

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERNESTO ACEDO RAVENTOS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52020

FILED

DEC 05 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *J. Shoop*
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; Donald M. Mosley, Judge.

On March 5, 2007, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted lewdness with a child under the age of fourteen years. The district court sentenced appellant to serve a term of 72 to 180 months in the Nevada State Prison. No direct appeal was taken.

On January 18, 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 June 18, 2008, the district court denied appellant's petition. This appeal followed.¹

¹The record on appeal contains an affidavit from appellant's trial counsel. This court has held that a petitioner's statutory rights are violated when the district court improperly expands the record with an
continued on next page . . .

In his petition, appellant claimed that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, 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.² In order to demonstrate prejudice to invalidate the decision to enter a guilty plea, a petitioner must demonstrate a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial.³ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁴

First, appellant claimed that his trial counsel was ineffective for allowing him to waive his preliminary hearing, which deprived him of

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affidavit presented by the State refuting the claims in the petition in lieu of conducting an evidentiary hearing when an evidentiary hearing is required. Mann v. State, 118 Nev. 351, 46 P.3d 1228 (2002). Although we conclude that the district court erred to the extent that it considered the affidavit submitted by appellant's former trial counsel in resolving the petition, appellant was not prejudiced by the error because appellant was not entitled to an evidentiary hearing on the claims that he raised in the petition. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

²Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

³Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁴Strickland, 466 U.S. at 697.

the opportunity to confront witnesses against him. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that he would not have entered a guilty plea absent trial counsel's advice regarding the preliminary hearing. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to conduct an adequate pretrial investigation. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to identify the information a more thorough investigation would have uncovered and how a more thorough investigation would have altered his decision to enter a guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to discuss any strategy or review the evidence with petitioner. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to identify the strategy and evidence that trial counsel failed to discuss with him. Further, in signing his guilty plea agreement, appellant acknowledged that he had discussed any possible defenses, defense strategies and circumstances that may be in appellant's favor. Appellant failed to demonstrate that further discussion would have had a reasonable probability of altering his decision to enter a guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to obtain a surveillance videotape from the Luxor, which would have verified appellant's statements regarding threats to enter a guilty

plea. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to specifically identify the alleged threats or explain how these threats would be shown on a videotape. More importantly, during the plea canvass, appellant affirmatively acknowledged that his guilty plea was not the product of any threats. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to present appellant in the best light possible at sentencing. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to indicate what mitigating information should have been presented, and thus, appellant failed to demonstrate that there was a reasonable probability of a different outcome at the sentencing hearing. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to review and contest the presentence investigation report. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to indicate what information in the presentence investigation was false, and thus, appellant failed to demonstrate that there was a reasonable probability of a different outcome at the sentencing hearing. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for failing to advise him of the right to appeal and the right to counsel on appeal. Appellant failed to demonstrate that his trial counsel was ineffective in this regard. The record on appeal reveals that appellant

was advised of his limited right to appeal in the written guilty plea agreement. Specifically, appellant was advised that by entry of his plea he waived his "right to appeal the conviction, with the assistance of an attorney, either appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035." During the plea canvass, appellant acknowledged that the written guilty plea agreement was read to him in Spanish and that he understood its terms. Thus, appellant's contention that he was not advised of his limited right to appeal is belied by the record on appeal.⁵ Moreover, there is no constitutional requirement that counsel must inform the defendant who pleads guilty of the right to pursue a direct appeal unless the defendant inquires about an appeal or there exists a direct appeal claim that has a reasonable likelihood of success.⁶ Appellant did not allege that he asked counsel to file a direct appeal and nothing in the record suggests that a direct appeal in appellant's case had a reasonable likelihood of success. 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

⁵See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

⁶See Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470 (2000); Davis, 115 Nev. at 20, 974 P.2d at 660.

establishing that the plea was not entered knowingly and intelligently.⁷ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.⁸ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.⁹

First, appellant claimed that his plea was not valid because he was assured by trial counsel that he would receive probation if he entered a guilty plea. Appellant failed to carry his burden in this regard. During the guilty plea canvass, the negotiations were set forth on the record, and appellant affirmatively acknowledged that his guilty plea was not the product of any promise of probation or leniency. Appellant was informed in the written guilty plea agreement, which he acknowledged was read to him in Spanish and understood by him, that the decision regarding probation was in the district court's discretion. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing.¹⁰ Therefore, we conclude that the district court did not err in denying this claim.

⁷Bryant 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).

⁸Hubbard, 110 Nev. at 675, 877 P.2d at 521.

⁹State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367.

¹⁰See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

Second, appellant claimed that his plea was not valid because he was not advised of the true elements, conditions and consequences of lifetime supervision.

Appellant failed to carry his burden in this regard. In Palmer v. State,¹¹ this court concluded that lifetime supervision is a direct consequence of a guilty plea. Consequently, the totality of the circumstances must demonstrate that a defendant was aware of the consequence of lifetime supervision prior to the entry of a guilty plea; otherwise, the defendant must be allowed to withdraw the plea.¹² The particular conditions of lifetime supervision are tailored to each individual case and, notably, are not determined until after a hearing is conducted just prior to the expiration of the sex offender's completion of a term of parole or probation, or release from custody.¹³ Thus, all that is constitutionally required is that the totality of the circumstances demonstrated that a petitioner was aware that he would be subject to the consequence of lifetime supervision before entry of the plea and not the precise conditions of lifetime supervision.¹⁴ Here, appellant was informed

¹¹118 Nev. 823, 59 P.3d 1192 (2002).

¹²Id. at 831, 59 P.3d at 1197.

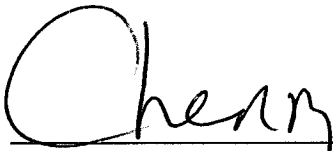
¹³See NRS 213.1243(1); NAC 213.290.


¹⁴Palmer, 118 Nev. at 831, 59 P.3d at 1197. We note that in Palmer this court recognized that under Nevada's statutory scheme, a defendant is provided with written notice and an explanation of the specific conditions of lifetime supervision that apply to him "[b]efore the expiration of a term of imprisonment, parole or probation." Id. at 827, 59 P.3d at 1194-95 (emphasis added).


in the written guilty plea agreement and during the guilty plea canvass that he was subject to the special sentence of lifetime supervision. Therefore, we conclude that the district court did not err in denying this claim.

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.¹⁵ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁶


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Saitta

¹⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁶We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Donald M. Mosley, District Judge
Ernesto Acedo Raventos
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk