Bassett to a term of life imprisonment with the possibility of parole after 20 years. No direct appeal was taken. On March 24, 2004, Bassett filed a post-conviction petition for a writ of habeas corpus. The district court conducted an evidentiary hearing and on December 22, 2004, denied Bassett's petition.[1] This appeal follows.

Bassett begins by raising three claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient and that the petitioner was prejudiced

[1]It is not evident that a copy of the district court's order was served on Bassett. See NRS 34.830(2) (providing that a copy of an order dismissing the petition or denying relief must be served on the petitioner and his counsel).

by counsel's performance.[2] To show prejudice, a petitioner who has entered a guilty plea must demonstrate "'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'"[3] The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong.[4]

First, Bassett claims that trial counsel was ineffective because he failed to advise Bassett of his right to appeal. However, "[t]here is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal."[5] Bassett does not claim that he inquired about an appeal or that he might have benefited from advice about an appeal because he has a claim with a reasonable likelihood of success on direct appeal.[6] The written plea agreement, which Bassett acknowledged that he understood during the plea canvass, informed him of his limited right to a direct appeal.[7] And in an affidavit, Bassett's trial counsel, Frederick Leeds, stated "[n]ot only was Bassett informed of his limited appeal rights in the plea agreement, he and I discussed his appeal rights as well."[8] Accordingly, we conclude that counsel was not deficient and Bassett was not deprived of an appeal.

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[2]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

[3]Id. at 988, 923 P.2d at 1107 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

[4]See Strickland, 466 U.S. at 697.

[5]Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

[6]See id.

[7]See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

[8]We have previously held that a petitioner's statutory rights are violated when the district court improperly expands the record, by

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Second, Bassett claims that trial counsel was ineffective because he failed to preserve federal constitutional issues for appeal. However, Bassett fails to state which issues counsel failed to preserve and demonstrate that these issues had a reasonable probability of success on appeal. Moreover, Bassett fails to show that but for counsel's failure to preserve these issues he would not have pleaded guilty and would have insisted on going to trial. Accordingly, we conclude that Bassett has not alleged sufficient facts that, if true, would entitle him to relief on this claim.[9]

Third, Bassett claims that trial counsel was ineffective because he failed to investigate and prepare a defense. Bassett contends that his wife attacked him with a knife and that he acted in self-defense. Trial counsel has an obligation to conduct a reasonable investigation or make a determination that a particular investigation is unnecessary.[10] Our review of the record reveals that trial counsel conducted a reasonable investigation and prepared a possible defense. In his affidavit, Leeds states that after considering his discussions with Bassett, Bassett's incriminating statements to the police, the autopsy results, the crime

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. . . continued
accepting affidavits refuting claims presented in a petition, without first deciding to conduct an evidentiary hearing. Mann v. State, 118 Nev. 351, 355, 46 P.3d 1228, 1231 (2002). Here, the district court expanded the record by accepting Leeds's affidavit prior to conducting an evidentiary hearing. However, in light of the fact that the district court held an evidentiary hearing, we conclude that the error was harmless and that the district court could properly consider the evidence presented in Leeds's affidavit.

[9]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[10]Colwell v. State, 118 Nev. 807, 813, 59 P.3d 463, 467 (2003) (citing Strickland, 466 U.S. at 691).

scene video, and the victim's history of violence he concluded that Bassett was unlikely to prevail on a theory of self-defense. Nonetheless, had the case gone to trial, Leeds stated that he would have asserted self-defense. Bassett does not state what information would have been revealed as a result of additional investigation and how that information would have affected his decision to plead guilty. Accordingly, we conclude that he failed to demonstrate that counsel was ineffective.

Next, Bassett contends that his guilty plea is invalid because it was not entered knowingly, intelligently, and voluntarily. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[11] Further, this court will not reverse a district court's determination concerning the validity of a plea absent an abuse of discretion.[12] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[13] Bassett presents four claims in support of his contention.

First, Bassett claims that the State threatened to pursue habitual criminal charges if he did not plead guilty. We have previously held that "'a defendant's desire to plead guilty to an original charge in order to avoid the threat of the habitual criminal statute will not give rise

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[11]Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986) superseded by statute on other grounds as recognized by Hart v. State, 116 Nev. 558, 562 n.3, 1 P.3d 969, 971 n.3 (2000); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

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

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

to a claim of coercion.'"[14] Accordingly, we conclude that Bassett failed to carry his burden of establishing that his plea was a product of coercion.

Second, Bassett claims that he was under medication at the time he entered his plea. Bassett's claim is belied by the record.[15] In the written plea agreement, Bassett stated that he was "not now under the influence of intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea." And during the plea canvass, Bassett informed the district court that he was in full control of his mind and that he was not taking any medications. However, even if Bassett was on medication, the record fails to reveal that his appreciation of the events of the plea negotiation and plea canvass were diminished because of the medication.[16] Accordingly, we conclude that Bassett failed to carry his burden of establishing that the effects of any medication prevented him from knowingly entering his plea.

Third, Bassett claims that the district court participated in the plea negotiations. "The constitution does not forbid all participation by the judge in the plea negotiation process. Only where the judge's conduct is improperly coercive will we consider affording a defendant an

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[14]Hargrove, 100 Nev. at 503, 686 P.2d at 225-26 (quoting Schmidt v. State, 94 Nev. 665, 667, 584 P.2d 695, 696 (1978)).

[15]See id. at 503, 686 P.2d at 225 (holding that a petitioner is not entitled to post-conviction relief if his factual allegations are belied by the record).

[16]Iverson v. State, 107 Nev. 94, 98, 807 P.2d 1372, 1374-75 (1991) ("When the record fails to reveal that a defendant's appreciation of the events of trial was diminished because of medication, the result below will not be disturbed.").

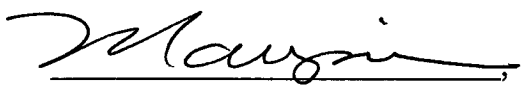
cc: Hon. J. Michael Memeo, District Judge
Matthew J. Stermitz
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk

opportunity to withdraw his or her plea."[17] Bassett does not specify how the district court participated in the plea negotiations, and nothing in the record suggests that his will was overborne, that he was unable to weigh alternatives, or that the district court abdicated its duty as a "'neutral arbiter of the criminal prosecution.'"[18] Accordingly, we conclude that Bassett failed to carry his burden of establishing that his plea was improperly induced.

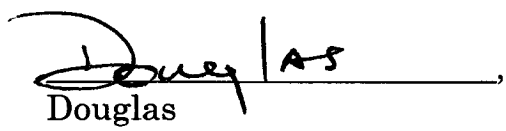
Finally, Bassett claims that the State breached the plea agreement by not transferring him to Lander County as allegedly promised. However, this claim is repelled by the record.

Bassett has failed to demonstrate that the district court erred in denying his post-conviction petition for a writ of habeas corpus. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Maupin



_____, J.
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[17]Standley v. Warden, 115 Nev. 333, 337-38, 990 P.2d 783, 785 (1999).

[18]Id. at 337, 990 P.2d at 785 (quoting United States v. Bruce, 976 F.2d 552, 557 (9th Cir. 1992)); See also Stocks v. Warden, 86 Nev. 758, 761, 476 P.2d 469, 471 (1970).