IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGEL NIETO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50706

FILED

AUG 29 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; Michael Villani, Judge.

On November 16, 2006, the district court convicted appellant, pursuant to a guilty plea, of one count of battery with the use of a deadly weapon with the intent to promote, further or assist a criminal gang. The district court sentenced appellant to serve two consecutive terms of 24 to 72 months in the Nevada State Prison. No direct appeal was taken.

On July 26, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, and appellant filed a response. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On November 20, 2007, after conducting an evidentiary hearing, 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 adequately visit with appellant, refused phone calls from appellant's family, knew appellant was being pressured by the police, failed to render competent advice or offer any assistance, and informed appellant to take the plea to get on with his life otherwise the State would bring more harsh and severe charges. Finally, he claimed that he was induced to enter a guilty plea because the district court allegedly stated that communities were tired of gangs destroying neighborhoods. 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. Further, appellant acknowledged in the written guilty plea agreement, which he affirmatively acknowledged reading and understanding, that his guilty plea was not the product of duress or coercion. Appellant failed to set forth any specific facts or argument demonstrating that further conversations with trial counsel would have

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

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

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

had a reasonable probability of altering his decision to enter a guilty plea.[4] Appellant further failed to offer any specific facts in support of his claim that trial counsel knew he was being pressured by the police and failed to render competent advice or provide any assistance.[5] 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 did not have an understanding of the consequences, the nature of the charge or the constitutional rights waived by entry of the guilty plea. Appellant further claimed that he was not specifically informed of the right to have a jury determine the gang enhancement. 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 potential sentence, 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. Appellant further affirmatively acknowledged during the guilty plea canvass that he had discussed the waiver of constitutional rights with his trial counsel and that he had no questions. The charge was set forth in an information attached to the plea agreement 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, and

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[4]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[5]See id.

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, but for counsel's errors, of a different outcome in the proceedings.[6] To demonstrate prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner must show that the petitioner would not have pleaded guilty and would have insisted on going to trial.[7] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[8] 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.[9]

Appellant claimed that his trial counsel was ineffective for failing to inform him of the direct consequences of the plea and the waiver of the right to a jury determination on the gang enhancement. Appellant

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

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

[8]Strickland, 466 U.S. at 697.

[9]Means 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).

failed to demonstrate that he was prejudiced. As stated earlier, the guilty plea agreement, which appellant acknowledged reading, signing and understanding, set forth the consequences of the guilty plea and the waiver of constitutional rights—including the right to a jury trial. During the plea canvass, appellant was personally canvassed about the consequences of his guilty plea. Appellant failed to demonstrate that further information from trial counsel about the direct consequences of the guilty plea and the waiver of constitutional rights would have had a reasonable probability of altering his decision to enter a guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that he was deprived of a direct appeal due to the ineffective assistance of trial counsel. Specifically, appellant claimed that he asked trial counsel to file an appeal because he was not satisfied with his sentence, but that trial counsel failed to file an appeal on his behalf.

This court has held that if a defendant expresses a desire to 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

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[10]See 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).

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

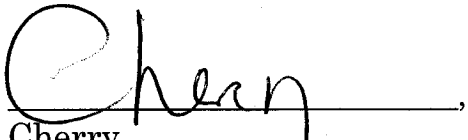
behalf. At the evidentiary hearing, appellant's trial counsel testified that he was not asked to file an appeal and that nothing during his representation indicated appellant desired to appeal. Appellant admitted at the evidentiary hearing that he had never asked trial counsel to file an appeal from the sentence. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed that the district court failed to attempt to understand appellant's mind set before sentencing appellant. This claim 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.[12] Therefore, we conclude that the district court did not err in denying this claim.

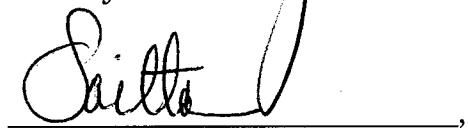
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[13] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Maupin



_____, J.
Cherry



_____, J.
Saitta

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[12]See NRS 34.810(1)(a).

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

cc: Hon. Michael Villani, District Judge
Angel Nieto
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk