

IN THE SUPREME COURT OF THE STATE OF NEVADA

EVAN RATCLIFF,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51079

**FILED**

AUG 04 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 March 28, 2007, the district court convicted appellant, pursuant to a guilty plea, of one count of second-degree murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole. No direct appeal was taken.

On October 22, 2007, appellant filed a motion to withdraw the guilty plea in the district court. The State opposed the motion. On December 10, 2007, the district court denied the motion. No appeal was taken.

On November 5, 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 February 6, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, 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.<sup>1</sup> The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.<sup>2</sup>

First, appellant claimed that his trial counsel was ineffective for advising him to take a guilty plea. Appellant claimed that trial counsel coerced him into entering a guilty plea by taking advantage of his confusion about the allegations and trial counsel was aware that the three witnesses who testified at the preliminary hearing could provide favorable testimony. Appellant further claimed that trial counsel failed to have the gun examined for fingerprints, have his clothing examined for gun powder residue, investigate the second person present at the shooting, and contact the owner of the car where the gun was found.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. During the plea canvass, appellant affirmatively acknowledged that he had read the amended information, that all of the statements in the information were

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<sup>1</sup>Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1109 (1996).

<sup>2</sup>Strickland v. Washington, 466 U.S. 668, 697 (1984).

true, and that he had read the guilty plea agreement thoroughly and understood the plea agreement. Appellant further affirmatively acknowledged that he had discussed the plea agreement with his trial counsel before he signed the plea agreement, and that he was satisfied with the services of his attorney. In the plea agreement, appellant acknowledged that his plea was not the product of duress or coercion. Appellant failed to demonstrate that with further investigation there was a reasonable probability that he would not have entered the guilty plea. While two of the witnesses at the preliminary hearing, appellant's girlfriend and an acquaintance of appellant, may have provided favorable testimony at the preliminary hearing regarding appellant's involvement in the shooting, the witness' testimony was subject to impeachment with the prior inconsistent statements implicating appellant in the shooting of the victim. If appellant had gone to trial, it would have been for the jury to determine the weight and credibility of the witness testimony.<sup>3</sup> Inconsistent witness statements are not per se a demonstration of innocence. Further, the driver of the vehicle that was shot at positively identified appellant as approaching the vehicle with a gun in his hand. Appellant received a substantial benefit by entry of his guilty plea as he avoided a possible conviction on the original charges of murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, assault with a deadly weapon, and discharging a firearm at or into a structure, vehicle, aircraft or watercraft. Therefore, we conclude that the district court did not err in denying these claims.

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<sup>3</sup>See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

Second, appellant claimed that his trial counsel was ineffective for advising him that if he entered a guilty plea to second-degree murder that he “would only do 10 years and get out.” Appellant further claimed that trial counsel did not fully advise him of the consequences of the guilty plea. Appellant failed to demonstrate that he was prejudiced. The written guilty plea agreement correctly advised appellant of the consequences of the guilty plea. During the guilty plea canvass, appellant acknowledged that he had thoroughly read the guilty plea agreement and understood the agreement. The district court specifically canvassed appellant about the potential sentences that he could receive. The district court further specifically canvassed appellant whether the plea was the product of probation, leniency or special treatment not set forth in the negotiation, and appellant responded, “No.” Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that his trial counsel was ineffective for failing to advise him that he could appeal his conviction. Appellant failed to demonstrate that he was prejudiced. Appellant was informed in the written guilty plea agreement of his limited right of appeal.<sup>4</sup> Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that his guilty plea was not valid. A guilty plea is presumptively valid, and a petitioner carries the burden of

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<sup>4</sup>Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

establishing that the plea was not entered knowingly and intelligently.<sup>5</sup> Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.<sup>6</sup> In determining the validity of a guilty plea, this court looks to the totality of the circumstances.<sup>7</sup>

Appellant claimed that he entered his plea without a full understanding of the consequences. Based upon our review of the record on appeal, we conclude that appellant failed to carry his burden. The written guilty plea agreement, which appellant acknowledged reading, signing and understanding, informed appellant about the potential sentences and the waiver of constitutional rights. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed that he was actually innocent. Appellant's claim of actual innocence was based upon alleged weaknesses with the three witnesses who testified at the preliminary hearing. First, he claimed that Khrisshawna Field's, appellant's girlfriend at the time of the shooting, voluntary police statement identifying appellant as the shooter was blemished because she was threatened by the police, her parents were not present when she was questioned by the police despite the fact that she was 17 years old, and she told the police that a man named Dominic could have used the gun in this case. Appellant noted

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<sup>5</sup>Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

<sup>6</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

<sup>7</sup>State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

that Fields testified at the preliminary hearing that appellant was not the shooter. Second, appellant claimed that Ericka McKnight's voluntary police statement that appellant had told her that he had to shoot at someone and smelled like gun smoke after the shooting was unsound because she admitted at the preliminary hearing that she was under the influence of drugs and alcohol when she made her statements to the police and she did not remember making statements to the police. Third, appellant attacked the testimony of Jorge Rios, the driver of the vehicle and the victim named in the attempted murder charge, because Rios could not clearly identify the shooter as he did not actually see who fired the shots, Rios testified that appellant's face was covered from the nose down, Rios testified he was too traumatized to remember whether the police questioned him before turning on the tape recorder, Rios changed stories about whether it was hard to see, and Rios admitted that he had been drinking earlier. Finally, appellant claimed that the police failed to investigate another individual present that could have committed the shooting.

NRS 34.810(1)(a) provides that the district court shall dismiss a petition if the "petitioner's conviction was upon a plea of guilty . . . and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel." Appellant's claims of actual innocence do not implicate the validity of the plea or the effective assistance of counsel; thus, these claims are procedurally defaulted.

However, a petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.<sup>8</sup> In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence of the crime—"it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation."<sup>9</sup> When the conviction is based upon a guilty plea, the petitioner must demonstrate that he is innocent of charges foregone in the plea bargaining process.<sup>10</sup>

Based upon our review of the record on appeal, we conclude that appellant failed to demonstrate that he was actually innocent. The evidence identified by appellant as demonstrating his actual innocence was brought out during the preliminary hearing. Further, the evidence identified by appellant did not establish his innocence; rather, at the most it raised credibility issues that would have been left to the jury to decide if the matter had gone to trial.<sup>11</sup> Because appellant's evidence of actual innocence fell far short of demonstrating that no reasonable juror would have convicted him, we conclude that the district court did not err in denying this claim.

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<sup>8</sup>Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

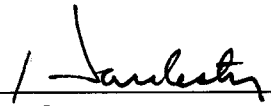
<sup>9</sup>Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

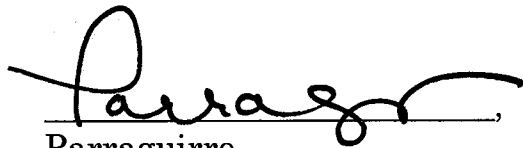
<sup>10</sup>Bousley v. United States, 523 U.S. 614, 623-24 (1998).

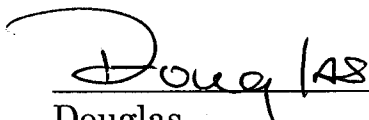
<sup>11</sup>See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

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.<sup>12</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

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

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<sup>12</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).