

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD CONTE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48255

**FILED**

JUL 17 2007

CHRISTIE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Ninth Judicial District Court, Douglas County; David R. Gamble, Judge.

Appellant Richard Conte was convicted, pursuant to a guilty plea, of second-degree kidnapping and unlawful administering of a controlled substance (class B felony). The district court sentenced him to serve a term of 72 to 180 months in prison for kidnapping and a concurrent term of 28 to 72 months for unlawful administering of a controlled substance. Conte did not file a direct appeal.

Conte filed in the district court a postconviction petition for a writ of habeas corpus, which the State opposed. After conducting an evidentiary hearing, the district court denied the petition. This appeal followed.

Conte argues that his guilty plea is invalid because it was the product of the ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, Conte must demonstrate that his

counsel's performance was deficient in that it fell below an objective standard of reasonableness.<sup>1</sup> Conte must also demonstrate a reasonable probability that but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial.<sup>2</sup>

First, Conte argues his counsel was ineffective for negotiating the guilty plea without ascertaining whether Conte was truly at risk of a State deadly weapon sentencing enhancement or federal kidnapping and weapons-related convictions. Conte contends that he was not at risk and that counsel was ineffective for negotiating a plea agreement that factored in dropping those potential charges. We disagree. Our review of the record reveals that counsel accurately assessed the possibility of the deadly weapon enhancement and additional charges. We therefore conclude that the district court did not err in rejecting this claim.

Second, Conte argues his counsel was ineffective for failing to file a motion to suppress his post-arrest statements to police officers on the grounds that the statements were taken in violation of his Fifth and Sixth Amendment rights and were involuntary. Conte does not appear to challenge that he was given Miranda<sup>3</sup> warnings and initially waived his rights. Our review of the record indicates that Conte never unequivocally

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<sup>1</sup>Strickland v. Washington, 466 U.S. 668, 690-91 (1984).

<sup>2</sup>Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

<sup>3</sup>Miranda v. Arizona, 384 U.S. 436 (1966).

invoked his right to have counsel present.<sup>4</sup> Our review also indicates that Conte never invoked his right to "cut off questioning;" rather, he refused to answer particular questions while allowing the interrogation session to continue.<sup>5</sup>

Moreover, our review of the totality of the circumstances also indicates that Conte's statements were voluntary despite his claim that he had not slept when questioned. Accordingly, we conclude the district court did not err in rejecting this claim.

Third, Conte argues his counsel was ineffective for failing to file a motion to suppress evidence seized pursuant to search warrants he claims contained overbroad provisions. Our review of the warrants indicates that even if certain provisions were overbroad, they were minor and were severable from the remaining provisions of the warrants,<sup>6</sup> which properly allowed for the search and seizure of evidence related to the charges. It is therefore unlikely that Conte would have insisted on going to trial had counsel filed a motion to suppress evidence seized pursuant to the warrants. Accordingly, we conclude the district court did not err in rejecting this claim.

Conte also argues that his sentence is illegal, in that the imposition of fines followed by civil forfeiture of property violated his

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<sup>4</sup>See Davis v. U.S., 512 U.S. 452, 459 (1994).

<sup>5</sup>See Michigan v. Mosley, 423 U.S. 96, 100-01 (1975).

<sup>6</sup>See U.S. v. Sears, 411 F.3d 1124, 1128-29 (9th Cir. 2004).

Fifth, Eighth, and Fourteenth Amendment rights to be free from excessive fines and double jeopardy. He concedes he did not raise this issue below, but argues that this court may hear the claim because, pursuant to NRS 176.555, an illegal sentence may be corrected at any time. However, Conte does not allege that his sentence was in excess of the statutory maximum or the district court lacked jurisdiction to sentence him.<sup>7</sup> The forfeiture is a separate civil action, not part of his sentence. His claim thus falls outside the narrow scope of issues permissibly raised pursuant to NRS 176.555.

To the extent he raises this issue as a habeas claim outside of NRS 176.555, failure to raise an issue below generally bars consideration on appeal.<sup>8</sup> However, this court may address constitutional issues raised for the first time on appeal.<sup>9</sup> We conclude that Conte's constitutional rights were not violated by the civil forfeiture. We have previously held that civil forfeiture does not constitute punishment for purposes of double jeopardy.<sup>10</sup> Even if the forfeiture could be considered an excessive fine, Conte agreed to it as part of his guilty plea negotiation.

Finally, Conte argues that his guilty plea to unlawfully administering a controlled substance (category B felony) was unknowing

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<sup>7</sup>See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

<sup>8</sup>State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998).

<sup>9</sup>Id.

<sup>10</sup>Levingston v. Washoe County, 114 Nev. 306, 956 P.2d 84 (1998).

and involuntary because unlawful administration of Ativan, the drug he gave the victim, is actually a category C felony. Conte further argues that his plea was invalid because Nevada lacked jurisdiction based on his claim that he administered the drug in Utah, not Nevada.

A guilty plea is presumptively valid and petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.<sup>11</sup> This court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.<sup>12</sup> In determining the validity of a guilty plea, this court looks to the totality of the circumstances.<sup>13</sup> By pleading guilty to the charges, Conte obtained the State's agreement to drop the deadly weapon enhancement and the assurance that he would not be prosecuted in federal court, where he faced a significantly longer penalty. We also note that a defendant may plead guilty to a so-called fictitious charge in order to obtain the benefits of plea agreement. To the extent that Conte raises this issue as an ineffective assistance of counsel claim, we are not persuaded that counsel's performance was deficient or that Conte would have refused to plead guilty and would have insisted on going to trial had counsel performed

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<sup>11</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>12</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

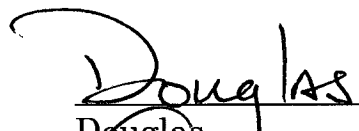
<sup>13</sup>State v. Freese, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

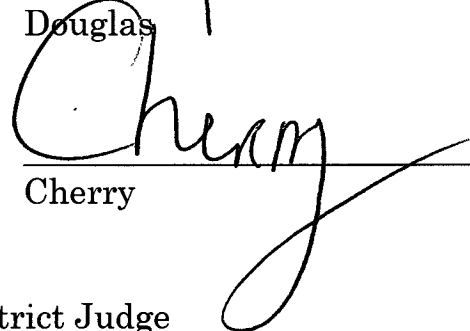
differently in this regard. We conclude the district court did not err in rejecting this claim.

Having reviewed Conte's arguments and concluded he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Gibbons

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

  
\_\_\_\_\_, J.  
Cherry

cc: Hon. David R. Gamble, District Judge  
Richard F. Cornell  
Attorney General Catherine Cortez Masto/Carson City  
Douglas County District Attorney/Minden  
Douglas County Clerk