

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT T. HOLMES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51072

ROBERT T. HOLMES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51417

**FILED**

APR 19 2009  
FRANK R. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

Docket No. 51072 is a proper person appeal from an order of the district court denying a motion to withdraw a guilty plea. Docket No. 51417 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 B. Barker, Judge. We elect to consolidate these appeals for disposition. NRAP 3(b).

On February 8, 2007, the district court convicted appellant, pursuant to a guilty plea, of one count of possession of a stolen vehicle. The district court sentenced appellant to serve a term of 24 to 60 months in the Nevada State Prison. No direct appeal was taken.

On September 24, 2007, appellant filed a proper person motion to withdraw a guilty plea in the district court. The State opposed

the motion. On March 5, 2008, the district court denied the motion. Appellant's appeal was docketed in this court in Docket No. 51072.

On January 30, 2008, 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 April 17, 2008, the district court denied appellant's petition. Appellant's appeal was docketed in this court in Docket No. 51417.

In his motion and petition, appellant claimed that his plea was invalid and his trial counsel were ineffective.<sup>1</sup> 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). 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. Further, 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. Hill v.

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<sup>1</sup>Appellant asserted that he was represented by both Mr. William Horne and Ms. Alina Kilpatrick.

Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland v. Washington, 466 U.S. 668, 697 (1984).

In his motion, appellant first claimed that his plea was invalid because trial counsel failed to explain the consequences of the plea, the waiver of rights, and the voluntariness of the plea. Appellant failed to carry his burden of demonstrating that his plea was invalid and failed to demonstrate that he was prejudiced by trial counsels' performance. During the plea canvass, appellant acknowledged that he had read and understood the guilty plea agreement and the constitutional rights waived by entry of the plea agreement. In signing the plea agreement, appellant acknowledged that trial counsel explained the elements, consequences of the guilty plea and waiver of rights. Appellant was specifically canvassed about whether his plea agreement was the product of threats or any promises and the district court set forth the range of penalties. Therefore, we conclude that the district court did not err in denying this claim.

In his motion, appellant further claimed that he did not understand the plea agreement because of his low reading level. Appellant failed to carry his burden of demonstrating that his plea was invalid and failed to demonstrate that he was prejudiced by trial counsels' performance. During the plea canvass, appellant affirmatively acknowledged that he read and understood the English language and that he had gone to high school. As stated above, appellant further acknowledged that he had read and understood the guilty plea agreement. Therefore, we conclude that the district court did not err in denying this claim.

In his motion, appellant next claimed that trial counsel failed to file a post-conviction motion to withdraw the guilty plea agreement despite indicating that he would do so. This claim did not impact the validity of the plea, and thus, was improperly raised in the motion to withdraw a guilty plea. See Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000). Therefore, we conclude that the district court did not err in denying this claim.

In his motion and petition, appellant claimed that his guilty plea was not voluntarily and intelligently entered and his trial counsel were ineffective for failing to include language that the guilty plea was conditioned upon his receipt of probation. Appellant claimed that he was advised by his trial counsel that he would get probation and that if he did not he could withdraw his plea. In support, appellant attached a copy of a letter from his trial counsel summarizing a hearing on a motion to reconsider filed after sentencing. In that letter, trial counsel indicated that the district court had been informed that a mistake had been made by trial counsel in not making the plea conditional and that trial counsel had asked the district court not to punish appellant for counsel's shortcomings. Trial counsel further stated that the district court had been informed that the State had no opposition to a motion to reconsider, and that Judge Elizabeth Halverson stated that trial counsel was using the wrong vehicle to raise this claim and suggested that a motion to withdraw the guilty plea be filed. Judge David Barker ultimately presided over the motion to withdraw a guilty plea and denied the motion and subsequent petition for a writ of habeas corpus.

Based upon our review of the record on appeal, we conclude that the district court erred in denying this claim without conducting an

evidentiary hearing. A petitioner is entitled to an evidentiary hearing on claims supported by specific facts, which if true, would entitle the petitioner to relief. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). It is unclear from the documents before this court whether trial counsel informed appellant that the plea agreement was conditioned upon receipt of probation and that appellant could withdraw his plea if he did not receive probation or whether trial counsel's sentiments after the plea were made upon reflection on the outcome of the proceedings but not based upon any promises to appellant. If trial counsel promised appellant that he would receive probation and that he could withdraw his plea if he did not receive probation, this may have unfairly induced the guilty plea. It is significant that in the written guilty plea agreement and during the plea canvass, appellant acknowledged that his guilty plea was not based on any promises not contained in the plea negotiations. However, trial counsel's post-conviction letter raises confusion regarding this issue. Therefore, we reverse the district court's denial of this claim and remand this matter for an evidentiary hearing on the information imparted by appellant's attorneys during the plea negotiations.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). 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.<sup>2</sup>

Cherry, J.  
Cherry

Saitta, J.  
Saitta

Gibbons, J.  
Gibbons

cc: Hon. David B. Barker, District Judge  
Robert T. Holmes  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>2</sup>We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.