

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD AGUILAR,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49962

**FILED**

NOV 14 2008  
TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On September 13, 2006, the district court convicted appellant Richard Aguilar, pursuant to an Alford plea,<sup>1</sup> of attempted murder with the use of a deadly weapon on a victim over the age of 60 years. The district court sentenced appellant to serve a term of 96 to 240 months in the Nevada State Prison and an equal and consecutive term for the victim over the age of 60 years enhancement. No direct appeal was taken.

On April 5, 2007, appellant filed a proper person petition for a writ of habeas corpus in the district court. 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 July 11, 2007, the district court denied appellant's petition. This appeal follows.

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<sup>1</sup>North Carolina v. Alford, 400 U.S. 25 (1970).

First, appellant argues that the district court erred in denying his claim of ineffective assistance of trial counsel without conducting an evidentiary hearing. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.<sup>2</sup> The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.<sup>3</sup> To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief.<sup>4</sup>

Appellant argues that his trial counsel was ineffective for informing him that he would receive probation. Appellant argues that his trial counsel led him to believe that he would receive probation due to his youth, his addiction to drugs and alcohol, and because this offense was appellant's first appearance in adult court. Appellant fails to demonstrate that he was prejudiced. The guilty plea agreement, signed by appellant, informed appellant that the district court determined whether appellant would receive probation. Further, at the plea canvass, the district court informed appellant that sentencing was strictly up to the court and that

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<sup>2</sup>See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test set forth in Strickland).

<sup>3</sup>Strickland, 466 U.S. at 697.

<sup>4</sup>Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

no one could promise probation, leniency, or any special treatment. Moreover, a mere subjective belief as to the potential sentence, without a promise from the State or indication by the court, is insufficient to invalidate a guilty plea.<sup>5</sup> Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Next, appellant claims that the district court erred in denying his claims that his plea was invalid without conducting an evidentiary hearing. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.<sup>6</sup> Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.<sup>7</sup> In determining the validity of a guilty plea, this court looks to the totality of the circumstances.<sup>8</sup> To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief.<sup>9</sup>

Appellant argues that his plea was not knowingly entered due to his confusion over whether his offense was probationable. Appellant

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<sup>5</sup>Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975).

<sup>6</sup>Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

<sup>7</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

<sup>8</sup>State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367.

<sup>9</sup>Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

argues that his confusion caused him to believe that he would receive probation rather than a prison sentence. Appellant fails to carry his burden of demonstrating that his plea was not knowingly entered. The guilty plea agreement, which appellant signed, informed appellant that he was eligible for probation and that the question of whether he would receive probation was in the discretion of the district court. Further, contrary to appellant's assertion, information regarding a term of imprisonment and probation eligibility were not mutually exclusive and inconsistent. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, appellant argues that his plea was not knowingly entered because he did not understand how the enhancements to the primary offense would be imposed. Appellant argues that he was confused because the guilty plea agreement stated that he would be sentenced to serve one term of 4 to 40 years, rather than a term of 2 to 20 years for the attempted murder with an equal and consecutive term for the victim over the age of 60 years enhancement, which he was actually sentenced to serve.<sup>10</sup> Appellant failed to carry his burden of demonstrating that his

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<sup>10</sup>We note that at the sentencing hearing, the district court informed appellant that he was sentenced to serve the enhancement for the use of a deadly weapon, while the judgment of conviction states that appellant was sentenced to serve the enhancement for a victim over the age of 60 years. Pursuant to NRS 193.169, the district court may only impose a sentence for one enhancement; as both the deadly weapon and victim over 60 enhancements carried the same potential sentences, appellant was not prejudiced due to the difference between what was stated at the sentencing hearing and what he was sentenced to in the judgment of conviction. See NRS 193.165 and NRS 193.167.

guilty plea was invalid. At the plea canvass, the district court informed appellant that he faced a sentence of 2 to 20 years for the attempted murder plus an equal and consecutive term for the enhancement. Thus appellant was informed of the correct sentence prior to his guilty plea. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Further, appellant argues that the collective confusion over the sentencing issues cumulatively combined to make appellant's guilty plea invalid. Appellant argues that the district court was confused as to whether his offense was probationable at a post-conviction status hearing. Appellant argues that the district court's confusion, combined with the above claims, shows that an evidentiary hearing is necessary to discover if appellant's plea was entered knowingly and intelligently. Appellant fails to demonstrate that collective confusion rendered his plea invalid. At a status hearing concerning appellant's post-conviction petition, the district court first stated that it did not believe that appellant's offense was probationable, but later reopened the record to state that it was informed that it was probationable. The district court's confusion over the offense occurred well after appellant was sentenced and the record of the sentencing hearing indicates that the district court was aware that appellant's offense was probationable. Moreover, even when appellant's claims are considered cumulatively, we conclude that they do not entitle him to relief.<sup>11</sup> Therefore, the district court did not err in denying appellant's petition without conducting an evidentiary hearing.

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<sup>11</sup>See Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).

Next, appellant argues that the district court conducted an improper ex parte evidentiary hearing on his post-conviction claims. A criminal defendant does not have an unlimited right to be present at every proceeding.<sup>12</sup> A “defendant must show that he was prejudiced by the absence.”<sup>13</sup> A review of the record reveals that no evidence or arguments were presented at the status hearing; rather, the status hearing was limited to the district court setting forth the reasons for denying the petition.<sup>14</sup> Appellant fails to demonstrate that the outcome of the proceedings would have been different had he been present. Therefore, we conclude that the district court did not conduct an improper ex parte evidentiary hearing.

Next, appellant argues that the district court erred by failing to appoint counsel to assist him with the post-conviction proceedings in the district court. Appellant argues that the district court should have appointed counsel because the issues in his petition were difficult, his youth and inexperience caused him difficulty in understanding the proceedings, and he faced severe consequences. Pursuant to NRS 34.750, the district court may appoint counsel to aid indigent petitioners. The court may consider: the severity of the consequences, whether the issues presented are difficult, whether the petitioner is unable to comprehend the

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<sup>12</sup>See Gallego v. State, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001).


<sup>13</sup>Kirksey v. State, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996).


<sup>14</sup>Cf. Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (2002) (concluding that defendant’s rights were violated when he was not present at hearing where testimony and evidence were presented).


proceedings, or whether counsel is necessary to proceed with discovery.<sup>15</sup> Here, the district court concluded that petitioner did not meet the requirements for appointment of counsel to aid him with his petition and appellant fails to demonstrate that the district court abused its discretion. Therefore, we conclude that the district court did not err in denying appellant's motion for appointment of counsel.

Accordingly, having considered Aguilar's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Jennifer Togliatti, District Judge  
Law Office of John J. Momot  
Richard Aguilar  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>15</sup>See NRS 34.750.