

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES JAY RICEMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45084

FILED

AUG 24 2005

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On August 9, 2001, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary while in possession of a firearm and one count of robbery. The district court sentenced appellant to serve two concurrent terms of sixty to one hundred and fifty months in the Nevada State Prison. No direct appeal was taken.

On August 23, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss the petition on the ground that it was untimely filed. Appellant filed a response to the motion. On December 9, 2002, the district court dismissed the petition as procedurally time barred. This court reversed the order of the district court on appeal and remanded the matter to the district court to consider appellant's good cause argument raised in his response.¹ The district court determined that

¹Riceman v. State, Docket No. 40962 (Order of Reversal and Remand, December 10, 2003).

appellant had demonstrated good cause to excuse the untimely filing of his petition. On April 27, 2005, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.²

In his petition, appellant claimed that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness and a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.³ The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.⁴ A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.⁵

²The record on appeal contains an affidavit prepared by trial counsel prior to the evidentiary hearing. This court has held that a petitioner's statutory rights are violated when the district court improperly expands the record with an affidavit presented by the State refuting the claims in the petition in lieu of conducting an evidentiary hearing when an evidentiary hearing is required. Mann v. State, 118 Nev. 351, 46 P.3d 1228 (2002). We conclude that the appellant suffered no prejudice with the filing of the affidavit prior to the evidentiary hearing because the district court conducted an evidentiary hearing on his claims and appellant was provided an opportunity to cross-examine his former trial counsel. We further conclude that the district court did not abuse its discretion in declining to consider claims not raised in the August 23, 2002 petition.

³See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁴Strickland v. Washington, 466 U.S. 668, 697 (1984).

⁵Means v. State, 120 Nev. ___, 103 P.3d 25, 33 (2004).

First, appellant claimed that his trial counsel was ineffective for failing to investigate possible defenses and advising appellant to enter a guilty plea without any investigation. We conclude that appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel testified that they discussed possible defenses prior to accepting the plea negotiations and that she believed a guilty plea was in appellant's best interests. Appellant failed to indicate what investigation should have been performed and how additional investigation would have made a difference to his decision to enter a guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for informing him that he would receive the same sentence as his co-defendant. He claimed that his co-defendant received a lighter sentence despite the fact that he had a similar criminal record. We conclude that appellant failed to demonstrate that he was prejudiced. Appellant's trial counsel testified at the evidentiary hearing that she did not promise appellant any particular sentence. The guilty plea agreement informed appellant of the potential sentences he faced by entry of his guilty plea. Appellant entered a guilty plea to both burglary while in possession of a deadly weapon and robbery, while his co-defendant entered a guilty plea only to the crime of robbery. Thus, the potential sentences were different for each defendant. Further, appellant's conduct was different from that of his co-defendant—the police report indicates that appellant entered the bar, showed the bartender a gun tucked in his waistband, and robbed the bartender while the co-defendant was the driver of the getaway vehicle and acted as a lookout. Appellant indicated

in the written guilty plea agreement, which he acknowledged reading and signing, that he was not promised anything in exchange for his guilty plea. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea.⁶ Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel erroneously advised him that he was eligible for probation. He claimed that because of a prior burglary conviction that he was not eligible for probation.⁷ Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The offenses to which appellant pleaded guilty were probation eligible.⁸ Nothing in the record supports appellant's assertion that he was not otherwise eligible for probation. Thus, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for leading him to believe that a guilty plea was in his best interests because additional counts would be dismissed. Appellant claimed that there were no additional counts to dismiss. Appellant further argued that he could not have been convicted of both conspiracy to commit robbery and robbery. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. In exchange for his guilty plea, the State did not pursue an additional count of conspiracy to commit robbery and the deadly weapon enhancement for the robbery count. The State further agreed not to seek habitual criminal

⁶See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

⁷See NRS 205.060(2).

⁸See NRS 176A.100; NRS 200.380; 205.060.

adjudication—appellant had at least three prior felony convictions. Contrary to appellant's assertion, appellant could have been convicted of both robbery and the conspiracy to commit robbery because conspiracy is not a lesser-included offense of robbery.⁹ Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for informing him that he had to enter a guilty plea because it was part of a plea package offered to his co-defendant. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. In the written guilty plea agreement, appellant acknowledged that he was not being coerced to enter a guilty plea. During the plea canvass, appellant further acknowledged that his guilty plea was being voluntarily entered. Therefore, we conclude that the district court did not err in denying this claim.

At the evidentiary hearing, appellant attempted to raise a claim that he was deprived of a direct appeal without his consent. He claimed that both he and his girlfriend asked trial counsel to file a direct appeal. The district court stated that it would not consider this claim because it was not raised on the face of his habeas corpus petition and was not properly presented in the response to the State's motion to dismiss the petition as procedurally barred. We conclude that the district court did not abuse its discretion in declining to consider this claim because

⁹See Smith v. State, 120 Nev. ___, 102 P.3d 569 (2004) (holding that "an offense is lesser included only where the defendant in committing the greater offense has also committed the lesser offense"); NRS 199.480(1); NRS 200.380.

appellant had not been granted permission to supplement the claims raised in his petition.¹⁰

Next, appellant claimed that his guilty plea was not entered 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 a clear abuse of discretion.¹² In determining the validity of a guilty plea, this court looks to the totality of the circumstances.¹³

Appellant claimed that his guilty plea was coerced by threats from an associate of the co-defendant. Appellant asserted that he was informed that if he did not accept the plea that he would have trouble on the "inside" and his girlfriend would have trouble on the "outside." The totality of the circumstances supports the district court's determination that this claim lacked merit. Appellant's trial counsel testified that she did not recall being informed of any threats against appellant or his girlfriend. Appellant indicated in the written guilty plea agreement that he was not under threat or being coerced into entering his guilty plea. During the plea canvass, appellant affirmatively acknowledged that his

¹⁰See NRS 34.750(5).

¹¹Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

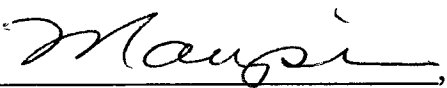
¹²Hubbard, 110 Nev. at 675, 877 P.2d at 521.


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

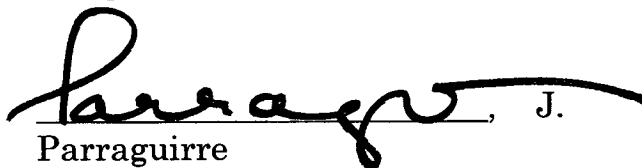
guilty plea was being entered voluntarily. Therefore, we conclude that the district court did not err in denying this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Maupin

 J.
Douglas

 J.
Parraguirre

cc: Hon. Donald M. Mosley, District Judge
James Jay Riceman
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁴See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).