

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM MOFFETT SMITH,

No. 35236

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

SEP 12 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.

On August 28, 1998 the district court convicted appellant, pursuant to a plea of nolo contendere, of driving under the influence of intoxicating liquor and reckless driving. The district court sentenced appellant to serve consecutive terms of twenty years with a minimum parole eligibility of eight years in the Nevada State Prison for driving under the influence of intoxicating liquor, and five years in the Nevada State Prison with a minimum parole eligibility of two years for reckless driving. The court also ordered appellant to pay restitution in the amount of \$307,710.87. No direct appeal was taken.

On July 19, 1999, appellant filed a "motion for a resentencing hearing." The district court denied the motion on August 13, 1999.

On August 10, 1999, 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 October 19, 1999, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his guilty plea was involuntary and unknowing because he received a sentence in excess of the sentence agreed upon in the plea agreement. Appellant argued that the sentencing judge was bound by the plea negotiation and breached the plea agreement by imposing a sentence in excess of the negotiations. We conclude that appellant's contention lacks merit. Appellant was specifically informed by the district court and through the plea memorandum of the minimum and maximum prison terms and fines for both crimes, that the matter of sentencing was strictly up to the district court, and that the district court was not obligated to accept any recommendation by appellant or the State. A defendant's mere subjective belief as to a potential sentence, unsupported by any promise from the State or indication by the court, is insufficient to render a guilty plea involuntary or unknowing.¹ Appellant entered a plea of nolo contendere to both counts, and appellant has not carried his burden of demonstrating that his plea was involuntarily or unknowingly entered.² Therefore, we conclude that the district court did not err in denying this claim.

¹See State v. Langarica, 107 Nev. 932, 934, 822 P.2d 1110, 1112 (1991) (citing Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975)), cert. denied, 506 U.S. 924 (1992).

²See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

Next, appellant claimed that his trial counsel rendered ineffective assistance by failing to object to the State's breach of the plea agreement. We conclude that appellant failed to demonstrate that his counsel's performance was deficient in this regard.³ The State explicitly reserved the right to present facts or argument at sentencing and complied with the terms of the plea agreement. We conclude that the State did not breach the plea agreement merely because the district court sentenced appellant to a greater term than was specified in the plea agreement.

Next appellant argued that his trial counsel was ineffective for failing to adequately investigate and present mitigating information during the sentencing hearing that he was amenable to treatment and could be rehabilitated in the community successfully. Specifically, appellant argued that his counsel could have called witnesses to testify that appellant had an alcohol problem. Appellant, however, failed to specify the individuals whom counsel should have called to testify at sentencing or where they could be located. Further, appellant failed to allege that he informed his counsel of the existence of these witnesses. Thus, we conclude that appellant failed to demonstrate counsel's performance was deficient in this regard.⁴

Finally, appellant argued that the sentencing judge was prejudiced against him. The only instance of alleged bias on the part of the sentencing judge that appellant refers to

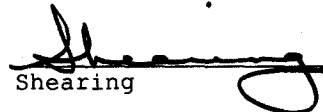
³See Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).


⁴See id.

is a statement made by the judge where he effectively likens a drunken driver to a loaded gun. This claim falls outside the scope of claims that can be raised in a post-conviction petition when the judgment of conviction is based upon a guilty plea.⁵

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.⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Shearing, J.


Rose, J.


Becker, J.

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General
Clark County District Attorney
William Moffett Smith
Clark County Clerk

⁵See NRS 34.810(1)(a).

⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).