IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ALLEN HICKS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34688

FILED

JUL 12 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On May 15, 1998, the district court convicted appellant, pursuant to an Alford[1] plea, of burglary, Count 1, and attempted sexual assault, Count 2.[2] The district court sentenced appellant to serve a maximum of 72 months with a minimum parole eligibility of 16 months in the Nevada State Prison on Count 1, and a maximum of 180 months with a minimum parole eligibility of 60 months on Count 2, Count 1 to run concurrently with Count 2.[3] Appellant did not file a direct appeal.

On April 30, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a response to the State's opposition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint

[1]See North Carolina v. Alford, 400 U.S. 25 (1970).

[2]Prior to sentencing, appellant filed a motion to withdraw his guilty plea. After conducting a hearing, the district court denied appellant's motion.

[3]On February 9, 1999, the district court amended appellant's judgment of conviction to include a DNA Analysis Fee and psychiatric evaluation fee.

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counsel to represent appellant or to conduct an evidentiary hearing. On July 30, 1999, the district court denied appellant's petition. This appeal followed.

In his petition, appellant first raised several claims of ineffective assistance of 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 fell below an objective standard of reasonableness.[4] Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.[5] The court need not consider both prongs if the defendant fails to make a showing on either prong.[6]

First, appellant argued that his trial counsel was ineffective for misinforming him that he would receive a five-year sentence under the plea agreement. The record on appeal belies appellant's claim. Appellant was present when his attorney explained the terms of the plea agreement to the court, appellant received a thorough verbal canvass, and appellant verbally affirmed to the trial judge that he understood the terms of the guilty plea agreement. The plea memorandum, signed by appellant, also belies appellant's claim that counsel misinformed him that he would receive a five-year sentence under the plea agreement. The guilty plea memorandum expressly states that for burglary, Count 1, appellant may be imprisoned for a period of not less than 1 year and a maximum

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

[5]See Kirksey, 112 Nev. 980, 923 P.2d 1102.

[6]See Strickland v. Washington, 466 U.S. 668, 697 (1984).

term of not more than 10 years, and further indicates that the State and appellant had expressly agreed to a stipulated sentence on attempted sexual assault, Count 2, of 60 months to 180 months, Count 1 to run concurrent to Count 2, with the State retaining the right to argue at sentencing. The "'[m]ere subjective belief of a defendant as to potential sentence, or hope of leniency, unsupported by any promise from the State or indication by the court, is insufficient to invalidate a guilty plea as involuntary or unknowing.'"[7] Thus, we conclude that appellant failed to demonstrate that his counsel's performance was deficient in this regard.[8]

Second, appellant argued that his trial counsel was ineffective for failing to properly investigate and prepare a defense. Appellant did not support these claims with specific factual allegations, which if true, would entitle him to the relief requested.[9] Appellant did not indicate the witnesses or information counsel would have discovered had counsel conducted a more thorough investigation. Moreover, during the plea canvass, appellant answered affirmatively that his counsel had discussed possible defenses with him. Thus, we conclude that appellant failed to demonstrate that his counsel's performance was deficient in this regard.[10]

Third, appellant argued his trial counsel was ineffective for failing to inform him he was subject to lifetime supervision. The record on appeal belies appellant's claim. The plea memorandum, signed by appellant, expressly

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[7]State v. Langarica, 107 Nev. 932, 934, 822 P.2d 1110, 1112 (1991) (quoting Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975)).

[8]See Kirksey, 112 Nev. 980, 923 P.2d 1102.

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

[10]See Kirksey, 112 Nev. 980, 923 P.2d 1102.

states that lifetime supervision is part of appellant's sentence. Additionally, the court transcript indicates this was explained in appellant's presence. Thus, we conclude that appellant failed to demonstrate that his counsel's performance was deficient in this regard.[11]

Next, appellant claimed that his guilty plea was not made knowingly and voluntarily for several reasons. A guilty plea is presumptively valid, and an appellant carries the burden of establishing that the plea was not entered knowingly and intelligently.[12] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[13]

First, appellant argued that his guilty plea was not made knowingly and voluntarily because he had been led to believe that sexual assault was a probational offense when he signed the plea memorandum. The record on appeal belies appellant's claim. Appellant was charged with attempted sexual assault, not sexual assault. Attempted sexual assault is a probational offense.[14] The signed plea agreement contains language correctly informing appellant that he is eligible for probation and that the decision to order probation is at the discretion of the sentencing judge. The sentencing judge also thoroughly explained this to appellant. Thus, we conclude that appellant failed to carry his burden of alleging facts sufficient to support his contention that his plea was not knowingly and voluntarily entered.[15]

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[11]See id.

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

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

[14]See NRS 176A.500; see also NRS 200.366; NRS 193.330.

[15]See Bryant, 102 Nev. 268, 721 P.2d 364.

Second, appellant argued that his guilty plea was not made knowingly and voluntarily because appellant did not understand the elements of the attempted sexual assault charge. The record on appeal belies appellant's claim. The written guilty plea memorandum informs appellant of the State's burden of proof and the elements of the offense. The district court conducted an adequate plea canvass, explaining the elements of the charged crimes and the rights appellant was waiving by entry of his plea. The State provided a factual basis for the plea. Thus, we conclude that appellant failed to carry his burden of alleging facts sufficient to support his contention that his plea was not knowingly and voluntarily entered.[16]

Third, appellant argued that his guilty plea was not made knowingly and voluntarily because appellant was not informed of the potential maximum sentences. The record on appeal belies appellant's claim. In the written plea agreement and during the plea canvass, appellant was informed of the maximum potential sentence he was facing and that it was within the court's discretion to impose any sentence within the limits of the statute. Thus, we conclude that appellant failed to carry his burden of alleging facts sufficient to support his contention that his plea was not knowingly and voluntarily entered.[17]

Fourth, appellant argued that his guilty plea was not made knowingly and voluntarily because it was a product of coercion. The record on appeal belies appellant's claim. During the plea canvass the district court inquired into whether he had received any threats or promises in exchange

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[16]See id.

[17]See id.

for his plea and whether he had reviewed the plea agreement with his attorney. Appellant affirmatively indicated that he was voluntarily entering his plea because he wished to avoid a harsher punishment should the case proceed to trial. By pleading guilty, appellant avoided the possibility of being charged as a habitual criminal and being sentenced to life without the possibility of parole. A guilty plea may be validly entered where motivated by desire to accept the "certainty or probability of a lesser penalty" than might be imposed upon a conviction rendered after trial.[18] "Furthermore, `a defendant's desire to plead guilty to an original charge in order to avoid the threat of the habitual criminal statute will not give rise to a claim of coercion.'"[19] Thus, we conclude that appellant failed to carry his burden of alleging facts sufficient to support his contention that his plea was not knowingly and voluntarily entered.[20]

Lastly, appellant claimed he was actually innocent of all charges. We note that this court has previously stated that a challenge to the voluntariness of an Alford plea based upon a claim of actual innocence is "essentially academic."[21] Thus, we conclude appellant failed to carry his burden of alleging facts sufficient to support his contention that the withdrawal of his plea was necessary to correct manifest injustice.[22]

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[18]See Conger v. Warden, 89 Nev. 263, 265, 510 P.2d 1359, 1361 (1973).

[19]Hargrove, at 503, 686 P.2d at 225-26 (quoting Schmidt v. State, 94 Nev. 665, 667, 584 P.2d 695, 696 (1978)).

[20]See Bryant, 102 Nev. 268, 721 P.2d 364.

[21]See Hargrove, 100 Nev. at 503, 686 P.2d at 226.

[22]See NRS 176.165.

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.[23] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[24]

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Rose

cc: Hon. Sally L. Loeher, District Judge
Attorney General
Clark County District Attorney
David Allen Hicks
Clark County Clerk

[23]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).