

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO ORTIZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50494

FILED

APR 18 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 a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On February 5, 2007, the district court convicted appellant, pursuant to a guilty plea, of one count of discharging a firearm out of a motor vehicle with the intent to promote, further or assist a criminal gang. The district court sentenced appellant to serve two consecutive terms of 24 to 96 months in the Nevada State Prison. No direct appeal was taken.

On June 14, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. 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 October 23, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that his guilty plea was not entered knowingly or voluntarily. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not

entered knowingly and intelligently.¹ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.² In determining the validity of a guilty plea, this court looks to the totality of the circumstances.³

First, appellant claimed that his guilty plea was the product of coercion. Appellant claimed that he entered a guilty plea because trial counsel failed to explain anything to appellant except that a guilty plea was in his best interests. Based upon our review of the record on appeal, we conclude that appellant failed to carry his burden in this regard. At the guilty plea canvass, appellant affirmatively indicated that he was entering his plea freely and voluntarily and that his plea was not the product of threats or coercion. Further, in signing the guilty plea agreement, appellant acknowledged that his guilty plea was not the product of duress or coercion. During the guilty plea canvass, appellant further acknowledged that he had discussed the charges with his trial counsel, that trial counsel had answered all his questions, and that he understood the charges. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his guilty plea was not entered knowingly and voluntarily because he was not informed of the direct consequences of his guilty plea. Specifically, appellant claimed that he did not understand the gang enhancement and that he had a right to have the

¹Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

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

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

jury determine the gang enhancement. Appellant further claimed that the elements of the offense and the nature of the charges were not explained to him. Based upon our review of the record on appeal, we conclude that appellant failed to carry his burden in this regard. Appellant was informed of the range of punishments, including the gang enhancement, during the plea canvass and in the plea agreement. The written plea agreement, which appellant acknowledged reading, signing and understanding, specifically informed appellant that he waived his right to a jury trial. During the plea canvass, the district court asked appellant if he understood that his guilty plea was a waiver of his trial rights, and appellant answered in the affirmative. The charge was set forth in an information attached to the criminal information and appellant made a factual admission during the plea canvass. In the written plea agreement, appellant further acknowledged that his trial counsel had explained the consequences of the guilty plea, the charge against him, the elements of the charge, and the waiver of constitutional rights. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel, 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, there is a reasonable probability of a different outcome in the

proceedings.⁴ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁵

Appellant claimed that his trial counsel was ineffective for failing to adequately consult with him regarding his appeal rights. Appellant claimed that he was not informed of the right to appeal and that he did not waive the right to an appeal. Appellant further claimed that trial counsel told him he had no right to appeal his guilty plea and did not ascertain appellant's wishes regarding an appeal. Based upon our review of the record on appeal, we conclude that appellant failed to demonstrate that he was prejudiced. The guilty plea agreement, which appellant acknowledged reading, signing and understanding, informed appellant of his limited right to appeal.⁶ Notably, in Nevada, there is no requirement that trial counsel inform a criminal defendant of the right to a direct appeal when the conviction is based upon a guilty plea.⁷ Appellant did not claim that he asked trial counsel to file an appeal and that counsel refused to do so.⁸ Appellant further failed to demonstrate that trial counsel was obligated to file a notice of appeal due to the existence of a direct appeal claim with a reasonable likelihood of success.⁹ Finally, trial counsel was correct that appellant could not challenge the validity of his

⁴See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁵Strickland, 466 U.S. at 697.

⁶See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

⁷See Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

⁸See id.


⁹See id.

guilty plea on direct appeal in the instant case.¹⁰ Therefore, we conclude that the district court did not err in denying this claim.

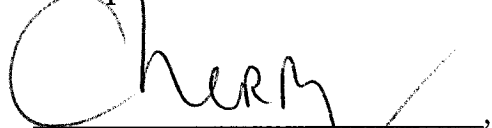
Finally, appellant claimed: (1) the district court erred in imposing the gang enhancement because there was not sufficient evidence of a criminal gang, and (2) the district court improperly relied upon a juvenile adjudication in sentencing appellant. These claims fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea.¹¹ Therefore, we conclude that the district court did not err in denying these claims.

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.¹² Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.

Maupin

 _____, J.

Cherry

 _____, J.

Saitta

¹⁰See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

¹¹See NRS 34.810(1)(a).

¹²See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Michelle Leavitt, District Judge
Francisco Ortiz
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk