IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTOINE SALATHIE FREEMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50784

FILED

SEP 05 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an 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 R. Kosach, Judge.

On June 1, 2005, the district court convicted appellant Antoine Freeman, pursuant to a guilty plea, of robbery with the use of a firearm. The district court sentenced Freeman to serve a prison term of 48 to 180 months plus an equal and consecutive term for the firearm enhancement. This court affirmed Freeman's judgment of conviction on direct appeal.[1]

On April 19, 2006, with the assistance of retained counsel, Freeman filed a post-conviction petition for a writ of habeas corpus in the district court. The State moved to dismiss the petition. Counsel filed an opposition to the State's motion to dismiss. The district court dismissed several of Freeman's claims and granted an evidentiary hearing on the

[1]Freeman v. State, Docket No. 45576 (Order of Affirmance, February 17, 2006).

remaining claims. Following an evidentiary hearing, the district court denied Freeman's petition. This appeal follows.

On appeal, Freeman contends that the district court erred in denying without an evidentiary hearing his claim that actions by the district court resulted in his guilty plea being coerced.

Freeman was initially charged with several charges under an aiding and abetting theory resulting from a robbery. Freeman consistently claimed that he was merely present and was not aware that his codefendants were going to rob the victims or that the codefendants had weapons. The State offered a package plea deal to Freeman and his two codefendants. It appears from the record that Freeman refused the plea deal two separate times and attempted to exercise his right to trial. Upon refusing the plea deal the second time, the district court directed Freeman and his counsel to enter the jury room to discuss plea negotiations with the two codefendants and their counsel.

Prior to entering the jury room, the district court stated, "Mr. Freeman, I want you to discuss—you don't really have to answer this right now—but what makes you so special? That's what I want you to discuss amongst yourselves."

There is apparently no transcript available of the discussion between the parties while in the jury room, however, Freeman signed his plea agreement while in the room, and was canvassed upon exiting the room.

During the plea canvass, the following colloquy took place between the district court and Freeman:

> COURT: And specifically, Mr. Freeman, when I addressed you earlier about, "What makes you so special?" did you in any way, shape or form think

that I was forcing you into changing your mind or pleading guilty to this charge because of what I said to you?

FREEMAN: No, Your Honor.

COURT: Are you doing this, Mr. Freeman, of your own free will?

FREEMAN: Yes, Your Honor.

COURT: Okay. I want to make sure of that, because it was probably an inappropriate comment for me to make prior to you going outside and discussing. That's why I said that. Do you understand that, Mr. Freeman?

FREEMAN: Yes, Your Honor.

A guilty plea is presumptively valid, and appellant carries the burden of establishing that his plea was not entered knowingly and intelligently.[2] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[3] This court has not hesitated to invalidate a guilty plea as involuntary where it plainly appears from the record that the plea was improperly coerced by the district court.[4] "'When

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[2]See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

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

[4]See e.g., Standley v. State, 115 Nev. 333, 336, 990 P.2d 783, 785 (1999); Smith v. State, 110 Nev. 1009, 879 P.2d 60 (1994). We note that this court established a new rule governing judicial participation in Cripps v. State, 122 Nev. 764, 137 P3d 1187 (2006). However, that rule is not retroactive, and thus, we review the present case pursuant to the rule as set forth under Standley.

a judge suggests to a defendant . . . that he should plead guilty, the coercive effect of this suggestion is likely to be overwhelming.'"[5]

The record indicates that the district court improperly coerced Freeman's guilty plea. Although the district court attempted to cure the coercive affect of its comment, such questioning, particularly when combined with the coercive nature of the package plea in this "individual circumstance,"[6] and the forced secluded meeting with his more culpable codefendants and their counsel, did little to cure the coerciveness of the comment. Under these circumstances, it is apparent that Freeman's will was overborne and that the district court abdicated its duty as a "'neutral arbiter of the criminal prosecution.'"[7] We conclude that Freeman should be afforded an opportunity to withdraw his plea. Therefore, we reverse the denial of this claim.

Freeman next contends that the district court abused its discretion by denying Freeman an evidentiary hearing on whether he received ineffective assistance of counsel due to a conflict of interest between Freeman and defense counsel. This court has already considered

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[5]Standley, 115 Nev. at 337, 990 P.2d at 785 (quoting Welsh S. White, A Proposal for Reform of the Plea Bargaining Process, 119 U. Pa. L. Rev. 439, 452 (1971), quoted in U.S. v. Bruce, 976 F.2d 552, 556 n.3 (9th Cir. 1992)).

[6]In re Ibarra, 666 P.2d 980, 983 (Cal. 1983) (explaining that a package plea deal is not "intrinsically coercive, but may be so under the individual circumstances"), overruled on other grounds by People v. Howard, 824 P.2d 315 (Cal. 1992).

[7]Standley, 115 Nev. at 337, 990 P.2d at 785 (quoting Bruce, 976 F.2d at 557); see also Stocks v. Warden, 86 Nev. 758, 761, 476 P.2d 469, 471 (1970).

and rejected a substantially similar claim on direct appeal.[8] Thus, Freeman has necessarily failed to demonstrate that counsel was ineffective. Accordingly, the district court did not err in denying this claim.[9]

Freeman next contends that defense counsel was ineffective for failing to move for a severance from his codefendants. Freeman asserts that had his trial be severed from his codefendants' trial, he would not have had to face the undue pressure to accept the guilty plea. Because this court has determined his guilty plea was coerced and this court is remanding to allow Freeman an opportunity to withdraw his plea, we decline to address this issue.

Last, Freeman appears to contend that the guilty plea memorandum did not specify the stipulated sentence and that counsel was ineffective for failing to object to the State's argument, during sentencing, that Freeman was not cooperative with police officers. These arguments are raised by Freeman for the first time in this appeal and were not presented in the habeas petition filed below; therefore, the arguments were not considered by the district court. As a result, Freeman's arguments are not properly raised and we decline to address them.[10]

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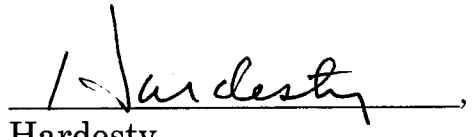
[8]Freeman v. State, Docket No. 45576 (Order of Affirmance, February 17, 2006) (citing Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984)).

[9]Milender v. Marcum, 110 Nev. 972, 879 P.2d 748 (1994).

[10]See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

In conclusion, because the record demonstrates that Freeman was coerced by the district court into entering a plea of guilty, we reverse the judgment of the district court and remand this matter to the district court with instructions to allow Freeman to withdraw his plea. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.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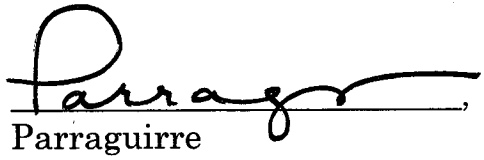
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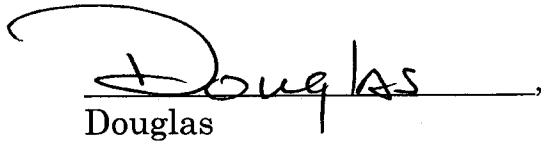
, J.
Douglas

cc: Hon. Steven R. Kosach, District Judge
Karla K. Butko
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk