IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD D. LIRA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35516

FILED

JAN 18 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
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 June 1, 1998, the district court convicted appellant, pursuant to a guilty plea, of driving under the influence of alcohol in two district court cases. The district court sentenced appellant to serve a term of seventy-two months with a minimum parole eligibility of twenty-eight months in the Nevada State Prison for each district court case, to run consecutively. Appellant did not appeal.

On May 28, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a response. 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 December 20, 1999, the district court denied appellant's petition. This appeal followed.

First, appellant contended that his counsel rendered ineffective assistance. A claim of ineffective assistance of counsel is a mixed question of law and fact subject to independent review.[1] Nevertheless, the factual findings of a district court regarding a claim of ineffective assistance of counsel are entitled to deference on subsequent review so long as they are supported by substantial evidence and are not clearly

[1]State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

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wrong.[2] 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 counsel's performance fell below an objective standard of reasonableness.[3] A petitioner must also demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.[4] A guilty plea is presumptively valid, and a petitioner has the burden of establishing that the plea was not entered knowingly and intelligently.[5] Furthermore, the tactical decisions of defense counsel are "virtually unchallengeable absent extraordinary circumstances."[6] Finally, this court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.[7]

Appellant claimed that his counsel was ineffective for promising appellant that he would receive the minimum sentence. We conclude that the district court did not err in denying this claim of ineffective assistance of counsel.[8] In the plea canvass, the district court stated to appellant,

> Now the State apparently is going to recommend that you receive a minimum sentence. You recognize of course, that I don't have to do that. . . . [T]he maximum sentence I could give you is seventy-two months and twenty-eight months. . . . Even though the State has recommended that . . . I may want to do different than the agreement the State might have.

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[2]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[3]Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

[4]Id. at 988, 923 P.2d at 1107; see also Hill v. Lockhart, 474 U.S. 52 (1985).

[5]Paine v. State, 110 Nev. 609, 619, 877 P.2d 1025, 1031 (1994) (citing Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986)).

[6]Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691).

[7]Strickland, 466 U.S. at 697.

[8]See Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107; Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Additionally, the court asked appellant if anyone had threatened or coerced him and appellant replied, "No." Furthermore, appellant admitted in his "Traverse to the State's Answer" that counsel's performance did not rise to the level of ineffective assistance. Therefore, appellant has not demonstrated that counsel's performance fell below an objective standard of reasonableness.

Next, appellant claimed his counsel was ineffective for not arguing to withdraw appellant's guilty plea when the court gave appellant the maximum sentence. We conclude the district court did not err in denying appellant's claim.[9] A trial court may properly accept a guilty plea, "if the trial court sufficiently canvassed the defendant to determine whether the defendant knowingly and intelligently entered into the plea."[10] Appellant was sufficiently canvassed, and was told he could receive the maximum sentence despite the State's recommendation. It was not unreasonable, therefore, for counsel to conclude that a motion to withdraw guilty plea was not likely to succeed.[11]

Second, appellant contended that the district court erred by not allowing appellant to withdraw his guilty plea after the court sentenced him to a term longer than what the State agreed to recommend in the plea negotiation. Preliminarily, we note that appellant has never filed a motion to withdraw guilty plea. Appellant argued that the district court should have informed him he could withdraw his guilty plea pursuant to NRS 174.065(3), or else should have informed him at the plea canvass that he could not withdraw his plea if he received a sentence greater than the State's recommendation, pursuant to FRCP 11(e)(2). Based on our review of the record, we conclude that

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[9]See Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107; Paine, 110 Nev. at 619, 877 P.2d at 1031 (citing Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986)).

[10]Baal v. State, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990).

[11]Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

the district court did not err in rejecting this claim. NRS 174.065(3),[12] on which appellant relied, was repealed in 1993.[13] Appellant argued that even if NRS 174.065(3) was no longer in effect, that FRCP 11(e)(2) should be given effect. However, federal rules of procedure do not apply in the Nevada courts. Thus, appellant's argument has no merit.

Third, appellant contended that the district court erred by disregarding the plea bargain. Appellant argued that allowing the district court to disregard the plea bargain would allow the State to "trick" defendants into pleading guilty and then give nothing in return for the guilty plea. Appellant alleged that he received nothing in return for his negotiated guilty plea, except the "promise" that he would receive the minimum sentence. Appellant further argued that the Fifth and Fourteenth Amendments prohibit the district court from disregarding the plea agreement. We conclude the district court did not err in rejecting this claim. Appellant's claims are belied by the record.[14] At the plea canvass, the State recited the plea bargain for the record and stated it would recommend the minimum sentence. Additionally, the State agreed to drop charges in Pahrump Justice Court Case Number 98-489, and not to pursue charges for a failure to appear and an attempted escape. All of the terms of the plea bargain were realized. Additionally, as discussed above, appellant was informed by the district court that appellant could receive the maximum sentence if he entered a plea of guilty. Therefore, appellant's claims lack merit.

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[12]"On a plea of guilty or nolo contendere to [an offense other than first degree murder or an offense divided into degrees], the defendant and the district attorney may agree to recommend an appropriate punishment. The court may defer its decision upon the recommendation until it has considered the presentence report. If the court accepts the recommendation, it shall impose the specified punishment or a lesser punishment. If the court rejects the recommendation, the defendant may withdraw the plea." 1993 Nev. Stat., ch. 279, § 1, at 828.

[13]See id.

[14]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

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 affirm the order of the district court.

It is so ORDERED.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. John P. Davis, District Judge
Attorney General
Nye County District Attorney
Ronald D. Lira
Nye County Clerk

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