

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRUCE WOLOSKY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50436

FILED

SEP 25 2008

JUDITH L. LINDEMAN
CLERK OF SUPREME COURT
BY *J. Cavall*
CHIEF DEPUTY CLERK

BRUCE WOLOSKY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50437

BRUCE WOLOSKY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51081

BRUCE WOLOSKY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51082

ORDER OF AFFIRMANCE

Docket Nos. 50436 and 50437 are proper person appeals from orders of the district court denying motions to withdraw the guilty pleas in district court case numbers C215290 and C215291. Docket Nos. 51081 and 51082 are proper person appeals from orders of the district court

denying post-conviction petitions for writs of habeas corpus in district court case numbers C215290 and C215291. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. We elect to consolidate these appeals for disposition.¹

On March 21, 2006, the district court convicted appellant, pursuant to a guilty plea, of one count of theft in district court case number C215290. The district court sentenced appellant to serve a term of 48 to 120 months in the Nevada State Prison. The district court provided appellant with 183 days of credit for time served. No direct appeal was taken.

On March 22, 2006, the district court convicted appellant, pursuant to a guilty plea, of one count of theft in district court case number C215291. The district court sentenced appellant to serve a term of 48 to 120 months in the Nevada State Prison. The district court ordered that his sentence be served consecutively to the sentence imposed in district court case number C215290 and ordered that appellant receive no credit for time served in district court case number C215291. No direct appeal was taken.

On June 21, 2007, appellant filed, with the assistance of counsel, a motion to withdraw the guilty plea in each district court case. The State opposed the motions. Counsel withdrew from representing appellant in the motions. On November 6, 2007, and on November 7, 2007, the district court denied the motions in each case. Appellant appealed, and the appeals were docketed in this court in Docket Nos. 50436 and 50437.

¹See NRAP 3(b).

On March 15, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in each district court case. The State opposed the petitions. 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 15, 2008, and on January 22, 2008, the district court denied the petitions. Appellant appealed, and the appeals were docketed in this court in Docket Nos. 51081 and 51082.

Motions to Withdraw the Guilty Pleas

In his motions, appellant claimed that the district court and the State agreed to appellant being released on his own recognizance release [O.R. release] for the purpose of paying full restitution to the victims prior to sentencing and that appellant would then receive probation rather than prison time. However, because of out-of-state detainers, which the district court and the State knew about at the time of the plea negotiations, appellant was not released on O.R. release. Appellant's trial counsel, who prepared the motions to withdraw the guilty pleas, attached a declaration stating that a conversation between himself, the State and the district court occurred in chambers and that the negotiations contemplated appellant being released on O.R. release in order to pay restitution and that such a payment would "weigh heavily on the court's decision whether or not to grant [appellant] probation at sentencing." Appellant claimed that his guilty pleas were conditional upon his receiving O.R. release, and relying upon Crawford v. State,² appellant claimed that he should be allowed to withdraw his guilty plea.

²117 Nev. 718, 30 P.3d 1123 (2001).

A guilty plea is presumptively valid, and a defendant carries the burden of establishing that the plea was not entered knowingly and intelligently.³ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.⁴ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.⁵

In Crawford, this court determined that a guilty plea was not valid where the plea was conditioned upon the district court's promise to allow the defendant to remain on bail until after Christmas, but the bail was revoked earlier by the district court.⁶ Although the bail term was not contained in the written guilty plea agreement, this court determined that the record revealed that the condition was discussed prior to entry of the plea in two bench conferences and the district court explicitly agreed prior to the defendant entering his plea to allow the defendant to be sentenced after Christmas and strongly implied that the district court would allow the defendant to remain on bail until sentencing.⁷ This court determined that because the condition was "articulated in court after [the defendant] signed the written plea agreement," the State could not rely upon the

³Bryant 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).

⁴Hubbard, 110 Nev. at 675, 877 P.2d at 521.

⁵State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367.

⁶117 Nev. at 721-24, 30 P.3d at 1125-27.

⁷Id. at 722-23, 30 P.3d at 1126.

written guilty plea agreement as evidence that the plea was knowing, voluntary and intelligent.⁸

Appellant failed to carry his burden of demonstrating that his plea was invalid in the instant case. The record does not support appellant's claim that his plea was conditioned upon his receiving O.R. release and that he would consequently receive probation. Appellant signed a written guilty plea agreement, which he acknowledged that he had read and understood. The written plea agreement stated that in exchange for guilty pleas to four counts in three district court cases,⁹ the State retained the right to argue for prison time, appellant stipulated to full restitution in all counts and cases including those being dismissed, the parties stipulated to a rendition of a minimum sentence of two years, the State would not oppose dismissing the remaining counts, and the State agreed not to make a federal referral. The district court recited this statement of the negotiations during the plea canvass and asked appellant if this was his "complete understanding" of the negotiations, to which appellant responded, "Yes, ma'am." In the written plea agreement, appellant was further informed of the potential terms of imprisonment and that he was eligible for probation, but that whether he received probation was left to district court's discretion. In the written guilty plea

⁸Id. at 724, 30 P.3d at 1127.

⁹In district court case number C215289, appellant entered a guilty plea to 2 counts of drawing and passing a check for wages with insufficient funds on deposit in drawee bank (gross misdemeanors). In district court case number C215290 and in district court case C215291, appellant entered guilty pleas to one count of theft (felonies) in each district court case.

agreement, appellant further acknowledged that he understood that his sentence was to be determined by the district court and that the district court was not obligated to accept any recommendation as to a specific punishment. During the plea canvass, appellant affirmatively acknowledged that sentencing was "completely up to the Court."

At the hearing on the motions, the district court specifically stated that O.R. release "was never part of the deal." Unlike the situation described in Crawford, O.R. release was never mentioned or implied by the district court on the record prior to appellant's entry of the guilty plea. It was only after he entered his guilty plea that trial counsel raised the issue of O.R. release. Further, in raising the issue of O.R. release, trial counsel did not assert that O.R. release had been promised or that the plea was conditioned upon O.R. release. Rather, trial counsel asked the district court to consider O.R. release for his client:

At this time I would like the Court to consider giving [appellant] an own-recognizance release. The negotiations will require him to pay restitution to all named victims in this case. [Appellant] owns two homes in the Las Vegas area, and he anticipates selling one or refinancing the other in order to pay full restitution.

So I would ask for two things. First I would ask that the Court consider putting sentencing down for the 12th of January, which would give [appellant] 60 days in order to try to get this restitution paid. Obviously it argues into his benefit that perhaps he is more deserving of probation if he can pay all of these people back.

The district court then mentioned that trial counsel was taking care of issues with other jurisdictions, and the State indicated that they would assist in dealing with the other jurisdictions and they were "on board with

getting these victims paid back.” It appears that at the conclusion of this discussion the district court agreed to O.R. release. However, subsequent to this hearing, the record indicates that at least one state, Ohio, had filed a detainer and officials from Ohio from were coming to Nevada to pick-up appellant if he were released from custody. Consequently, trial counsel agreed with the State’s request to remand appellant back into custody in order not to lose custody of appellant to the State of Ohio.

It is clear from the record that the parties and the district court understood when appellant asked for O.R. release, after he entered his plea, that there were complications regarding O.R. release because of the possible demands of the other jurisdictions. The record does not support appellant’s assertion that his plea was conditioned upon his receiving O.R. release and probation. Trial counsel’s statement in the declaration that the payment of restitution would “weigh heavily on the court’s decision whether or not to grant [appellant] probation at sentencing” appears to be a tacit recognition that the plea was not conditioned upon appellant receiving probation and that the district court always retained discretion regarding sentencing issues. Thus, the fact that appellant was not able to be released on his own recognizance did not invalidate his guilty plea in the instant case. Therefore, the district court did not err in denying the motions.

Post-Conviction Petitions for Writs of Habeas Corpus

In his petitions, appellant claimed that his guilty plea was invalid. As stated earlier, a guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered

knowingly and intelligently.¹⁰ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.¹¹ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.¹²

First, appellant claimed that his guilty plea was coerced and/or induced by a promise of O.R. release by the State and the district court. Similar to the claim set forth earlier, appellant claimed that he was promised O.R. release in order to pay restitution so that he may receive probation. Appellant further claimed that the plea agreement was breached when he did not receive O.R. release. For the reasons discussed earlier, we conclude that appellant failed to demonstrate that his guilty plea was invalid in this regard. The record does not support appellant's assertion that he was promised O.R. release as a condition of his plea by the State and the district court. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that he received no benefit for his guilty plea because the maximum sentence at trial would have been 10 years and he received 10 years by entry of his plea. Appellant failed to demonstrate that his plea was invalid in this regard. In exchange for his guilty plea in district court case numbers C215289, C215290, and C215291, the State retained the right to argue for prison time, appellant

¹⁰Bryant 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).

¹¹Hubbard, 110 Nev. at 675, 877 P.2d at 521.

¹²State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

stipulated to full restitution in all counts and cases including those being dismissed, the parties stipulated to a rendition of a minimum sentence of two years, the State would not oppose dismissing the remaining counts, and the State agreed not to make a federal referral. Appellant faced multiple additional charges in each case thereby increasing the amount of time he faced had he gone to trial on the original charges. Appellant also avoided the possibility of habitual criminal adjudication. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his guilty plea was coerced or induced by the threat of habitual criminal adjudication. Appellant claimed that he was afraid when the district court warned him that a failure to appear may result in his adjudication as a habitual criminal. Appellant failed to demonstrate that his plea was invalid in this regard. First, the admonishment regarding the spectre of habitual criminal adjudication occurring at the change of plea hearing was made after appellant had entered and the district court had accepted his guilty plea. More importantly, this court had held that a defendant's desire to plead guilty in order to avoid the possibility of habitual criminal adjudication will not give rise to a claim of coercion.¹³ Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that the district court improperly participated in the plea negotiations, which induced his guilty plea. Appellant based this claim in large part on his assertion that trial counsel had told him prior to entry of his plea that the district court was "on

¹³See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225-26 (1984).

board” with the terms of the plea agreement. Appellant failed to demonstrate that his plea was invalid in this regard. There is nothing in the record to support appellant’s claim that the district court participated in the plea negotiations. An isolated statement that the district court was inclined to follow the terms of the plea agreement does not rise to the level of coercion.¹⁴ Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that the terms of the guilty plea were vague and ambiguous. Specifically, appellant claimed that the district court’s statement of a “minimum of two years” was vague and ambiguous. Appellant failed to demonstrate that his plea was invalid in this regard. Appellant was informed of the potential minimum and maximum terms of imprisonment in the written guilty plea agreement and during the plea canvass. Appellant was further informed in both the written guilty plea agreement and during the plea canvass that matters of sentencing were left to the district court’s discretion. In the written guilty plea agreement, appellant further acknowledged that he had not been promised or guaranteed any particular sentence by anyone and that he understood that his sentence was to be determined by the district court and that the district court was not obligated to accept any recommendation as to a

¹⁴See Standley v. Warden, 115 Nev. 333, 337, 990 P.2d 783, 785 (1999) overruled by Cripps v. State, 122 Nev. 764, 137 P.3d 1187 (2006) (setting forth a prospective bright-line rule relating to judicial involvement in the plea process, but recognizing that Standley will be applied to guilty pleas entered prior to Cripps). Appellant’s guilty plea was entered prior to this court’s holding in Cripps.

specific punishment. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed 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.¹⁵ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.¹⁶

Appellant claimed that his trial counsel never informed him that he faced a potential sentence of 2 to 10 years. Appellant claimed that he believed the worst-case scenario was a term of 2 to 5 years. Appellant failed to demonstrate that he was prejudiced. As stated above, appellant was informed of the minimum and maximum potential sentences in the written guilty plea agreement and during the plea canvass. Appellant was further informed that matters of sentencing were left to the district court's discretion and the district court was not required to follow any recommendation for a specific punishment. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant raised all of the above claims as violations of due process and equal protection. Appellant failed to demonstrate his

¹⁵Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

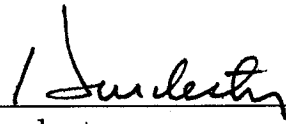
¹⁶Strickland v. Washington, 466 U.S. 668, 697 (1984).

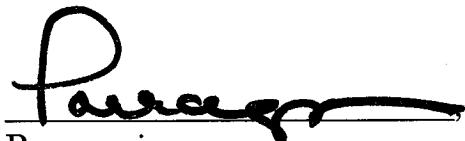
due process and equal protections rights were violated for the reasons set forth above. Therefore, we conclude that the district court did not err in denying these petitions.

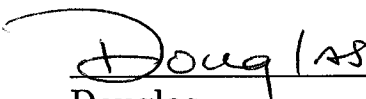
Conclusion

Having reviewed the records 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 judgments of the district court AFFIRMED.¹⁸


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

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

¹⁸We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in these matters, 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.

cc: Hon. Jackie Glass, District Judge
Bruce Wolosky
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk