


IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN PAUL MARKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47507

FILED

JAN 10 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND FOR
CORRECTION OF JUDGMENT OF CONVICTION

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 October 14, 2005, the district court convicted appellant, pursuant to a guilty plea, of two counts of conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, and one count of ex-felon in possession of a firearm. The district court adjudicated appellant a large habitual criminal and sentenced appellant to serve a term of ten to twenty-five years in the Nevada State Prison. No direct appeal was taken.

On January 27, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant filed two supplements to the petition. 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 June 19, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his guilty plea was not entered voluntarily and knowingly. A guilty plea is presumptively

valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.¹ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.² In determining the validity of a guilty plea, this court looks to the totality of the circumstances.³

First, appellant claimed that his plea was not entered knowingly and voluntarily because he was not canvassed about the voluntariness of his guilty plea, the waiver of the right to trial, the elements of the offenses and the consequences of his plea. The record belies appellant's assertions of fact.⁴ Appellant was personally canvassed about the voluntariness of his plea, the waiver of the right to trial, the elements of the offenses and the potential maximum penalties. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his plea was not voluntary as it was induced by a promise of a particular sentence and he did not receive that sentence. Appellant failed to provide any facts in support of this claim, and thus, he failed to carry his burden of demonstrating that his guilty plea was invalid in this regard.⁵ Appellant was personally

¹Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

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

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

⁴See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

⁵See id.

canvassed about the potential maximum penalties, and appellant received the sentence that he bargained for during the plea process—a sentence of ten to twenty-five years. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his guilty plea was not entered voluntarily as it was the product of coercion. Appellant claimed that the district court coerced his guilty plea by stating, "I gave a lady in a wheel chair life without, so what do you think I'm going to give you?" Appellant claimed that this statement bullied him into entering a guilty plea.

Where a district court's conduct is improperly coercive, the courts will consider affording a defendant an opportunity to withdraw the plea.⁶ In Standley, this court determined that the district court convinced the defendant to accept the plea offer through lengthy exposition and comment on the plea offer that evinced an unmistakable desire that appellant accept the offer and repeated references to the district court's prior experience as a defense attorney representing clients in similar circumstances.⁷

Appellant failed to demonstrate that the district court's conduct was improperly coercive in the instant case. The transcript of the plea canvass does not contain the statement that appellant attributed to

⁶See Standley v. Warden, 115 Nev. 333, 338, 990 P.2d 783, 785 (1999). We note that this court's recent holding in Cripps v. State establishing a bright-line rule regarding judicial involvement in plea negotiations is inapplicable as the holding in Cripps has prospective effect only. 122 Nev. ___, 137 P.3d 1187 (2006).

⁷See id. at 337, 990 P.2d at 785.

the district court. A review of the record indicates that the district court conducted a lengthy canvass about the potential maximum penalties appellant faced and informed appellant that a minimum penalty of five years would not be considered under any circumstances because of appellant's criminal record and the crimes in the instant case. Although the district court referenced a prior sentencing decision of another defendant, the record indicates that appellant was not influenced by this statement as appellant insisted upon going to trial when he learned about the potential maximum penalties. It appears from the record that appellant changed his mind about the plea offer during the lunch recess when he discussed the matter with his attorney. After the lunch recess, appellant indicated that he did not wish to dispute the charges and wished to enter a guilty plea to the charged offenses with the agreement that he receive a sentence of ten to twenty-five years. The district court informed appellant that she would commit herself to that agreement. Appellant then affirmatively acknowledged that he was not forced into entering his guilty plea and his guilty plea was not the product of any threats. Under these facts, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that he received ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based upon 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.⁸ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁹

First, appellant claimed that his trial counsel was ineffective because he coerced him into waiving his right to a speedy trial. Appellant failed to indicate how the waiver of the right to speedy trial impacted his decision to enter a guilty plea, and thus, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for allowing appellant to enter a guilty plea when he knew that appellant was actually innocent. Appellant claimed that he was only a passenger in the car and had no involvement in the robberies. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. A factual basis for the plea was established during the plea canvass when appellant admitted the facts of the crimes. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective because he failed to read the guilty plea agreement to appellant and appellant could not read or write. Appellant failed to demonstrate that he was prejudiced. The district court personally canvassed appellant about the nature of the charges, the elements of the offenses, the potential maximum penalties, the waiver of constitutional rights, and the

