IN THE SUPREME COURT OF THE STATE OF NEVADA

VINCENT H. PINDER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45396

FILED

AUG 24 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF 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; Michael A. Cherry, Judge.

On December 4, 2003, the district court convicted appellant, pursuant to an Alford[1] plea, of one count of second degree murder and one count of discharging a firearm at or into a vehicle. The district court sentenced appellant to serve a term of ten to twenty-five years in the Nevada State Prison for the murder count and a concurrent term of twelve to thirty-six months for the firearm count. The district court imposed these terms to run consecutively to the terms imposed for an earlier jury verdict and conviction of two counts of felony escape in the same case. This court affirmed appellant's judgment of conviction on appeal.[2] The remittitur issued on September 21, 2004.

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

[2]Pinder v. State, Docket No. 42595 (Order of Affirmance, August 26, 2004).

05-16718

On March 1, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a response. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On May 18, 2005, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his trial counsel was ineffective. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.[3] A petitioner must further establish a reasonable probability that, in the absence of counsel's errors, the results of the proceedings would have been different.[4] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[5] A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence.[6]

First, appellant claimed that his trial counsel was ineffective for failing to call character witnesses at the sentencing hearing. Appellant claimed that he had informed his trial counsel that his mother was present and prepared to testify on his behalf. Appellant claimed that his

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

[4]Id.

[5]Strickland, 466 U.S. at 697.

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

mother would have informed the district court that appellant was a good child who had grown up in the church, that she was proud of her son when he attended barber college, and that she convinced appellant to enter a guilty plea. Appellant further claimed that his mother would have asked for mercy on his behalf. Appellant failed to demonstrate that he was prejudiced by trial counsel's failure to call his mother at the sentencing hearing. Appellant failed to demonstrate that any testimony from his mother would have had a reasonable probability of altering the outcome of the sentencing hearing. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to object to a portion of the victim impact statement. He claimed that the victim's aunt cast an unfair aspersion upon his mother's character by referring to appellant as a "murdering son-of-a-bitch." It was a reasonable tactical decision not to object to the victim impact statement.[7] Further, there was no reasonable probability of a different outcome because it was unnecessary for appellant's mother to refute the alleged aspersion cast upon her character. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that his guilty plea was not entered knowingly and voluntarily. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered

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[7]See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); see also Hurd v. State, 114 Nev. 182, 189, 953 P.2d 270, 274-75 (1998).

knowingly and intelligently.[8] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[9] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[10]

First, appellant claimed that he was coerced into entering his guilty plea. He based this claim in part on a statement that the district court made at sentencing that the district court had been intimately involved in the plea negotiations and that he had been informed that a third trial would not have been favorable to appellant.[11] He further claimed that his mother had conversations with the district court and she guided him into entering a guilty plea. Appellant claimed that his trial counsel was ineffective in allowing him to enter a guilty plea under these circumstances.

Appellant failed to demonstrate that his guilty plea was entered involuntarily.[12] Appellant affirmatively indicated that he was

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

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

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

[11]The record indicates that two prior trials ended in a mistrial on the murder and firearm counts.

[12]We note that the district court rejected this claim as barred by the law of the case because this court had considered the validity of the guilty plea on direct appeal in the context of a presentence motion to withdraw a guilty plea. However, this particular issue was not raised as a basis for the presentence motion to withdraw a guilty plea. Thus, it was properly

continued on next page . . .

entering his guilty plea voluntarily at the plea canvass and in the written plea agreement. He further affirmatively indicated in the written plea agreement that he was not acting under duress or coercion. Appellant's supporting facts do not establish that he was coerced by the district court into accepting the plea offered by the State.[13] Appellant acknowledged that he was unaware of any alleged involvement of the district court at the time he entered his guilty plea. Appellant cannot make a successful claim of coercion when the statement was made by the district court after appellant entered his guilty plea. There is nothing in the record to support appellant's claim of judicial bias, prejudice or an interest in the case.[14] Appellant failed to demonstrate that his trial counsel was ineffective in this regard.[15] Appellant received a substantial benefit by entry of his guilty plea because he avoided a potential conviction of first degree murder with the use of a deadly weapon and a possession of a firearm by an ex-felon charge. Therefore, we conclude that the district court did not err in denying this claim.

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raised in the instant petition. See NRS 34.810(1)(a). However, for the reasons set forth above, we conclude that the district court reached the correct result in denying the claim.

[13]But cf. Standley v. Warden, 115 Nev. 333, 990 P.2d 783 (1999) (holding that trial judge improperly coerced defendant into accepting plea bargain where trial judge addressed defendant at a pretrial hearing about the advantages of the offer made by the State).

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

[15]See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

Second, appellant claimed that his guilty plea was not entered voluntarily and knowingly because he did not read the plea agreement and did not understand the consequences of his guilty plea. He acknowledged that he moved to withdraw his guilty plea at sentencing because he had not had an opportunity to read the plea agreement. He claimed that his trial counsel should have asked for a continuance when appellant's concerns came to light.

The district court concluded that this challenge to the validity of his guilty plea was barred by the law of the case. We agree. This court considered and rejected this claim in the context of appellant's challenge to the denial of his presentence motion to withdraw a guilty plea on direct appeal. The doctrine of the law of the case prevents further litigation of this issue and cannot be avoided by a more detailed and precisely focused argument.[16] To the extent that appellant claimed that his trial counsel was ineffective for failing to move to continue the sentencing hearing, we conclude that appellant cannot demonstrate any prejudice.[17] This court determined on direct appeal that the record as a whole established that appellant was aware of the terms of the plea agreement and the consequences of his guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his guilty plea was not entered knowingly because he was never informed of the handwritten changes made to the plea agreement by the district attorney and his trial counsel.

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[16]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

[17]See Hill, 474 U.S. 52; Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

He further claimed that the handwritten changes rendered the guilty plea agreement void, and therefore, there was no valid waiver of his rights. He claimed that his trial counsel should have continued the plea canvass and explained the handwritten changes to appellant so that he could understand the entire plea agreement.

Appellant failed to demonstrate that his guilty plea was not entered knowingly.[18] The interlineations made by the attorneys corrected misstatements made in the plea agreement and clarified that the guilty plea was being entered pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). The interlineations were explained on the record and reflected the terms as set forth during the plea canvass. Appellant affirmatively indicated that the terms of the negotiations were as set forth during the plea canvass. Thus, appellant's failure to read the handwritten corrections did not invalidate his guilty plea, and he was not prejudiced by trial counsel's failure to continue the plea canvass or explain the handwritten changes to the plea agreement. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his guilty plea was not entered knowingly and voluntarily because of a breach of the plea agreement. Appellant claimed that his trial counsel should have objected to the

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[18]We note that the district court rejected this claim as barred by the law of the case because this court had considered the validity of the guilty plea on direct appeal in the context of a presentence motion to withdraw a guilty plea. However, this particular issue was not raised on direct appeal. Thus, it was properly raised in the instant petition. See NRS 34.810(1)(a). However, for the reasons set forth above, we conclude that the district court reached the correct result in denying the claim.

district court's determination to impose the sentences for the murder and firearm count consecutively to the sentences imposed for the escape counts because he believed that he would receive concurrent sentences. He further claimed that neither side had an opportunity to argue for concurrent or consecutive sentences.

Appellant failed to demonstrate that his guilty plea was not entered knowingly and voluntarily because he failed to establish a breach of the plea agreement. The plea negotiations as set forth in the written plea agreement and as set forth during the plea canvass provided that the State was free to argue that the terms for the murder and firearm count be imposed consecutively with the terms for the escape counts. The record belies appellant's claim that neither side was permitted to argue for concurrent or consecutive time[19]; prior to imposing consecutive sentences, the district court listened to arguments from the State for consecutive sentences and arguments from appellant's trial counsel for concurrent sentences. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing.[20] Thus, appellant failed to demonstrate that his trial counsel was ineffective for failing to object.[21] Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed that various constitutional rights were violated due to the errors set forth above. Because appellant failed to

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[19]Hargrove, 100 Nev. at 503, 686 P.2d at 225.

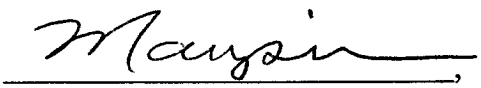
[20]See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

[21]See Strickland, 466 U.S. 668; Lyons, 100 Nev. 430, 683 P.2d 504.

demonstrate that his guilty plea was invalid or that his trial counsel was ineffective, appellant failed to demonstrate a violation of any protected constitutional rights.

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.[22] Accordingly, we

ORDER the judgment of the district court AFFIRMED.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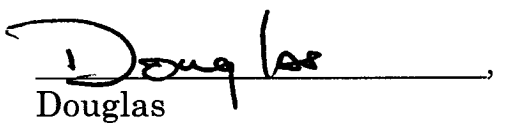
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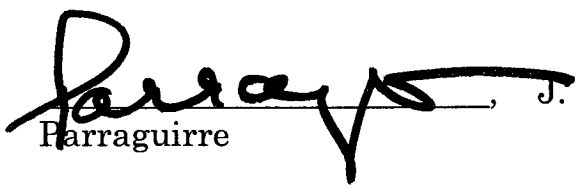
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cc: Hon. Michael A. Cherry, District Judge
Vincent H. Pinder
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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