IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL KAGAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45554

FILED

OCT 21 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 motion to withdraw a guilty plea. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On May 4, 2004, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a term of five to twenty years in the Nevada State Prison. No direct appeal was taken.

On June 9, 2005, appellant filed a proper person motion to withdraw the guilty plea in the district court.[1] The State opposed the motion. On June 27, 2005, the district court summarily denied appellant's motion. This appeal followed.

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[1]Appellant labeled the motion, "motion to set aside judgment" pursuant to NRS 176.165. Because NRS 176.165 relates to a motion to withdraw a guilty plea, we construe appellant's motion to be a motion to withdraw a guilty plea.

In his motion, appellant contended that the information did not contain mention of the habitual criminal statute, the State failed to provide notice of its intention to seek habitual criminal adjudication, and the district court abused its discretion in adjudicating appellant a habitual criminal because the priors were non-violent and remote, and appellant was not a serious threat to society.

A guilty plea is presumptively valid, and a defendant carries the burden of establishing that the plea was not entered knowingly and intelligently.[2] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[3] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[4] A defendant must show "manifest injustice" when the motion is filed after entry of the judgment of conviction.[5]

Our review of the record on appeal as a whole reveals that appellant failed to carry his burden of demonstrating that his guilty plea was not entered knowingly and intelligently and failed to demonstrate a

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

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

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

[5]See NRS 176.165.

manifest injustice. Appellant agreed to enter a guilty plea to the crime of burglary, to small habitual criminal treatment and to a term of five to twenty years, in exchange for the dismissal of an additional count of burglary, two counts of battery by a prisoner, and two counts of unlawful acts related to human excrement or bodily fluid. Appellant was informed in the written guilty plea agreement of the potential penalty for small habitual criminal treatment—a term of five to twenty years. The record also indicates that appellant was aware of the State's intention to seek habitual criminal treatment as early as the preliminary hearing as the plea offer for small habitual criminal treatment is set forth on the record.[6] The presentence investigation report listed at least six prior felony convictions, and appellant has not provided any argument that any of these prior convictions is constitutionally infirm. Appellant's particular challenges to habitual criminal treatment should have been raised on direct appeal and do not implicate the voluntary or knowing nature of his guilty plea in the instant case.[7] Therefore, we affirm the order of the district court denying appellant's motion.

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[6]The State further noted during the preliminary hearing that the State would not seek large habitual criminal treatment.

[7]See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

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.[8] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[9]

_____, J.
Douglas

_____, J.
Rose

_____, J.
Parraguirre

cc: Hon. Joseph T. Bonaventure, District Judge
Daniel Kagan
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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

[9]We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.