

IN THE SUPREME COURT OF THE STATE OF NEVADA

THEODORE T. WOODS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50495

FILED

AUG 25 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; David Wall, Judge.

On January 26, 2007, the district court convicted appellant, pursuant to a guilty plea, of two counts of robbery with the use of a deadly weapon. The district court sentenced appellant to serve a total of two consecutive terms of 36 to 120 months in the Nevada State Prison. No direct appeal was taken.

On May 25, 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, the district court declined to appoint counsel to represent appellant. On October 12, 2007, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his guilty plea was invalid. 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 plea was invalid because he did not understand the nature of the deadly weapon enhancement, in particular that he had a right to a jury determination of the deadly weapon enhancement. Appellant failed to carry his burden of demonstrating that his plea was invalid. Appellant entered a guilty plea to two counts of robbery with the use of a deadly weapon. Appellant was informed in the written guilty plea agreement and during the plea canvass that a consequence of the deadly weapon enhancement was an equal and consecutive term. The written guilty plea agreement further informed appellant of the constitutional rights he waived by entry of his guilty plea, including the right to a jury trial. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that the district court should not have accepted his plea without canvassing him on the waiver of rights,

¹Bryant 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).

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

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

particularly the right to a jury determination of the essential elements of the deadly weapon enhancement. Appellant failed to carry his burden of demonstrating that his plea was invalid. The written guilty plea agreement set forth the rights waived by entry of the guilty plea. During the guilty plea canvass, appellant acknowledged that he had read and understood the plea agreement. The district court personally canvassed appellant about his waiver of the right to a jury trial on the six original charges—which included charges with the deadly weapon enhancement. Appellant affirmatively acknowledged that he was giving up the right to go to trial. 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 sufficient to invalidate a judgment of conviction, 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 of a different outcome but for counsel's errors.⁴ In order to demonstrate prejudice to invalidate the decision to enter a guilty plea, a petitioner must demonstrate a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial.⁵

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

⁵Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁶ A petitioner must prove the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁷

Appellant claimed that his trial counsel was ineffective for using mental coercion to induce his guilty plea. Appellant claimed that his trial counsel made threats and promises to induce the guilty plea. Appellant claimed that his trial counsel told him that if he lost at trial, the State would be angry and appellant would get a life sentence. Appellant claimed that this was improper given his youthful age, 19 years old, his limited education, and his drug and alcohol problems. Appellant failed to demonstrate that he was prejudiced in the instant case. In the written plea agreement and during the plea canvass, appellant affirmatively acknowledged that his guilty plea was freely and voluntarily entered and was not the product of threats or promises. Appellant further failed to demonstrate that he would not have entered a guilty plea in the instant case absent the allegedly deficient performance. Appellant was originally charged with two counts of conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, and two counts of first-degree

⁶Strickland, 466 U.S. at 697.

⁷Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

kidnapping with the use of a deadly weapon. Thus, appellant faced substantially greater periods of incarceration with the original charges, including life imprisonment.⁸ Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel failed to present mitigating evidence or witnesses, including his family. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel presented mitigating evidence and witnesses at sentencing. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that his trial counsel was ineffective for informing he had no right to appeal from a guilty plea and failing to file an appeal despite being asked to do so.

A defendant who has entered a guilty plea has a limited right to appeal.⁹ This court has held that if a defendant expresses a desire to

⁸See NRS 200.310; NRS 200.320.

⁹See NRS 174.063 (setting forth in the form plea agreement that the right to appeal is waived “unless the appeal is based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings and except as provided in subsection 3 of NRS 174.035”); Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999) (recognizing the right to a direct appeal from a judgment of conviction based upon guilty plea and that direct appeal claims could include a challenge to the constitutional validity of the statute, a challenge to the

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appeal, counsel is obligated to file a notice of appeal on the defendant's behalf.¹⁰ Prejudice is presumed where a defendant expresses a desire to appeal and counsel fails to do so.¹¹

Based upon our review of the record on appeal, we conclude that appellant failed to demonstrate by a preponderance of evidence that his trial counsel was deficient for failing to file a notice of appeal on his behalf. At the evidentiary hearing, appellant's counsel at both the plea canvass and at the sentencing hearing testified that appellant did not ask either of them to file an appeal. Appellant's counsel at the plea canvass testified that she reviewed the guilty plea agreement with appellant prior to entry of the plea and that review included the limited right to appeal. Appellant's counsel at the plea canvass further testified that she did not tell appellant that he could not appeal. Therefore, we conclude that substantial evidence supports the district court's conclusion that appellant

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sentence based on constitutional or other grounds, a claim that the plea agreement was breached, a challenge to the procedures that led to entry of the plea, and claims of judicial bias or other conditions rendering the proceedings unfair).

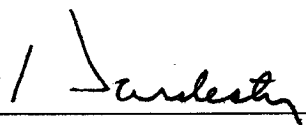
¹⁰See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470 (2000).

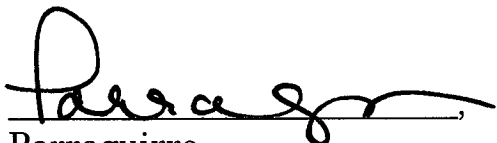
¹¹Mann v. State, 118 Nev. 351, 353-54, 46 P.3d 1228, 1229-30 (2002).

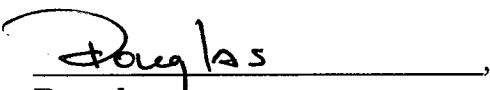
did not ask for a notice of appeal to be filed, and the district court did not err in denying this claim.

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.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. David Wall, District Judge
Theodore T. Woods
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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