

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID BALDUS PHILLIPS, III,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51204

**FILED**

JUN 18 2009  
TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing appellant David Phillips' post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

On September 2, 2002, the district court convicted appellant, pursuant to a guilty plea, of one count of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to life in the Nevada State Prison with the possibility of parole after 20 years, plus an equal and consecutive term for the deadly weapon enhancement. No direct appeal was taken.

On April 21, 2003, appellant filed a post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to assist appellant and counsel filed a supplement to the petition. The State opposed the petition and filed motion to dismiss. On November 1, 2004, the district court entered an order dismissing a number of appellant's claims, and setting the remainder of appellant's claims for an evidentiary hearing. Following an evidentiary hearing, the district court determined that appellant had been deprived of his right to a direct

appeal, and allowed appellant to file a supplemental brief raising any additional issues which could have been raised on direct appeal pursuant to the remedy set forth in Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). Appellant filed a supplemental brief and the State filed a response. The district court concluded that these claims lacked merit, and dismissed the entirety of appellant's petition on January 30, 2008. This appeal follows.

### Post-Conviction Claims

#### Voluntariness of Plea

First, appellant argues that the district court erred in dismissing, prior to the evidentiary hearing, his claim 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. Bryant 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). Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion. Hubbard, 110 Nev. at 675, 877 P.2d at 521. In determining the validity of a guilty plea, this court looks to the totality of the circumstances. State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367. An evidentiary hearing on these claims is required only when a post-conviction petition contains factual allegations which, if true, would entitle the petitioner to relief. Bolden v. State, 99 Nev. 181, 183, 659 P.2d 886, 887 (1983). A petitioner "is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Appellant argues that he pleaded guilty to murder as a result of the State's threats that if he did not plead guilty, the State would continue to prosecute his mother in a number property crimes connected to the murder, and would seek prison time for his mother at sentencing. In Gardner v. State, this court concluded that a threat to prosecute a defendant's family member if a defendant does not accept a plea agreement may constitute coercion if the defendant demonstrates "(1) that the threats were made, (2) that such threats did in fact influence him, and (3) that the influence was such that it amounted to coercion." 91 Nev. 443, 446, 537 P.2d 469, 471 (1975).

Despite appellant's arguments, we conclude that even if the allegations in his petition were true, he failed to demonstrate a "threat" pursuant to Gardner. In Gardner, this court concluded that statements by a prosecutor that a defendant's family "will be charged and prosecuted" if the defendant did not plead guilty had the potential to be coercive. Id. at 445-46, 537 P.2d at 470-71. However, in the instant case, appellant's mother had already been charged with multiple counts of burglary, possession of stolen property, and conspiracy to possess stolen property in connection with the charges against appellant. Appellant was also charged with multiple property crimes in addition to the murder charge. In exchange for appellant and his mother's pleas of guilty, the State agreed to drop the property crime charges against appellant, to recommend a sentence of life in prison with the possibility of parole, to drop the charges in several unrelated cases against appellant, to charge appellant's mother with a single felony count of possession of stolen property and a misdemeanor count of conspiracy to commit possession of stolen property, and to concur with the recommendation of parole and

probation regarding his mother's sentence. The State offered leniency to appellant and his mother in a package plea negotiation.

In addition, even if the plea negotiations by the State did constitute threats, appellant's claim that he was coerced by these statements is belied by the record. Appellant repeatedly acknowledged, in both the plea agreement and at the plea canvass, that his plea was free and voluntary. Further, the State initially made the plea offer to appellant and his mother in March 2001. Appellant rejected the offer and did not enter a guilty plea until July 2002. Given this lapse of time, as well as appellant's own statements, it does not appear that the State's alleged threats had a coercive effect on appellant. Accordingly, we conclude that the district court did not err in dismissing this claim prior to the evidentiary hearing.<sup>1</sup>

#### Ineffective Assistance of Counsel

Second, appellant argues that the district court erred in denying his claim that he received ineffective assistance of trial counsel at sentencing. To state a claim of ineffective assistance of counsel at sentencing, 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. See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683

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<sup>1</sup>We also note that while the district court dismissed this claim prior to the evidentiary hearing, at the hearing, the district court allowed appellant to testify regarding this claim and concluded that appellant's testimony that he was coerced was not credible.

P.2d 504, 505 (1984). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697.

Appellant argues that counsel was ineffective for failing to present mitigating evidence at sentencing. Appellant has failed to demonstrate that he was prejudiced. At the evidentiary hearing, appellant presented several letters from acquaintances praising his character, and the testimony of a good friend of appellant's who stated that he had always been there for her. After reviewing the evidence, the district court determined that even if presented with this evidence, the sentence would have remained the same. Notably, appellant received the sentence the State agreed to recommend in the plea agreement. Therefore, appellant has failed to demonstrate a reasonable probability of a different outcome had counsel presented this mitigating evidence. Accordingly, the district court did not err in denying this claim.

### Direct Appeal Claims

#### Adequacy of Lozada Remedy

As a preliminary matter, appellant contends that the district court erred in directing appellant to file a supplemental brief of direct appeal claims in the district court pursuant to Lozada. Appellant argues that the Lozada remedy is inadequate because there is no right to effective assistance of counsel in a Lozada proceeding, and the remedy results in different treatment from that received by other appellants who file a timely notice of appeal. Appellant contends that the appropriate remedy for an appeal deprivation claim should be a delayed or belated appeal. We conclude that this argument lacks merit.

In 1994, when the Lozada remedy was implemented, this court expressly concluded that it was an adequate vehicle to remedy a petitioner's loss of his appellate rights. 110 Nev. at 359, 871 P.2d at 950. While not identical to the remedy of a belated direct appeal, the Lozada remedy is the functional equivalent of a belated direct appeal and is an adequate remedy for a petitioner's loss of his appellate rights. Contrary to appellant's claim, a petitioner afforded the Lozada remedy has the right to effective assistance of counsel involving the Lozada claims because the appointment of counsel for that proceeding is constitutionally required. See Gebbers v. State, 118 Nev. 500, 505, 50 P.3d 1092, 1095 (2002) (noting that the Lozada remedy is "incomplete if the district court does not provide the petitioner with the assistance of counsel to identify and pursue any potential direct appeal claims"); Lozada, 110 Nev. at 359, 871 P.2d at 950; see also Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); McKague v. Warden, 112 Nev. 159, 163-65, 912 Nev. 255, 257-58 (1996). Moreover, although the district court initially considers a Lozada petitioner's direct appeal claims, the district court's conclusions are independently reviewed by this court, indicating that ultimately, an appellant pursuant to Lozada receives the same treatment as any other criminal appellant. See generally Paige v. State, 116 Nev. 206, 208, 995 P.2d 1020, 1021 (2000) (recognizing that questions of law are reviewed de novo). Therefore, we conclude that the district court did not err in requiring appellant to proceed pursuant to the procedures set forth in Lozada.

#### Propriety of Sentence

Next, appellant argues that the district court abused its discretion in sentencing him to two consecutive terms of life in prison with

the possibility of parole after 20 years, rather than two definite terms of 20 to 50 years. We conclude that this argument lacks merit.

This court has consistently afforded the district court wide discretion in its sentencing decision. *See, e.g., Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). This court will refrain from interfering with the sentence imposed “[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.” *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). In the instant case, appellant does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statute is unconstitutional. Further, we note that the sentence imposed was within the parameters provided by the relevant statute. *See* NRS 200.030. In addition, appellant agreed to a recommended sentence of life with the possibility of parole in the plea agreement. Appellant received this sentence. Accordingly, we conclude that the district court did not abuse its discretion in sentencing appellant. Therefore, this claim was properly dismissed by the district court.

#### Joinder


Finally, appellant argues that the district court erred in granting the State’s pretrial motion to join multiple informations filed against appellant. We conclude that appellant has waived the right to raise this claim on direct appeal. In the guilty plea agreement, appellant acknowledged that he waived the right to appeal from any adverse rulings on pretrial motions, unless the State and the district court agreed to preserve the issue for appeal. *See* NRS 174.035(3) (stating that any right to appeal from an adverse determination of a pretrial motion made prior to


the entry of a guilty plea must be preserved in writing). Appellant has presented no evidence of any agreement with the State preserving his right to appeal with respect to this issue. Therefore, appellant has waived the right to raise this claim.


Conclusion

Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Brent T. Adams, District Judge  
Nathalie Huynh  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>2</sup>On June 9, 2009, appellant also filed a proper person "Request for Judicial Notice." Notably, appellant is represented by counsel, and has not received permission from this court to file proper person documents. See NRAP 46(b). We decline to grant appellant leave to file these documents. Therefore, we instruct the clerk of this court to return, unfiled, appellant's June 9, 2009 "Request for Judicial Notice."