IN THE SUPREME COURT OF THE STATE OF NEVADA

ALAN SCOTT HANES,
Appellant,
vs.
DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, GLEN WHORTON,
Respondent.

No. 49372

FILED

DEC 13 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

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. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

On October 5, 2005, the district court convicted appellant, pursuant to a guilty plea, of two counts of robbery with the use of a deadly weapon. The district court sentenced appellant to two concurrent terms of 72 to 180 months in the Nevada State Prison with equal and consecutive terms for the use of a deadly weapon. The district court imposed the sentences consecutively to a sentence in another case. This court affirmed appellant's judgment of conviction and sentence.[1] The remittitur issued on April 21, 2006.

On June 27, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State moved to dismiss the petition. On March 16, 2007, appellant filed an amended post-conviction petition for a writ of habeas corpus. Pursuant

[1]Hanes v. State, Docket No. 46184 (Order of Affirmance, March 27, 2006).

07-21074

to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On March 30, 2007, the district court dismissed appellant's petition. This appeal followed.[2]

In his petition, appellant contended that the State violated the terms of the plea agreement when it did not prosecute appellant for a lesser charge, the district court improperly sentenced appellant based on errors in the presentence investigation report, and the district court improperly conducted sentencing proceedings while appellant was overmedicated. As appellant's claims did not address the voluntariness of his plea or whether his plea was entered without the effective assistance of counsel, appellant's claims fell outside the scope of claims permissible in a habeas corpus petition challenging a judgment of conviction based upon a guilty plea.[3] Therefore, the district court did not err in dismissing these claims.

Appellant also claimed that his plea was involuntary. A guilty plea is presumptively valid, and a petitioner carries the burden of

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[2]The district court's order does not expressly address appellant's March 16, 2007, "Relation-Back Amended [Rule 15(c) NRCP] Petition for Writ of Habeas Corpus NRS 34.720 et seq." We conclude that to the extent that this appeal could be construed as an appeal from the district court's refusal to consider appellant's amended petition on the merits, the district court did not err. In the amended petition, appellant did not respond to the State's motion to dismiss other than to claim it was moot because he filed the amended petition. While appellant could have responded to the State's motion to dismiss, NRS 34.750(5) provides that "[n]o further pleadings may be filed except as ordered by the court."

[3]NRS 34.810(1)(a).

establishing that the plea was not entered knowingly and intelligently.[4] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[5] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[6]

Appellant claimed the conditions at the detention center and use of medication hindered his ability to assist his counsel and thus rendered him incompetent and his plea involuntary. A defendant is competent to enter a plea if he has: (1) "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding;'" and (2) "'a rational as well as factual understanding of the proceedings against him.'"[7] Nothing in the record indicates that appellant was not competent to enter his guilty plea. Appellant did not identify the medications that he was prescribed or the specific treatment he received at the detention center.[8] At the plea canvass, appellant responded appropriately and coherently to the district court's questions. Further, appellant specifically stated that he was on medication but the

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

[5]Hubbard, 110 Nev. at 675, 877 P.2d at 521.

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

[7]Godinez v. Moran, 509 U.S. 389, 396 (1993) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)); see also 1995 Nev. Stat., Ch. 639 § 23 at 2458 (NRS 178.400).

[8]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that "bare" or "naked" claims, which are unsupported by specific facts, are insufficient to grant relief).

medication did not hinder his ability to understand the proceedings. Appellant's counsel also stated that he did not have any difficulty communicating with appellant. In addition, appellant acknowledged that he understood the factual basis for his plea and the rights he was waiving by pleading guilty. It is not apparent from the record that appellant was impaired or that he did not understand the district court's questions. Therefore, the district court did not err in dismissing this claim.

Appellant also contended that he received ineffective assistance of trial counsel. 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 that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.[9] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[10]

First, appellant claimed that his counsel was ineffective for leading him to believe that the plea agreement was to his benefit. Appellant failed to demonstrate that he was prejudiced. Appellant received a substantial benefit by entry of his guilty plea because he avoided a trial and possible conviction for solicitation to commit murder and an additional charge of robbery with the use of a deadly weapon. Moreover, appellant stated in the plea agreement and during the plea

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

[10]Strickland v. Washington, 466 U.S. 668, 697 (1984).

canvass that he was not pleading guilty as a result of coercion or promises. Therefore, the district court did not err in dismissing this claim.

Second, appellant claimed that his counsel was ineffective for failing to advise him that his guilty plea prevented him from arguing a Fourth Amendment issue on appeal. Appellant failed to demonstrate that he was prejudiced. Appellant did not describe the nature of the Fourth Amendment claim he wished to raise on appeal.[11] Moreover, the guilty plea memorandum, which appellant signed, stated that appellant waived the right to appeal from adverse rulings on pretrial motions or issues that could have been raised at trial unless the State and district court consented to the appeal. Neither the State nor the district court consented to permit appellant to argue a Fourth Amendment issue on appeal. Thus, appellant did not establish that, but for his counsel's failure to advise him that his guilty plea waived the right to appeal a Fourth Amendment violation, he would have insisted upon going to trial. Therefore, the district court did not err in dismissing this claim.

Appellant also claimed that he received ineffective assistance of appellate counsel. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.[12] Appellate counsel is not required to raise every non-frivolous issue on appeal.[13] This court has held that

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[11]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[12]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[13]Jones v. Barnes, 463 U.S. 745, 751 (1983).

appellate counsel will be most effective when every conceivable issue is not raised on appeal.[14]

Appellant claimed that his appellate counsel failed to argue that appellant's sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment. Appellant failed to demonstrate that appellate counsel's performance was deficient or that he was prejudiced. The applicable statutes are constitutional and the sentence does not exceed the statutory provisions.[15] Appellant's sentence is neither grossly disproportionate, nor does it shock the conscience. Moreover, appellant's sentence was not the result of the district court's consideration of impalpable or highly suspect evidence.[16] Although the presentence investigation report contained several purported errors, appellant's trial counsel objected to the errors and argued that appellant only had three prior felony convictions as appellant had conceded in the plea agreement. Therefore, the district court did not err in dismissing this claim.

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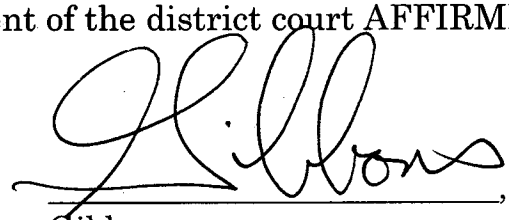
[14]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

[15]See NRS 200.380; 1995 Nev. Stat., ch. 455 § 1 at 1431 (NRS 193.165); see also Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) ("A sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'") (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

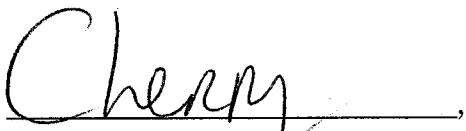
[16]See Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) ("So long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, this court will refrain from interfering with the sentence imposed.").

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.[17] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[18]



_____, J.
Gibbons



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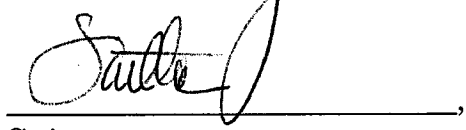

_____, J.
Saitta

cc: Hon. Robert H. Perry, District Judge
Alan Scott Hanes
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[17]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[18]We 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.