IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES KENTON WARDELL A/K/A DALE ALLEN WARDELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50097

FILED

MAR 24 2008

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On September 7, 2006, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted burglary. The district court sentenced appellant to serve a term of 2 to 5 years in the Nevada State Prison. Appellant did not file a direct appeal.

On October 17, 2006, appellant filed a proper person post-conviction 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 June 21, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that the plea agreement was not followed in his case because he entered a plea that contemplated a

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sentence from 1 to 5 years, but the Department of Parole and Probation recommended 2 to 5 years and he was ultimately sentenced to a term of 2 to 5 years.[1]

A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[2] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[3] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[4]

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[1]To the extent that appellant contended that his sentence was illegal we conclude that this claim lacked merit. Appellant pleaded guilty to attempted burglary. Burglary is a category B felony pursuant to NRS 205.060(2), which provides for a minimum sentence of not less than 1 year and a maximum sentence of not more than 10 years. Pursuant to NRS 193.330(1)(a)(3) appellant is thus guilty of a category C felony, not a category D felony as he contended. A category C felony is punishable by a term of imprisonment of not less than 1 year and not more than 5 years pursuant to NRS 193.130(2)(c). Appellant's sentence of 2 to 5 years was therefore facially legal.

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

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

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

Our review of the record on appeal reveals that appellant's claim lacked merit. During appellant's plea canvass, the court specifically asked appellant if he understood that the district court did not have to follow any plea bargain or sentence recommended by the attorneys in the instant case and appellant clearly indicated that he understood. Moreover, in signing his guilty plea agreement, appellant acknowledged that the district court was not bound by the agreement of the parties and that sentencing was a matter to be determined solely by the district court. Appellant further acknowledged that he could be sentenced for a period of up to 5 years. Accordingly, appellant failed to demonstrate that his guilty plea agreement was invalid because it was not followed in the instant case. Therefore, the district court did not err in denying this claim.

Appellant further contended that he was subject to an illegal search and seizure and that he was not given a warning pursuant to Miranda v. Arizona[5] when he was arrested. These claims are outside the scope of claims permissible in a petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea.[6] Therefore, the district court did not err in denying these claims.

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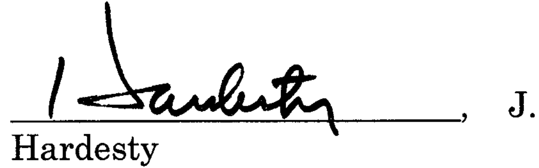
[5]384 U.S. 436 (1966).

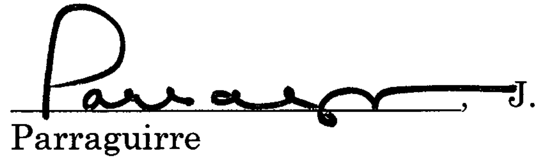
[6]NRS 34.810(1)(a).

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.[7] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_______________, J.
Hardesty



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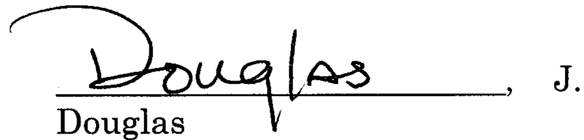

_______________, J.
Douglas

cc: Hon. Steven P. Elliott, District Judge
James Kenton Wardell
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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