

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFONSO C. CRUZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49903 **FILED**

MAR 06 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

This is an appeal from an order of the district court denying appellant Alfonso Cruz's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

On May 16, 2006, Cruz was convicted, pursuant to a guilty plea, of one count each of carrying a concealed firearm or other deadly weapon, burglary while in possession of a firearm, attempted first-degree kidnapping with the use of a deadly weapon, and extortion with the use of a deadly weapon. The district court sentenced Cruz to serve concurrent prison terms of 12 to 32 months for the carrying a concealed weapon count; 24 to 84 months for the burglary while in possession of a firearm count; 24 to 96 months for the attempted kidnapping count with an equal and consecutive term for the deadly weapon enhancement; and 12 to 48 months for the extortion count with an equal and consecutive term for the deadly weapon enhancement. Cruz did not file a direct appeal.

Cruz filed a timely proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel. The State opposed the petition. Without conducting an evidentiary hearing, the district court denied the petition. Cruz filed the instant appeal.

Cruz contends that his 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.¹ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.²

Cruz first contends that the district court erred in denying his post-conviction petition without conducting an evidentiary hearing. Cruz contends that, if the district court had conducted an evidentiary hearing, it would have found that his defense counsel was ineffective for coercing him into pleading guilty. Cruz does not provide any specificity as to this claim³ and thus, failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Accordingly, the district court did not err in denying this claim.

Cruz next contends that his counsel was ineffective for failing to adequately advise him about the consequences of his plea, including the mandatory consecutive enhancement for the attempted kidnapping with a deadly weapon count. We agree with Cruz that a plea is invalid where a defendant pleads guilty without knowing about a mandatory consecutive sentence.

¹Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

²Strickland v. Washington, 466 U.S. 668, 697 (1984).

³Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

This court has recognized that a mandatory consecutive sentence is “an important and direct consequence” and is “critical information” of which the defendant should be advised to ensure that his guilty plea is both knowing and voluntary.⁴ In considering whether a defendant was advised about the mandatory sentencing enhancement prior to entry of his plea, this court examines the totality of the circumstances.⁵

In the instant case, the record reveals that Cruz was not advised during the plea canvass or in the written plea agreement that he would receive a mandatory consecutive sentence for the attempted kidnapping with the use of a deadly weapon count. The advisement in the plea agreement with regard to consecutive sentence for this count provided that:

I understand that as a consequence of my plea of guilty as to [attempted first-degree kidnapping with the use of a deadly weapon], the Court must sentence me to imprisonment in the Nevada Department of Corrections for a minimum term of not less than two (2) years and a maximum term of not more than twenty (20) years. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment.

Moreover, the following colloquy took place at Cruz’s plea canvass:

COURT: You understand the penalty range for count three is two to twenty years, Nevada Department of Prisons—there should be a

⁴Director, State Prison v. Powell, 101 Nev. 736, 738, 710 P.2d 73, 74 (1985).

⁵See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

consecutive twenty years at—two to twenty after that, shouldn't there—for count three?

DEFENSE COUNSEL: I believe the attempt first-degree kidnapping is a simple two to—excuse me, attempt first-degree with the use is a simple two-to-twenty.

STATE: Yeah.

COURT: Okay. So there's not—it's not an additional enhancement? Just want to make sure?

STATE: No.

COURT: Okay.

DEFENSE COUNSEL: Similar to a burglary with use, your Honor.

COURT: Okay. That sounds good enough. Thank you, [counsel]. You understand the penalty range for count three is two to twenty?

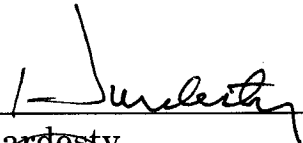
DEFENDANT: Yes.

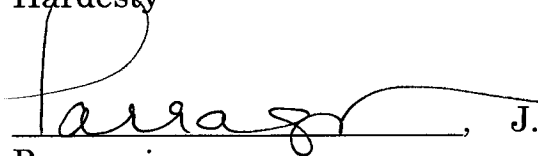
At the sentencing hearing, the district court proceeded to sentence Cruz to a term of 24 to 96 months for the attempted first-degree kidnapping count, with an equal and consecutive term for the deadly weapon enhancement. The record is devoid of any corrections to the misadvisement given in the plea agreement and during the plea canvass. Therefore, counsel was ineffective in failing to advise Cruz about the mandatory sentence enhancement for the attempted kidnapping with a deadly weapon count.

We therefore remand this case to the district court to allow Cruz to withdraw his plea.⁶ Based on the foregoing, we

⁶We note that Cruz also claims that defense counsel failed to advise him on the deadly weapon enhancement for the extortion with the use of a deadly weapon count. The record indicates that Cruz was advised during
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ORDER the judgment of the district court AFFIRMED in part, VACATED in part, and REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Michael Villani, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

... continued

the plea canvass and in the plea agreement about the deadly weapon enhancement on the extortion count. Accordingly, Cruz's claim lacks merit.