

IN THE SUPREME COURT OF THE STATE OF NEVADA

ESTEBAN HERNANDEZ,

No. 35462

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

NOV 21 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On October 12, 1999, the district court convicted appellant, pursuant to a guilty plea, of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in prison with the possibility of parole. Appellant did not pursue a direct appeal.

On November 12, 1999, appellant, through counsel, filed a post-conviction petition for a writ of habeas corpus. The district court denied the petition without conducting an evidentiary hearing. This timely appeal followed.

Appellant contends that the district court erred in denying his petition. First, appellant contends that the district court erred in rejecting his claim that his guilty plea was not knowingly and voluntarily entered because: (1) he was coerced into pleading guilty by his attorney and by threats to his family; (2) he did not understand the consequences of his guilty plea; and (3) one of the promises he relied upon in exchange for pleading guilty was illusory and void. Second, appellant contends that his guilty plea was

the result of ineffective assistance of counsel because counsel failed to adequately consult with him or explain the terms and consequences of the guilty plea and because counsel coerced appellant into pleading guilty. We conclude that the district court did not err in denying the petition.

Initially, we note that appellant raised the same grounds for relief in a presentence motion to withdraw the guilty plea.¹ The district court denied the motion on its merits prior to sentencing appellant. Appellant could have challenged that decision on direct appeal from the judgment of conviction. See Hargrove v. State, 100 Nev. 498, 502 n.3, 686 P.2d 222, 225 n.3 (1984). Appellant, however, failed to pursue a direct appeal from the judgment of conviction. Accordingly, the claims raised in the presentence motion to withdraw must "be considered waived in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). We therefore conclude that the district court should have denied the claims raised in the post-conviction petition because they were waived by appellant's failure to raise them on appeal. Nonetheless, we further conclude that appellant's claims lack merit.

The district court made available a jury deliberation room for appellant to discuss the plea negotiations with his attorneys and family members. Additionally, after appellant decided to enter a guilty plea, the district court thoroughly canvassed appellant regarding

¹When appellant's trial counsel indicated that appellant desired to withdraw the guilty plea, the trial court allowed counsel to withdraw and appointed new counsel to represent appellant and file a motion to withdraw the guilty plea.

his guilty plea and the consequences of the guilty plea. During the canvass, appellant admitted that he had not been coerced to plead guilty or promised anything that was not reflected in the negotiations described to the court. Appellant also signed a written plea agreement. We further note that, consistent with the plea negotiations, the State recommended that appellant serve his sentences at the Southern Desert Correctional Center at Indian Springs, Nevada. Finally, the district court included in the written judgment of conviction a recommendation that appellant serve his sentence at Indian Springs. Although appellant claims that this recommendation is essentially worthless because "due to the nature of the crime, it apparently will not be possible for Defendant to serve his sentence at Indian Springs," he has not demonstrated that he is precluded, as a matter of law, from serving his sentence at the Southern Desert Correctional Center.² Under the circumstances, we conclude that appellant failed to demonstrate that his guilty plea is not valid or that he received ineffective assistance of counsel that caused him to plead guilty. See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (burden is on defendant to establish that guilty plea is not valid); see also Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996) (addressing test for demonstrating ineffective assistance of counsel where conviction is result of guilty plea).

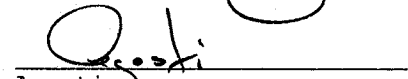
²We note that the plea agreement merely required the State to recommend that the sentence be served at the Southern Desert Correctional Center; it did not guarantee that the Department of Prisons would classify appellant to that institution. Moreover, the record clearly demonstrates that appellant was aware that the State and district court could only recommend such a classification and could not require the Department of Prisons to follow the recommendation.

For the reasons stated above, we conclude that the district court did not err in denying appellant's post-conviction petition for a writ of habeas corpus. We therefore affirm the district court's order denying the petition.

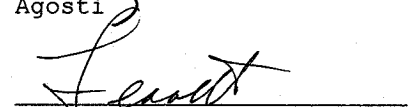
It is so ORDERED.³



Shearing J.



Agosti J.



Leavitt J.

cc: Hon. Joseph T. Bonaventure, District Judge
Attorney General
Clark County District Attorney
Amesbury & Schutt
Clark County Clerk

³We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.