⁸Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁹Strickland v. Washington, 466 U.S. 668, 697 (1984).

voluntariness of the plea. Appellant failed to demonstrate that trial counsel's failure to read him the guilty plea agreement would have altered his decision to enter a guilty plea in the instant case. Appellant received a substantial benefit as he avoided multiple life sentences when he agreed to imprisonment for a term of ten to twenty-five years. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel coerced his guilty plea. Appellant claimed that his trial counsel "hammered" him into pleading guilty. Appellant failed to demonstrate that his trial counsel was ineffective in this regard. Trial counsel's candid advice about the maximum potential penalties and the likelihood of success at trial is not deficient. Appellant acknowledged during the plea canvass that he was not forced into entering a guilty plea and his plea was not the product of a threat. As discussed above, appellant received a substantial benefit by entry of his plea. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to file an appeal despite being requested to do so, failing to investigate case facts, failing to interview key witnesses, failing to advise appellant about defense strategy, and failing to prepare for trial. Appellant failed to provide any specific facts in support of these claims, and thus, appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced.¹⁰ Notably, appellant failed to indicate that his request for counsel to file an appeal was made

¹⁰See Hargrove, 100 Nev. 498, 686 P.2d 222.

within the statutory time period for filing a direct appeal. Trial counsel would not be ineffective if he failed to file a direct appeal when the request was made after the statutory time period for filing a direct appeal. Therefore, we conclude that the district court did not err in denying these claims.

Next, appellant claimed that the district court erroneously denied a motion to dismiss counsel and request for additional time to retain counsel, he could not be convicted of both robbery and conspiracy to commit robbery, the ex-felon charge could not be enhanced, and the State failed to present certified copies of the prior convictions. These claims fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea.¹¹

In reviewing the record, this court observed a potential error in the judgment of conviction. The judgment of conviction states, "AS TO ALL FIVE COUNTS, ONE SENTENCE OF A MINIMUM of TEN (10) YEARS and a MAXIMUM OF TWENTY-FIVE (25) YEARS." However, appellant committed five separate offenses, and thus, appellant was required to receive a sentence for each offense.¹² It is clear from the record that the district court intended appellant to be imprisoned for a term of ten to twenty-five years and that this could be effectuated by imposing a term of ten to twenty-five years on each count, the terms for each count to be served concurrently with one another. Because it appears that this was

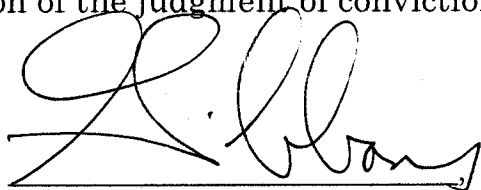
¹¹See NRS 34.810(1)(a).

¹²See NRS 207.010(1)(b).

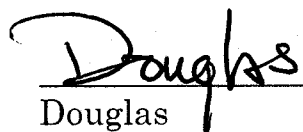
the district court's intention and because the language in the judgment of conviction may lead to confusion, we direct the district court to enter a corrected judgment of conviction imposing a term of ten to twenty-five years for each count, the terms to be served concurrently.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant briefing and oral argument are unwarranted.¹³ Accordingly, we

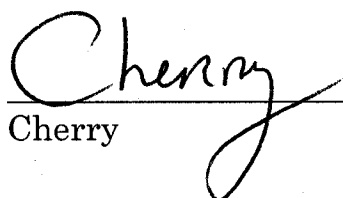
ORDER the judgment of the district court AFFIRMED and REMAND this matter for correction of the judgment of conviction.¹⁴



Gibbons J.



Douglas J.



Cherry J.

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.

cc: Hon. Sally L. Loehrer, District Judge
Steven Paul Marks
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk