

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMIE DAVIS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48555

**FILED**

**JUN 22 2007**

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On December 20, 1988, the district court convicted appellant, pursuant to a guilty plea, of first-degree murder. The district court sentenced appellant to serve a prison term of life without the possibility of parole. Appellant did not file a direct appeal.

Appellant unsuccessfully sought state relief from his conviction;<sup>1</sup> however, the Ninth Circuit Court of Appeals held in an unpublished opinion that appellant's trial counsel was ineffective and

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<sup>1</sup>Davis v. State, Docket No. 31157 (Order Dismissing Appeal, December 4, 1999); Davis v. State, Docket No. 31521 (Order Dismissing Appeal, April 30, 1999); Davis v. State, Docket No. 28400 (Order Dismissing Appeal, April 30, 1999); Davis v. State, Docket No. 23338 (Order Dismissing Appeal, February 21, 1995).

remanded the case to the district court to allow appellant to withdraw his plea.<sup>2</sup>

On September 15, 2005, following the withdrawal of appellant's plea, the district court convicted appellant, pursuant to a second guilty plea, of second-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive prison terms of 5 to 20 years. Appellant was granted 6,246 days credit for time served. Appellant did not file a direct appeal.

On June 13, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing.<sup>3</sup> On October 5, 2006, the district court dismissed appellant's petition. This appeal followed.

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<sup>2</sup>Davis v. Del Papa, 84 Fed. Appx. 988 (9th Cir. 2004).

<sup>3</sup>The record on appeal contains an affidavit from appellant's defense counsel. This court has held that a petitioner's statutory rights are violated when the district court improperly expands the record with an affidavit presented by the State refuting the claims in the petition in lieu of conducting an evidentiary hearing. Mann v. State, 118 Nev. 351, 46 P.3d 1228 (2002). Although we conclude that the district court erred to the extent that it considered the affidavit submitted by appellant's former defense counsel, appellant was not prejudiced by the error because he was not entitled to an evidentiary hearing on the claims that he raised in the petition. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

In his petition, appellant contended that defense counsel was ineffective. 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 resulted in 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>4</sup> The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.<sup>5</sup>

First, appellant claimed that defense counsel was ineffective for failing to investigate, review affidavits, and interview witnesses. Appellant failed to demonstrate that defense counsel's performance was deficient or that he was prejudiced. Appellant failed to provide specific factual allegations explaining or identifying what evidence counsel would have discovered had he conducted further investigation.<sup>6</sup> Appellant failed to demonstrate that had counsel pursued further investigation, appellant would have refused to plead guilty and would have insisted on proceeding to trial. Thus, the district court did not err in dismissing this claim.

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

<sup>5</sup>Strickland v. Washington, 466 U.S. 668, 697 (1984).

<sup>6</sup>Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

Second, appellant claimed that defense counsel was ineffective because there was a conflict of interest between them.<sup>7</sup> "The Sixth Amendment guarantees a criminal defendant the right to conflict-free representation."<sup>8</sup> In order to establish a violation of this right, a defendant must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance."<sup>9</sup> The existence of an actual conflict of interest must be established on the specific facts of each case, but "[i]n general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties."<sup>10</sup>

Appellant attached letters as exhibits to his petition that appeared to establish that defense counsel Lee-Elizabeth McMahon briefly represented him during his initial post-conviction proceedings.<sup>11</sup>

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<sup>7</sup>To the extent that appellant raised the underlying issue independently from his ineffective assistance of counsel claim, we conclude that it 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. NRS 34.810(1)(a).

<sup>8</sup>Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993); see also Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992).

<sup>9</sup>Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); see also Clark, 108 Nev. 324, 831 P.2d 1374.

<sup>10</sup>Clark, 108 Nev. at 326, 831 P.2d at 1376 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

<sup>11</sup>Prior to the filing of his initial petition for a writ of habeas corpus, appellant filed a motion to have McMahon removed as post-conviction counsel and the motion was granted.

Appellant filed a complaint with the Nevada State Bar against McMahon. Later, McMahon, as appellate counsel for the office of the Special Public Defender, sent appellant a letter informing him of his direct appeal deadlines, but she did not further represent appellant. Given McMahon's limited representation of appellant, even had a conflict existed, appellant failed to establish that an actual conflict of interest adversely affected attorney McMahon's performance. Thus, the district court did not err in dismissing this claim.

Third, appellant claimed that defense counsel was ineffective for failing to file a motion to suppress his confession. Even assuming defense counsel was deficient for failing to file a suppression motion, appellant has failed to demonstrate that he was prejudiced by the alleged deficiency. Appellant's statement to police was not entirely incriminating in that he told police the shooting was accidental. Additionally, the State's evidence against appellant was convincing and included eyewitness testimony that appellant wanted the victim's gun, but did not want to pay for it, and shot the victim in an attempt to scare her. Finally, appellant received a substantial benefit in exchange for the guilty plea in that the State dismissed the first-degree murder charge and agreed to a stipulated sentence of two consecutive terms of 5 to 20 years. Appellant failed to demonstrate that, had counsel filed a motion to suppress, he would have refused to plead guilty and insisted on proceeding to trial. Thus, the district court did not err in dismissing this claim.

Fourth, appellant claimed that defense counsel was ineffective for refusing to file a direct appeal and misinforming him about the deadline for filing a notice of appeal. "[A]n attorney has a duty to perfect

an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction."<sup>12</sup> Appellant failed to demonstrate that defense counsel's performance was deficient. Appellant attached a letter from defense counsel explaining the deadlines for filing a direct appeal, so it was apparent that appellant was aware of this information.<sup>13</sup> Appellant did not specifically allege when he asked counsel to file a direct appeal, or whether he did so in a timely manner.<sup>14</sup> Thus, the district court did not err in dismissing this claim.

Next, appellant claimed that his guilty plea was not knowingly and voluntarily entered. Specifically, appellant claimed that (1) his guilty plea was unknowing and involuntary because he was not read the information at the canvass, (2) there was no factual basis for the plea, (3) he did not admit the charged offense, (4) he was misinformed about the potential sentence and did not know the elements of the offense, (5) he believed he could receive probation, and (6) his former attorneys from the public defender's office had previously been found to have provided ineffective assistance.

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<sup>12</sup>Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994).

<sup>13</sup>Appellant's second judgment of conviction was filed on September 15, 2005. The letter that counsel sent to appellant incorrectly stated that his filing deadline was on October 7, 2005, which is earlier than the required deadline. Therefore, the error in the above cited letter could not have prevented him from filing a timely notice of appeal.

<sup>14</sup>See Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

A guilty plea is presumptively valid, and appellant carries the burden of establishing that his plea was not entered knowingly and intelligently.<sup>15</sup> In determining the validity of a guilty plea, this court looks to the totality of the circumstances.<sup>16</sup> This court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.<sup>17</sup>

The totality of the circumstances indicates that appellant's guilty plea was knowing, voluntary and intelligent. At the plea canvass, appellant acknowledged that he shot the victim with a firearm under circumstances that would amount to second-degree murder. The signed plea agreement, which appellant indicated that he had read and understood, stated that he was stipulating to two consecutive prison terms of 5 to 20 years and that he was not eligible for probation. Appellant stated during the plea canvass that he understood the negotiated sentence and requested that the State stipulate on the record that the plea was binding. Appellant was represented by the Special Public Defender, not the Public Defender, in his second arraignment to avoid a conflict of interest. We conclude that appellant understood the nature of the charged offense and the consequences of his guilty plea. Appellant's mere

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<sup>15</sup>See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

<sup>16</sup>State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

<sup>17</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

subjective belief as to his potential sentence, or hope of leniency, unsupported by a promise from the State or indication by the court, is insufficient to invalidate his guilty plea as involuntary or unknowing.<sup>18</sup> Thus, the district court did not err in dismissing this claim.

Finally, appellant claimed that (1) the imposition of the deadly weapon enhancement violated his statutory and constitutional due process and double jeopardy rights; (2) the district court abused its discretion in failing to address appellant's motion for self-representation or, alternatively, self-appointment as co-counsel; (3) the district attorney intruded into appellant's attorney/client relationship; (4) the district court lacked jurisdiction over him because he was a juvenile at the time of the commission of the crime; (5) his guilty plea was "unauthorized by law" because it was motivated by a coerced confession; (6) he was wrongly denied bail; (7) he was wrongly refused discovery; (8) the State failed to give him a copy of the charging document; (9) he was denied his speedy trial rights; (10) the State failed to bring him before a magistrate within 72 hours; and (11) his presentence investigation report was based, in whole or part, on the presentence investigation report prepared 17 years earlier. These claims fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of

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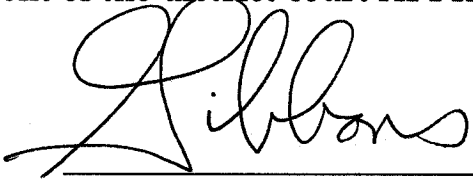
<sup>18</sup>See Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975).




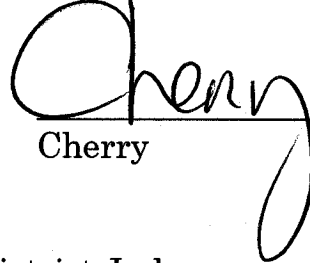
conviction based upon a guilty plea.<sup>19</sup> Thus, the district court did not err in dismissing these claims.

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>20</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Donald M. Mosley, District Judge  
Jimmie Davis  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>19</sup>NRS 34.810(1)(a).

<sup>20</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).