

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAFAEL FREGOSO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44778

**FILED**

JUN 08 2005

*[Signature]*  
CLERK OF SUPREME COURT  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant Rafael Fregoso's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

On February 27, 2004, the district court convicted Fregoso, pursuant to a guilty plea, of robbery with the use of a deadly weapon. The district court sentenced Fregoso to serve two consecutive terms of 24 to 120 months in the Nevada State Prison. Fregoso did not file a direct appeal.

On October 11, 2004, Fregoso 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 Fregoso or to conduct an evidentiary hearing. On February 8, 2005, the district court denied Fregoso's petition. This appeal followed.

In his petition, Fregoso contended that his trial counsel was ineffective for failing to inform him of his right to file an appeal. "[T]here is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal," unless

the defendant inquires about a direct appeal or there exists a direct appeal claim that has a reasonable likelihood of success.<sup>1</sup> The burden is on the defendant to indicate to his attorney that he wishes to pursue an appeal.<sup>2</sup> Here, Fregoso did not allege that he asked his trial counsel to file an appeal; nor did Fregoso establish the existence of an issue that had a reasonable probability of success on appeal. Therefore, the district court did not err in denying Fregoso relief on this claim.

Next, Fregoso claimed that his guilty plea was not entered knowingly and voluntarily. A guilty plea is presumptively valid, and Fregoso carries the burden of establishing that his plea was not entered knowingly and intelligently.<sup>3</sup> In determining the validity of a guilty plea, this court looks to the totality of the circumstances.<sup>4</sup> We will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.<sup>5</sup>

First, Fregoso alleged that his plea was unknowingly entered because the district court did not advise him of the constitutional rights he was waiving by entering a guilty plea. A review of Fregoso's written guilty plea agreement—which he acknowledged having read, understood, and signed—contained a lengthy section listing the constitutional rights he

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<sup>1</sup>Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

<sup>2</sup>Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

<sup>3</sup>Bryant 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).

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

<sup>5</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

was waiving by entering his guilty plea. Although the district court did not specifically question Fregoso about his waiver of these rights during the plea canvass, we conclude that Fregoso did not establish that under the totality of the circumstances, his guilty plea was unknowingly entered. We therefore affirm the district court's denial of this claim.

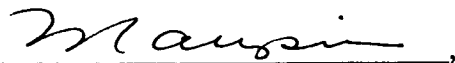
Second, Fregoso contended that his guilty plea was unknowingly entered because he was not advised that he would receive a sentencing enhancement for using a deadly weapon in the commission of robbery. We conclude that Fregoso failed to demonstrate that his guilty plea was unknowingly entered. Fregoso's written guilty plea agreement stated that he was pleading guilty to robbery with the use of a deadly weapon. Further, the agreement provided that as a consequence of his guilty plea

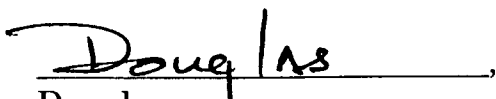
the Court must sentence me to imprisonment in the Nevada Department of Corrections for a minimum term of not less than TWO (2) years and a maximum term of not more than FIFTEEN (15) years. . . . with an equal consecutive term of . . . not less than TWO (2) years and a maximum term of not more than FIFTEEN (15) years for the use of a deadly weapon.

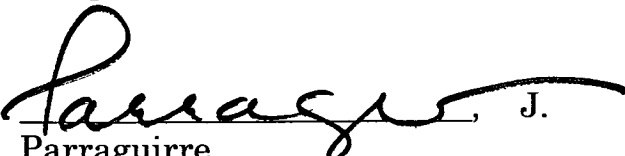
Fregoso acknowledged having read, understood, and signed the written guilty plea agreement, and stated that he did not have any questions prior to entering his plea. Consequently, the district court did not err in denying Fregoso relief on this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Fregoso is not entitled to relief and that briefing and oral argument are unwarranted.<sup>6</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Maupin

 J.  
Douglas

 J.  
Parraguirre

cc: Hon. Stewart L. Bell, District Judge  
Rafael Fregoso  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>6</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).