IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN WILLIAM DUNCAN,
Appellant,
vs.
WARDEN, NORTHERN NEVADA CORRECTIONAL CENTER, DON HELLING,
Respondent.

No. 48877

FILED

JUL 17 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellant Brian Duncan was convicted on November 16, 2004, by the district court, pursuant to a guilty plea, of one count of burglary. He was sentenced to serve a prison term of ten years with the possibility of parole in four years. His direct appeal was dismissed.[1]

Duncan filed in the district court a timely proper person postconviction habeas corpus petition. The district court appointed counsel to represent Duncan and a supplemental petition was filed. The district court held an evidentiary hearing on February 9, 2007, and issued an order denying him relief. Duncan raises three issues for our review.

[1]Duncan v. State, Docket No. 44446 (Order Dismissing Appeal, March 16, 2005).

07-15493

First, Duncan contends that the district court improperly denied his claim that his plea was invalid because his trial counsel, Kevin Van Ry, was ineffective and coerced him into entering it. We disagree.

A guilty plea is presumptively valid, and the burden is on the defendant to show under a totality of the circumstances that it was not freely, knowingly, and voluntarily entered.[2] To state a claim of ineffective assistance of counsel sufficient to invalidate a guilty plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness,[3] and that but for his counsel's errors, "'he would not have pleaded guilty and would have insisted on going to trial.'"[4]

Here, Duncan signed a written plea agreement where he admitted guilt to having committed a burglary and acknowledged that his plea was in his best interest and was being entered voluntarily, without any duress or coercion. During his canvass by the district court, Duncan stated that he understood the agreement. The district court asked: "Has anyone made any threats to get you to enter this plea?" Duncan replied:

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[2]See Freese v. State, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000); Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

[3]See Hill v. Lockhart, 474 U.S. 52, 57 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

[4]Kirksey, 112 Nev. at 988, 923 P.2d at 1107 (quoting Hill, 474 U.S. at 59).

"No, your Honor, they have not." Thus, Duncan's claim that he was coerced by Van Ry to enter his plea is belied by the record.[5]

Moreover, during the evidentiary hearing, Van Ry testified that he reviewed the plea agreement with Duncan; he advised Duncan that he could proceed to trial; and he believed that the plea was freely, knowingly, and voluntarily entered. Although Duncan's testimony at the evidentiary hearing contradicted Van Ry's testimony, the district court found Van Ry to be the more credible witness and we defer to its determination.[6]

Van Ry's advice to Duncan to enter the plea was also reasonable. Although the victim testified at the postconviction evidentiary hearing that her prior accusations against Duncan were "exaggerated" and raised doubt about her own veracity, this court avoids "the distorting effects of hindsight" when reviewing the effectiveness of trial counsel.[7] The victim's preliminary hearing testimony supported the charges against Duncan. And the victim even reiterated at Duncan's sentencing hearing that Duncan "did commit these crimes" and asked the court "to bestow the maximum sentence allowed by law." Given the known evidence, Van Ry's advice to Duncan that he should enter into the guilty plea was reasonable

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[5]See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d at 222, 225 (1984).

[6]See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[7]See Strickland v. Washington, 466 U.S. 668, 689 (1984).

at the time. We conclude that Duncan has failed to demonstrate that his plea was coerced or that Van Ry was ineffective. The district court properly denied this claim.

Second,[8] Duncan contends that the district court improperly denied his claim that the trial court erroneously denied his oral motion to remove his trial counsel prior to the entry of his plea. We disagree.

A motion to remove counsel is reviewed under the following three-part test: (1) the extent of the conflict; (2) the timeliness of the motion; and (3) the adequacy of the district court's inquiry.[9] Here, the district court inquired into Duncan's motion during a hearing where Duncan complained that he disagreed with Van Ry over trial strategy and expressed other premature concerns about his trial. Decisions regarding trial strategy are entrusted to counsel,[10] and Duncan has failed to demonstrate there was "a significant breakdown" in his relationship with Van Ry that demanded his removal as counsel. We conclude that the trial court did not abuse its discretion in denying Duncan's motion. The district court properly denied this claim.

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[8]The district court found that Duncan was deprived of his direct appeal and the final two claims we address in this order were considered below pursuant to Lozada v. State, 110 Nev. 349, 359, 871 P.2d 944, 950 (1994).

[9]See Garcia v. State, 121 Nev. 327, 337, 113 P.3d 836, 842-43 (2005).

[10]See Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 168 (2002).

Finally, Duncan contends that the district court improperly denied his claim that the prosecutor committed misconduct when he allegedly "embarrassed him in front of a bunch of people [by] stating that he would do the rest of his life in prison and needed to bring his toothbrush with him." We disagree. Duncan failed to show that the prosecutor's statements were coercive or unfairly prejudicial. We conclude that this claim, along with the other claims Duncan raises on appeal, was properly denied by the district court. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. Connie J. Steinheimer, District Judge
Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk