

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAMIEN J. GIBSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45744

DAMIEN J. GIBSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45746

**FILED**

DEC 06 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
*J. Rubade*  
CLERK

These are proper person appeals from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. We elect to consolidate these appeals for disposition.<sup>1</sup> Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On August 11, 2004, the district court convicted appellant, pursuant to a guilty plea, of robbery with the use of a deadly weapon in district court case number C199484. The district court sentenced appellant to serve a term of thirty-five to one hundred and fifty-six months in the Nevada State Prison. On August 9, 2005, the district court entered an amended judgment of conviction to impose an equal and consecutive term of thirty-five to one hundred and fifty-six months for the deadly weapon enhancement. The sentences were imposed to run consecutively to the sentences imposed in district court case number C198957 and

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<sup>1</sup>See NRAP 3(b).

concurrently to the sentence imposed in district court case number C199422. No appeal was taken.

On November 10, 2004, the district court convicted appellant, pursuant to a guilty plea, of robbery with the use of a deadly weapon in district court case number C198957. The district court sentenced appellant to serve two consecutive terms of thirty-five to one hundred and fifty-six months in the Nevada State Prison. The sentences were imposed to run consecutively to the sentences imposed in district court case number C199484 and concurrently to the sentence imposed in district court case number C199422. No appeal was taken.

On March 29, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court designating district court case numbers C199484 and C198957. The State opposed the petition. 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 July 13, 2005, the district court denied appellant's petition. These appeals followed.

Appellant claimed that his guilty plea was invalid and that his counsel was ineffective. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.<sup>2</sup> Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.<sup>3</sup> In determining the validity of a guilty plea, this court

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

<sup>3</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

looks to the totality of the circumstances.<sup>4</sup> 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 was deficient in that it fell below an objective standard of reasonableness and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.<sup>5</sup>

First, appellant contended that the plea agreement reached for both cases had been breached because of the imposition of consecutive sentences between district court case numbers C199484 and C198957. Appellant claimed that he understood the terms of the guilty plea agreement to be that the sentences for each of these cases would be imposed concurrently with one another. He claimed that his counsel was ineffective for failing to accurately inform him of the terms of the plea agreement and misinforming him that the State had stipulated to concurrent time.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate that his guilty plea was invalid or that his counsel was ineffective in this regard. The written guilty plea agreements filed in district court case numbers C199484 and C198957 advise appellant that the State was free to argue for consecutive time between these cases. The

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

<sup>5</sup>See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

written guilty plea agreements further informed appellant that the district court had the discretion to impose the sentences concurrently or consecutively. The negotiations were set forth in the plea canvass, and appellant affirmatively acknowledged the statement of the negotiations. The State's argument at the sentencing hearing fell within the bounds of the terms set forth in the plea negotiations. Appellant's mere subjective belief about the potential sentences is insufficient to invalidate his guilty plea as involuntary and unknowing.<sup>6</sup> Therefore, we conclude that the district court did not err in denying this claim.

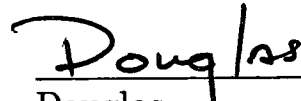
Next, appellant claimed that his trial counsel was ineffective for only visiting him twice. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to indicate what further visits would have accomplished. Moreover, appellant received a substantial benefit by entry of his guilty plea. By entry of his guilty pleas to one count of robbery with the use of a deadly weapon in each district court, appellant avoided two additional counts of burglary while in possession of a firearm, two counts of first degree kidnapping with the use of a deadly weapon, four additional counts of robbery with the use of a deadly weapon, and one count of conspiracy to commit robbery. Appellant failed to demonstrate that additional visits from his trial counsel would have had a reasonable probability of altering his decision to enter a guilty plea. Thus, we conclude that the district court did not err in determining that this claim lacked merit.


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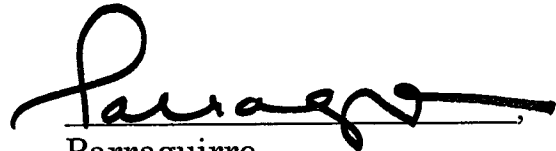
<sup>6</sup>See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

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.<sup>7</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. John S. McGroarty, District Judge  
Damien J. Gibson  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>7</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).