

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAFAEL MORENO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34722

FILED

JUN 27 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
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. Appellant was originally convicted, pursuant to a guilty plea, of one count of attempted murder with the use of a deadly weapon with the intent to promote, further or assist a criminal gang, and one count of intimidating a witness to influence testimony with the intent to promote, further or assist a criminal gang. The district court sentenced appellant to a prison term of 2 to 20 years for attempted murder, with an equal and consecutive term for the use of a deadly weapon. The district court further sentenced appellant to a concurrent prison term of 19 to 48 months for intimidating a witness, with an equal and consecutive term for the gang enhancement.

Appellant filed an appeal from the judgment of conviction, contending that the district court erred by

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denying appellant's pre-sentencing motion to withdraw his guilty plea. This court dismissed appellant's appeal.¹

Appellant filed the instant petition in proper person. The district court declined to appoint counsel, and denied the petition without an evidentiary hearing.²

Although appellant stated that he did not commit the crimes charged, his plea was entered pursuant to North Carolina v. Alford.³ Appellant argues that his plea was invalid because the district court did not engage in a colloquy with him to resolve his guilty plea with his simultaneous assertion of innocence, as required by Tiger v. State.⁴ In Tiger, this court held: "the district judge, in accepting the plea, must determine that there is a factual basis for the plea, and he must further inquire into and seek to resolve the conflict between the waiver of trial and the claim of innocence."⁵

In the instant case, we note that the State dropped numerous additional charges against appellant in exchange for

¹Moreno v. State, Docket No. 31969 (Order Dismissing Appeal, June 17, 1998).

²See NRS 34.750; NRS 34.770.

³400 U.S. 25 (1970).

⁴98 Nev. 555, 654 P.2d 1031 (1982).

⁵Id. at 558, 654 P.2d at 1033.

his plea. The plea was therefore obviously entered to avoid the possibility of a harsher penalty.⁶

Moreover, the prosecutor made an extensive statement on the record of the facts the State was prepared to prove should the case go to trial. This court has previously held that, "if the [district] court makes factual statements concerning the offense, e.g., as here, by way of summary, that are sufficient to constitute an admission to the offense had they been made personally by the accused, then the accused may affirmatively adopt the court's factual statements as true, and thereby admit the offense by adoption."⁷ We conclude that appellant's adoption of the facts as testified to by the State satisfies the requirement of Tiger. Accordingly, the district court did not err by dismissing the petition on this ground.

Appellant also contended in the petition below that his trial counsel was ineffective for allowing him to enter a plea where the requirements of Tiger had not been met. 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. Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded


⁶Id.

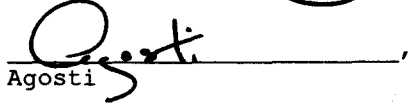
⁷Croft v. State, 99 Nev. 502, 505, 665 P.2d 248, 250 (1983).

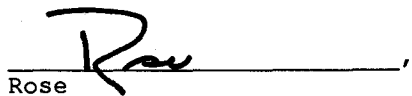
guilty and would have insisted on going to trial.⁸ Because the plea entered by appellant satisfied the requirements of Tiger, appellant has failed to demonstrate that counsel's performance fell below an objective standard of reasonableness. We therefore conclude that the district court did not err by dismissing the petition on this ground.

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.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Shearing J.


Agosti J.


Rose J.

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General
Clark County District Attorney
Rafael Moreno
Clark County Clerk

⁸See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).