

IN THE SUPREME COURT OF THE STATE OF NEVADA

KAREN GOLDBER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48302

FILED

APR 26 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

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; Stewart L. Bell, Judge.

On February 15, 2006, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary. Pursuant to a stipulation and presentment of proof of at least two prior convictions, the district court sentenced appellant as a habitual criminal to serve a term of 5 to 20 years in the Nevada State Prison. No direct appeal was taken.

On June 19, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant attached a motion to correct an illegal sentence to her 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 November 7, 2006, the district court denied appellant's petition. This appeal followed.

In her petition, appellant contended that she received ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that her 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 of a different result but for counsel's errors.¹ To demonstrate prejudice to invalidate the decision to enter a guilty plea, the petitioner must demonstrate that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³

First, appellant claimed that her trial counsel was ineffective for failing to conduct any strategy conferences, failing to procure a defense, failing to investigate the facts of the case or the facts relating to her prior convictions, and only advising that she enter a guilty plea. Appellant failed to provide any specific facts in support of these claims, and thus, she failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced.⁴ Therefore, we conclude that the district court did not err in denying these claims.

Second, appellant claimed that her trial counsel was ineffective for informing her that she could receive a life sentence if she did not take the deal offered by the State. Appellant failed to demonstrate

¹See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

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

³Strickland, 466 U.S. at 697.

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

that her trial counsel's performance was deficient or that she was prejudiced. In the charging information, the State provided notice of its intent to seek habitual criminal treatment based upon appellant's seven prior felony convictions. A criminal defendant who has been previously three times convicted of a felony is eligible for large habitual criminal treatment pursuant to NRS 207.010(1)(b). Under NRS 207.010(1)(b), a defendant may be sentenced to a term of imprisonment of life without the possibility of parole, life with the possibility of parole, or a definite term of twenty-five years with eligibility for parole after serving ten years. Thus, trial counsel was not mistaken in her advice that appellant faced a potential life sentence, and appellant cannot demonstrate that she was prejudiced by this information. Trial counsel's candid advice about the potential penalties is not deficient. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that her trial counsel was ineffective for failing to inform the district court that her prior convictions involved non-violent property offenses and that she had a drug problem that could be aided with treatment. Appellant failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. Appellant stipulated to small habitual criminal treatment as part of her guilty plea, and NRS 207.010 makes no allowance for non-violent property offenses.⁵ Further, the information set forth her prior offenses, and prior judgments of conviction were presented at the time appellant was sentenced and her convictions were set forth in the presentence

⁵See NRS 207.010.

investigation report. Thus, a review of the record demonstrates that this information was presented to the district court, and appellant failed to demonstrate that there was a reasonable probability of a different sentencing outcome had counsel presented this information to the district court. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that her trial counsel was ineffective for failing to object to the habitual criminal enhancement in the instant case on the ground that it violated Apprendi v. New Jersey.⁶ Appellant claimed that the district court was without the authority to enhance her sentence as a habitual criminal because she did not waive her right to a jury trial to decide the issue of habitual criminality, and thus, the five to twenty year sentence exceeded the statutory maximum for burglary.⁷ Appellant failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. In entering her guilty plea, appellant stipulated to small habitual criminal treatment, to receive a sentence of five to twenty years and waived the right to a jury trial. The State presented prior judgments of conviction for the court's consideration before she was sentenced. Thus, the district court did not err in enhancing her sentence as a habitual criminal under the facts presented in this case.⁸ Further, this court recently clarified that the

⁶530 U.S. 466 (2000).

⁷The statutory range of penalties for burglary is a term of one to ten years in the Nevada State Prison. See NRS 205.060(2).

⁸See Blakely v. Washington, 542 U.S. 296, 303 (2004) (stating that precedent makes it clear that the statutory maximum that may be
continued on next page . . .

district court's discretion in the area of habitual criminality relates to the discretion to dismiss a count and the exercise of discretion does not serve to increase the punishment.⁹ Thus, the district court could sentence appellant as a habitual criminal without submission of the issue before a jury. The requirements of NRS 207.010(1)(a) were satisfied as the State presented proof of at least two prior convictions. Absent a dismissal of the habitual criminal count, imposition of the habitual criminal enhancement was required under these facts. Therefore, appellant failed to demonstrate that her trial counsel was ineffective in this regard, and we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that her trial counsel was ineffective for failing to object to the habitual criminal enhancement as it was not in the original charging information. Appellant failed to demonstrate that her trial counsel's performance was deficient or that she was prejudiced. The information filed in the district court set forth the notice of habitual criminality. Appellant was not required to be served any further or earlier notice.¹⁰ Therefore, we conclude that the district court did not err in denying this claim.

... continued

imposed is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant" (emphasis in original).

⁹*O'Neill v. State*, 123 Nev. ___, ___ P.3d ___ (Adv. Op. No. 2, March 8, 2007).

¹⁰*See* NRS 207.016.

Next, appellant claimed that her guilty plea was not entered knowingly and voluntarily. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and voluntarily.¹¹ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.¹² In determining the validity of a guilty plea, this court looks to the totality of the circumstances.¹³

Appellant claimed that her guilty plea was not entered knowingly because the written guilty plea agreement contained conflicting information about the potential consequences. Appellant claimed that the body of the written guilty plea agreement only informed her that she faced a 1 to 10 year sentence for burglary. Appellant failed to demonstrate that her guilty plea was not entered knowingly. The written guilty plea agreement specifically stated that appellant was stipulating to small habitual criminal treatment and a sentence of 5 to 20 years. Although the written guilty plea agreement informed appellant that the sentencing range for burglary was 1 to 10 years, the written plea agreement further informed appellant that if she were adjudicated a small habitual criminal she faced a term of 5 to 20 years. Therefore, we conclude that the district court did not err in denying this claim.

¹¹Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

¹²Hubbard, 110 Nev. at 675, 877 P.2d at 521.

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

Second, appellant claimed that her guilty plea was not entered voluntarily because she was coerced into pleading guilty with the offer being made to her after she had been hit on the head with a mattress during the search of her cell. Appellant failed to demonstrate that her guilty plea was involuntarily entered. During the plea canvass appellant affirmatively acknowledged that the plea was entered freely and voluntarily and her plea was free from threats. Further, appellant did not demonstrate that she was incapacitated at the time she entered her guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed: (1) the habitual criminal sentence exceeded the sentence specified in the guilty plea agreement; (2) the district court failed to exercise its discretion regarding habitual criminality; (3) the district court could not have adjudicated her a habitual criminal without having her waive the right to a jury trial on the issue of habitual criminality; and (4) the prosecutor committed misconduct. 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.¹⁴ Therefore, we conclude that the district court did not err in denying these claims.

As stated earlier, appellant attached a motion to correct an illegal sentence to her petition. In the motion, appellant claimed: (1) her due process rights had been violated because her crime would not have required a term of imprisonment and could have been satisfied by a fine or

¹⁴See NRS 34.810(1)(a).

community service absent the prosecutor's charging her with a felony and seeking habitual criminal adjudication; (2) her sentence was harsher than other defendants who committed violent and more serious crimes; (3) her sentence reflected that she was being punished for her prior offenses and not the present offense; (4) her trial counsel was ineffective in regards to the habitual criminal adjudication; (5) her guilty plea was invalid because she was not correctly informed of the consequences and she was coerced into pleading guilty; (6) her habitual criminal adjudication violated Apprendi because the issue of habitual criminality was not presented to a jury;¹⁵ and (7) habitual criminal adjudication was not warranted because the prior convictions were minor and non-violent.

A motion to correct an illegal sentence may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence or the sentence was imposed in excess of the statutory maximum.¹⁶ "A motion to correct an illegal sentence 'presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.'"¹⁷

Our review of the record on appeal reveals that the district court did not err in denying the motion. Appellant's sentence was facially legal, and appellant failed to demonstrate that the district court was not a

¹⁵530 U.S. 466.

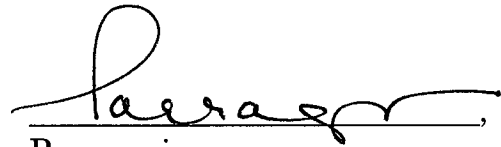
¹⁶Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

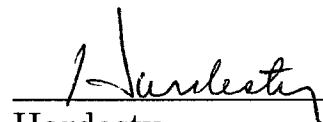
¹⁷Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).


court of competent jurisdiction.¹⁸ Further, appellant's claims fell outside the very narrow scope of claims permissible in a motion to correct an illegal sentence. Therefore, we affirm the decision of the district court.

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.¹⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²⁰


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

¹⁸See NRS 207.010(1)(a).

¹⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²⁰We 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. Stewart L. Bell, District Judge
Karen Golder
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk