

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARTIN HUBER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48925

MARTIN HUBER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48989

FILED

AUG 09 2007

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

Docket No. 48925 is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Docket No. 48989 is a proper person appeal from an order of the district court denying a motion to withdraw a guilty plea. We elect to consolidate these appeals for disposition.¹ Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

On December 2, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of battery with use of a deadly weapon. 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.

¹See NRAP 3(b).

Docket No. 48925

On September 5, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the majority of the claims, but requested an evidentiary hearing on an appeal deprivation claim. 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 January 17, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of trial counsel and that his guilty plea was involuntary.² 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 resulting prejudice such that there is a reasonable probability, but for counsel's errors, of a different outcome in the proceedings.³ In order to demonstrate prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner must demonstrate that he would not have pleaded guilty and

²To the extent that appellant raised any of his claims independently from his claims of ineffective assistance of counsel or involuntary and unknowing plea, 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. See NRS 34.810(1)(a).

³Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

would have insisted on going to trial but for counsel's errors.⁴ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁵ A petitioner further carries the burden of demonstrating that his guilty plea was involuntarily or unknowingly entered, and such claims are reviewed under the totality of the circumstances.⁶

First, appellant claimed that his trial counsel was ineffective for failing to initiate competency proceedings because the presentence investigation report indicated that appellant had been diagnosed paranoid schizophrenic, was taking medications and had attempted suicide on the day of his arrest. Appellant claimed that this failure of his trial counsel, as well as the district court's failure, rendered his plea involuntarily entered.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced, and appellant failed to carry his burden of demonstrating the invalidity of his guilty plea. Appellant failed to demonstrate that the information in his presentence investigation report required formal competency proceedings in the instant case.⁷ This court has held that the test for determining

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

⁵Strickland, 466 U.S. at 697.

⁶State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

⁷See NRS 178.405.

competency is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."⁸ The district court personally canvassed appellant, and appellant answered all questions put to him appropriately. The guilty plea canvass and sentencing proceedings do not provide any support for a claim that appellant was not able to assist his attorney or understand the proceedings. Notably, in his claim, appellant did not allege that he was actually unable to understand the proceedings or assist his counsel, but rather appellant rested his incompetency allegation merely on the diagnosis, medication and suicide attempt. These facts alone do not establish incompetency or a doubt of competency. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel that his trial counsel was ineffective for causing appellant stipulate to habitual criminal status. Appellant claimed that NRS 207.010, habitual criminal enhancement, does not apply to an individual who has only one violent offense and older prior offenses. Appellant claimed that this error caused his guilty plea to be entered involuntarily.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced, and appellant failed to carry his burden of demonstrating the invalidity of his guilty plea. The record belies appellant's claim that he stipulated to habitual criminal

⁸Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (quoting Dusky v. United States, 362 U.S. 402 (1960)).

enhancement. Rather, in exchange for his guilty plea to one count of battery with the use of a deadly weapon, the State agreed to make no recommendation at sentencing and the district court could consider options from probation to habitual criminal adjudication. Appellant's trial counsel argued against habitual criminal adjudication at the sentencing hearing. However, the district court was presented with four certified felony convictions that qualified as prior felony convictions. NRS 207.010 makes no specific allowance for stale or trivial prior felony convictions.⁹ Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to present evidence of actual innocence. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's guilty plea relieved trial counsel's obligation to investigate or present evidence of actual innocence. Further, the documents submitted by appellant in support of his innocence claim, e-mails exchanged between trial counsel and his investigator and other staff, do not establish appellant's innocence. Rather, the e-mails indicate that the witnesses presented with slightly different versions of the incident. Such differences do not establish innocence. Trial counsel did present appellant's version of the incident during the sentencing hearing. Therefore, we conclude that the district court did not err in denying this claim.

⁹See Tillema v. State, 112 Nev. 266, 271, 914 P.2d 605, 608 (1996).

Fourth, appellant claimed that his trial counsel was ineffective for failing to file an appeal after being requested to do so. In support of his claim, appellant filed a supplement to the petition containing two affidavits from alleged witnesses to appellant's request. The affiants, in what appear to be affidavits prepared on the same typewriter but signed and notarized by different individuals, indicate that the affiants witnessed appellant asking his trial counsel to file a direct appeal immediately after the sentencing hearing. The affidavits contained no statement or explanation of the affiants' relationship to appellant, if any, or how the affiants were able to overhear a conversation between appellant and his trial counsel.

This court has held that if a defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on the defendant's behalf.¹⁰ Prejudice is presumed where a defendant expresses a desire to appeal and counsel fails to do so.¹¹ A petitioner is entitled to an evidentiary hearing on claims supported by specific facts, which if true, would entitle the petitioner to relief.¹²

It appeared from this court's preliminary review of the record on appeal that the district court may have erred in denying this claim without first conducting an evidentiary hearing. Appellant's appeal deprivation claim was supported by specific facts and was not belied by

¹⁰See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470 (2000).

¹¹Mann v. State, 118 Nev. 351, 353-54, 46 P.3d 1228, 1229-30 (2002).

¹²See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

the record on appeal, and if true, would have entitled him to relief. Notably, the State in its response to the petition below indicated that an evidentiary hearing should be conducted on appellant's appeal deprivation claim. Although the affidavits were minor support at best for appellant's claim, there is no finding by the district court as to the reliability of the affidavits and credibility of the affiants. This court ordered the State to show cause why the matter should not be remanded. The State filed a timely response indicating no opposition to an order of remand.

Therefore, we reverse the district court's order to the extent that it denied appellant's appeal deprivation claim, and we remand this matter to the district court to conduct an evidentiary hearing on appellant's appeal deprivation claim. The evidentiary hearing should specifically explore the affidavits submitted by appellant, and the district court should make specific findings regarding the reliability of the affidavits after receiving competent evidence. If the district court determines that appellant was deprived of a direct appeal without his consent, the district court shall appoint counsel to pursue the remedy set forth in Lozada v. State.¹³ If the district court determines that appellant was not deprived of a direct appeal without his consent, the district court shall enter a final written order to that effect. We affirm the remainder of the district court's order denying his petition for the reasons set forth above.

¹³110 Nev. 349, 871 P.2d 944 (1994).

Docket No. 48989

On June 12, 2006, appellant filed a motion to withdraw his guilty plea in the district court. On February 1, 2007, the district court denied the motion. This appeal followed.

In his motion, appellant claimed that his guilty plea was involuntarily and unknowingly entered. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.¹⁴ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.¹⁵ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.¹⁶

First, appellant claimed that his plea was invalid because the State misled him into thinking he could get probation. Appellant failed to carry his burden regarding this claim. The written guilty plea agreement correctly informed appellant that he was eligible for probation on the primary offense of battery with the use of a deadly weapon, but that if he were adjudicated a habitual criminal that he would not be eligible for probation.¹⁷ Therefore, we conclude that the district court did not err in denying this claim.

¹⁴Bryant, 102 Nev. 268, 721 P.2d 364; see also Hubbard, 110 Nev. 671, 877 P.2d 519.

¹⁵Hubbard, 110 Nev. at 675, 877 P.2d at 521.

¹⁶Freese, 116 Nev. 1097, 13 P.3d 442; Bryant, 102 Nev. 268, 721 P.2d 364.

¹⁷See NRS 176A.100(1)(a); NRS 200.481(2)(e)(1).

Second, appellant claimed that he was mentally coerced into entering a plea in order to avoid large habitual criminal treatment and a potential life sentence. Appellant claimed that his fear caused him to be unable to rationally weigh the advantages of a guilty plea. Appellant failed to carry his burden in this regard. Contrary to appellant's assertion that he avoided large habitual criminal treatment by entry of his guilty plea, the district court had the discretion under NRS 207.010 to impose large habitual criminal treatment; appellant had four prior felony convictions, and thus, he qualified for large habitual criminal treatment and faced a potential penalty of life imprisonment.¹⁸ Candid advice and conversation about the potential penalties faced does not amount to coercion nor ineffective assistance of counsel.¹⁹ Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that he believed he was agreeing to a term of 5 to 12 years by entry of his guilty plea. Appellant failed to carry his burden regarding this claim. The written guilty plea agreement correctly informed appellant of the potential penalties he faced. Nowhere in the record is there any indication that appellant was promised a term of 5 to 12 years. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing.²⁰ Therefore, we conclude that the district court did not err in denying this claim.

¹⁸See NRS 207.010(1)(b).

¹⁹See Strickland, 466 U.S. 668; Lyons, 100 Nev. 430, 683 P.2d 504.

²⁰See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

Fourth, appellant claimed that he was innocent. Appellant claimed that the video demonstrated that he acted in self-defense. Appellant's claim of innocence was considered and rejected in the appeal in Docket No. 48925 as it related to an ineffective assistance of counsel claim. The doctrine of the law of the case prevents further litigation of this issue.²¹ Further, we note that the question of an accused's guilt or innocence is generally not at issue in a motion to withdraw a guilty plea.²² Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that the district court did not make a determination that it was just and proper to adjudicate him a habitual criminal. Because this claim did not challenge the validity of the guilty plea, it was improperly raised in a motion to withdraw the guilty plea.²³ Therefore, we conclude that the district court did not err in denying this claim.

Finally, it appears that appellant claimed that the State breached the plea agreement by arguing for habitual criminal treatment. In exchange for the guilty plea, the State agreed to make no recommendation at sentencing. However, at the beginning of the sentencing hearing, the State's attorney appeared to begin an argument for habitual criminal adjudication. Appellant's trial counsel objected, and the district court indicated that it would disregard the statements made

²¹See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

²²See Hargrove, 100 Nev. at 503, 686 P.2d at 224.


²³See Hart v. State, 116 Nev. 558, 564, 1 P.3d 969, 973 (2000).

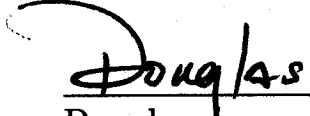
by the State. The State made no further recommendation during the hearing. Because this claim of breach of the plea agreement claim is more appropriately raised on direct appeal, this court declines to consider it here in light of this court's disposition of the appeal deprivation claim in Docket No. 48989. If the district court determines that appellant was not deprived of a direct appeal without his consent, the district court shall enter a written order containing a final resolution of this breach claim as well.

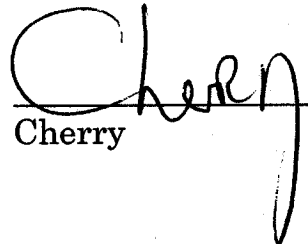
Conclusion

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.²⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

²⁴See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Valerie Adair, District Judge
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