

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD D. MILLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45431

FILED

OCT 18 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 a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On January 29, 2004, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary while in possession of a firearm and two counts of robbery with the use of a deadly weapon. The district court sentenced appellant to serve a total of two consecutive terms of twenty-four to eighty-four months in the Nevada State Prison. This court dismissed appellant's untimely appeal from his judgment of conviction for lack of jurisdiction.¹

On January 21, 2005, appellant 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, the district court declined to appoint counsel to represent appellant. On June 14, 2005, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

¹Miller v. State, Docket No. 44038 (Order Dismissing Appeal, November 1, 2004).

In his petition, appellant contended that he received ineffective assistance of counsel.² 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

First, appellant claimed that his trial counsel was ineffective for failing to request a competency hearing. Appellant claimed that he was bipolar and that he was in withdrawal from a controlled substance. Appellant claimed that his trial counsel should have informed the court of these facts and obtained his medical records.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. This court has held that the test for determining competency is "whether [the defendant] has

²To the extent appellant raised any of his claims independently from his claims of ineffective assistance of counsel, we conclude that the claims fall outside the scope of a petition for a writ of habeas corpus challenging a conviction based upon a guilty plea. See NRS 34.810(1)(a).

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).

sufficient present ability to consult with his attorney with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”⁶ Appellant's trial counsel testified that there was nothing in his conversations with appellant that would indicate a need to investigate mental health issues and that he was not aware that appellant was bipolar until he read that fact in the presentence investigation report. The district court personally canvassed appellant, and appellant answered all questions put to him appropriately. The guilty plea canvass does not provide any support for his claim that he was not able to assist his attorney or understand the proceedings. Appellant failed to demonstrate that trial counsel's failure to obtain his medical records made any difference to the outcome of the proceedings. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Second, appellant claimed that his trial counsel was ineffective for failing to move to suppress the evidence and file a pretrial petition for a writ of habeas corpus. Appellant claimed that his arrest was illegal, that there was an illegal search of his car, that the police violated Miranda,⁷ and that his confession was coerced by the police while he was mentally incompetent, under the influence of methamphetamine and in fear of a beating.

Appellant failed to demonstrate that he was prejudiced by counsel's performance. Appellant failed to show that a motion to suppress

⁶Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (quoting Dusky v. United States, 362 U.S. 402 (1960)).

⁷Miranda v. Arizona, 384 U.S. 436 (1966).

would have been meritorious and that there was a reasonable likelihood that the exclusion of any evidence would have had a reasonable probability of altering the outcome of the proceeding.⁸ Appellant's allegations are bereft of any specific facts, and consequently, appellant failed to demonstrate that the arrest was illegal, that the search was illegal, that the police violated Miranda, and that his confession was coerced. Appellant's trial counsel testified that there was no basis for a pretrial petition for a writ of habeas corpus, and appellant failed to demonstrate that grounds existed for a pretrial petition for a writ of habeas corpus.⁹ Therefore, we conclude that the district court did not err in determining that these claims lacked merit.

Third, appellant claimed that his trial counsel was ineffective for failing to conduct adequate pretrial discovery and hire an investigator to determine if appellant was guilty of the crimes. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel testified that the matter was negotiated prior to the preliminary hearing, and thus, no further preparation for trial was done from this point. Appellant failed to indicate what further discovery or investigation should have been performed that would have had a reasonable probability of altering the outcome of the proceedings. Appellant's trial counsel noted during the evidentiary hearing that the State's evidence against appellant included five eyewitness identifications, and videotape and photographic evidence depicting the crimes. Appellant received a substantial benefit by entry of

⁸See Kirksey, 112 Nev. at 990, 923 P.2d at 1109.

⁹See NRS 34.710.

his guilty plea. Appellant was originally charged with fifteen separate offenses, and appellant avoided the potential for a far greater term of imprisonment by entry of his guilty plea. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Fourth, appellant claimed that his trial counsel coerced his guilty plea by promising him concurrent sentences. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The written guilty plea agreement, which appellant acknowledged discussing with his counsel before he signed it, informed appellant that the deadly weapon enhancement required the imposition of an equal and consecutive sentence. Appellant acknowledged in the written guilty plea agreement that he was not promised a particular sentence. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing.¹⁰ Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Fifth, appellant claimed that his trial counsel was ineffective for falsely informing appellant that he was filing a direct appeal. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel testified at the evidentiary hearing that it was his normal practice to review the guilty plea agreement with his clients and that review included the advisement in the written guilty plea agreement about the limited right to appeal. Appellant's trial counsel further testified that appellant never asked for an appeal and that he never told appellant that he would file an

¹⁰See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

appeal. Because appellant failed to demonstrate by a preponderance of the evidence that he was told that counsel would file an appeal, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that his guilty plea was involuntary and unknowing. 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 involuntary due to his alleged incompetence at the time he entered his guilty plea. Appellant claimed that he was in withdrawal during the plea negotiations and canvass and that as a result he did not understand the consequences or range of sentences. Appellant further claimed that the plea canvass was inadequate. Appellant failed to carry his burden of demonstrating that his plea was invalid. As discussed previously, the district court personally canvassed appellant, and appellant answered all questions put to him appropriately. The guilty plea canvass does not provide any support for his claim that he was not able to assist his counsel or understand the proceedings. A factual basis for his guilty plea was set forth during the

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.

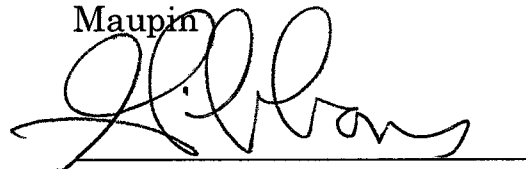
guilty plea canvass. Further, appellant was correctly informed of the consequences of his guilty plea and the range of sentences in the written guilty plea agreement, which appellant acknowledged reading, understanding and signing. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

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.

Gibbons

 J.

Hardesty

cc: Hon. Sally L. Loehrer, District Judge
Edward D. Miller
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).