

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 58303

**FILED**

FEB 08 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *R. Malone*  
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.<sup>1</sup> Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

In his petition, filed on October 14, 2010, appellant first alleged that his guilty plea was invalid. 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). Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion. Hubbard, 110 Nev. at 675, 877 P.2d at 521. In determining the validity of a guilty plea, this court looks to the totality of

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<sup>1</sup>This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

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.

In arguing that his guilty plea was invalid, appellant claimed that the guilty plea agreement erroneously advised him that he was potentially eligible for probation. Specifically, appellant entered a plea of guilty to a single count of burglary pursuant to NRS 205.060. While burglary is generally a probational offense, NRS 205.060(2) specifically provides that

A person who is convicted of burglary and who has previously been convicted of burglary or another crime involving the forcible entry or invasion of a dwelling must not be released on probation or granted a suspension of sentence.

Because appellant had a 1992 conviction for attempted burglary, appellant claimed that he was not actually eligible for probation. He further contended that this alleged inaccuracy in the plea agreement rendered the plea agreement void as a matter of law, indicating that the district court lacked jurisdiction to accept the plea agreement, and that the plea agreement was not knowingly and voluntarily entered. We disagree. Despite appellant's arguments that he was ineligible for probation, the language of NRS 205.060(2) applies only to persons convicted of burglary. Appellant was only convicted of attempted burglary. Appellant alleged no other facts indicating that the attempted burglary conviction involved the forcible entry or invasion of a dwelling. Accordingly, the plain language of NRS 205.060(2) did not exclude appellant from receiving probation.

In addition, the plea agreement, signed by appellant, specifically advised that he was also eligible to receive prison time, and stated that the question of whether or not he received probation was within the sole discretion of the district court judge. While the district

court chose not to impose probation, the district court stated at sentencing that because appellant's prior conviction was only for attempted burglary, she did not believe the language of NRS 205.060(2) applied. Therefore, we conclude that appellant failed to demonstrate that his plea was not knowingly and voluntarily entered, and that the district court did not err in denying this claim.

Next, appellant argued that he received ineffective assistance of trial and appellate counsel. To prove 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. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Similarly, to prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Both components of the inquiry must be shown. Strickland v. Washington, 466 U.S. 668, 697 (1984). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, appellant argued that trial counsel was ineffective for erroneously advising him that he was eligible for probation, and for failing

to challenge the validity of the guilty plea based on statements in the plea agreement that appellant was eligible for probation. Appellant failed to demonstrate that counsel was deficient. As discussed above, despite appellant's contentions, the plain language of NRS 205.060(2) did not preclude appellant from receiving probation. Accordingly, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel was ineffective for failing to adequately brief and provide documentation to the court to support appellant's direct appeal claim that the language regarding probation eligibility rendered the guilty plea invalid. Based on our rejection above of the underlying premise of this claim, appellant failed to demonstrate how the result of the appeal would have been different had appellate counsel made additional argument or provided further documentation. Accordingly, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to investigate all charges against appellant. This court considered, and rejected, this argument on direct appeal, indicating that this claim was barred by the doctrine of law of the case, which "cannot be avoided by a more detailed and precisely focused argument." Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for advising appellant to waive his right to a preliminary hearing. Appellant failed to demonstrate that counsel was ineffective or that he was prejudiced. Specifically, given the benefit appellant received from entry of the guilty plea, which included the dismissal of multiple other charges,

appellant failed to demonstrate that had counsel conducted a preliminary hearing, he would have refused to plead guilty and proceeded to trial. Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that trial counsel was ineffective for failing to object to a duplicitous charge and for failing to raise a statute of limitations argument with respect to Count IV of the information. Count IV was dismissed pursuant to the guilty plea agreement. Accordingly, appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Thus, the district court did not err in denying this claim.

For the reasons stated above, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.  
Cherry

Pickering, J.  
Pickering

Hardesty, J.  
Hardesty

cc: Hon. Valorie J. Vega, District Judge  
Robert Holmes, III  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk