

IN THE SUPREME COURT OF THE STATE OF NEVADA

VICTOR GONCHAROFF,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45589 **FILED**

NOV 17 2005

JANEITE M. BLOOM
CLERK OF SUPREME COURT
J. Richards
DEPUTY CLERK

ORDER AFFIRMING AND REMANDING FOR ENTRY OF CORRECTED
JUDGMENT OF CONVICTION

This a proper person appeal from an order of the district court denying appellant's post-conviction petitions for writs of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

On April 16, 2004, the district court convicted appellant, pursuant to a guilty plea, of two counts of attempted robbery. Appellant was sentenced to two consecutive terms of twenty-two to sixty months in the Nevada State Prison. No direct appeal was taken.

On November 29, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant supplemented the petition three times: on January 6, February 28, and April 14, 2005.¹ The State opposed each of the petitions. On June 8, 2005, the district court denied all four petitions. This appeal followed.

Appellant contended in his petitions that he received ineffective assistance of counsel.² To state a claim of ineffective assistance

¹The State at no time objected to appellant's petitions as successive. Because the district court and the State treated appellant's four petitions as supplemental rather than successive, we do likewise.

²To the extent that appellant raised any claims independently of his ineffective assistance of counsel claims and his invalid plea claims, those
continued on next page . . .

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.³ Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.⁴ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁵

Appellant contended his counsel was ineffective for negotiating the plea agreement based on the State's contention it would pursue a deadly weapon enhancement at trial when, according to appellant, "insufficient evidence" existed that a deadly weapon was used in the commission of the crimes.

Appellant failed to demonstrate his counsel's performance was deficient. Our review of the record on appeal reveals there were facts supporting the decision not to go to trial. Other than appellant's statements to the investigating officer, the record on appeal reveals no evidence that the gun (which apparently was not recovered) was not real. The first victim told police that appellant pointed "a gun wrapped in a

. . . continued

claims were properly denied, because they fell outside the narrow scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging the validity of a judgment of conviction based on a guilty plea. See NRS 34.810(1)(a).

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

⁴See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁵Strickland, 466 U.S. at 697.

white plastic bag with about three to four inches of the barrel sticking out" at him. The second victim stated at the sentencing hearing that appellant pointed a "deadly weapon" at her face. Had the case gone to trial, the issue of the use of a deadly weapon would have been a matter for the jury to decide based on the witnesses' credibility. Further, appellant benefited from the plea agreement. As a result of his guilty plea, the State refrained from pursuing the deadly weapon sentencing enhancement and agreed not to contest probation if it was recommended. In addition, the district court sentenced appellant to less than the maximum sentence for two counts of robbery. Therefore, we conclude that the district court did not err in determining this claim lacked merit.

Appellant also contended in his petitions that his guilty plea was not knowingly and voluntarily entered. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.⁶ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.⁷ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.⁸

First, appellant contended he believed he would be sentenced at most to two concurrent sentences of twelve to sixty months. Our review of the record on appeal reveals that the guilty plea memorandum signed by appellant stated he understood the sentences could be either

⁶Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

⁷Hubbard, 110 Nev. at 675, 877 P.2d at 521.

⁸State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

concurrent or consecutive and that the sentence was solely in the district court's discretion. Further, our review of the record on appeal reveals that when appellant entered his plea the district court asked appellant if he understood that the length of the sentences and whether they would be concurrent or consecutive would be determined by the district court and no one else, and appellant responded, "Yes." Appellant also affirmed when he entered his plea that he was pleading guilty without threats or promises of any kind. Therefore, we conclude the district court did not err in determining this claim was without merit.

Second, appellant contended his counsel's negotiating the plea agreement based on the State's intention to pursue a deadly weapon enhancement misled him into pleading guilty involuntarily. However, appellant failed to state any specific facts to demonstrate how his counsel misled him or how counsel's actions made the plea involuntary. Therefore, we conclude the district court did not err in determining this claim was without merit.

Third, appellant contended that the State coerced him into pleading guilty by threatening to pursue a deadly weapon enhancement at trial. A guilty plea is not compelled when motivated by the desire to accept a lesser penalty rather than face the possibility of a higher penalty.⁹ Therefore, we conclude the district court did not err in determining this claim was without merit.

Fourth, appellant contended his confession was coerced. By pleading guilty, appellant waived any claims relating to events that occurred prior to the entry of the plea.¹⁰ Further, appellant failed to state

⁹Stocks v. Warden, 86 Nev. 758, 476 P.2d 469 (1970).

¹⁰Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975).

how his alleged coerced confession caused him to plead guilty involuntarily. Therefore, we conclude the district court did not err in determining this claim was without merit.

Fifth, appellant contended the State failed to gather evidence on the deadly weapon. By pleading guilty, appellant waived any claims relating to events that occurred prior to the entry of the plea.¹¹ Further, appellant failed to state how the State's alleged failure to gather evidence caused him to plead guilty involuntarily. Therefore, we conclude the district court did not err in determining this claim was without merit.

Sixth, appellant contended the State engaged in prosecutorial misconduct by "mischaracterizing finger print [sic] evidence." By pleading guilty, appellant waived any claims relating to events that occurred prior to the entry of the plea.¹² Further, appellant failed to indicate specifically how the State mischaracterized evidence or otherwise acted improperly. In addition, appellant failed to indicate how the State's alleged misconduct caused him to plead guilty involuntarily. Therefore, we conclude the district court did not err in determining this claim was without merit.

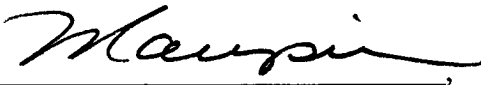
Our review of the judgment of conviction reveals a clerical error. The judgment of conviction incorrectly states that appellant was convicted of two counts of attempted burglary. The judgment of conviction should have stated that appellant was convicted of two counts of attempted robbery. We therefore conclude that this matter should be remanded to the district court for the limited purpose of correcting the clerical error in the judgment of conviction.

¹¹Id.

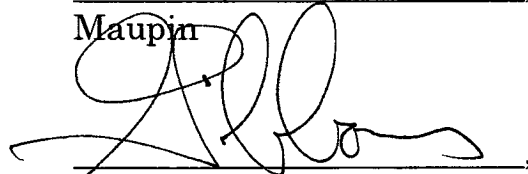
¹²Id.

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.¹³ Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the clerical error in the judgment of conviction.¹⁴

 J.

Maupin

 J.

Gibbons

 J.
Hardesty

cc: Hon. Brent T. Adams, District Judge
Victor Goncharoff
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹³See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁴We 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.