

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICK VAUGHN RUSSELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36073

**FILED**

OCT 30 2000

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
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.

The district court convicted appellant, pursuant to guilty pleas, of attempted robbery with the use of a deadly weapon (CR95-2586) and possession of stolen property (CR95-2243). The court sentenced appellant to serve two consecutive terms of 39 to 98 months in prison for attempted robbery with the use of a deadly weapon and one year in prison for possession of stolen property. Appellant did not pursue a direct appeal.

Appellant filed a timely proper person post-conviction petition for a writ of habeas corpus in CR95-2586. The district court appointed counsel to represent appellant, conducted an evidentiary hearing, and denied the petition. This timely appeal followed.

Appellant contends that the district court erred in rejecting his claim that he did not knowingly and voluntarily plead guilty. In particular, appellant argues that his plea was not knowingly and voluntarily entered because he was heavily medicated and was not operating under his own free will at the time he entered the guilty plea. We disagree.

The defendant has the burden of demonstrating that his guilty plea was not entered knowingly and intelligently. See *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986). To determine if a plea is valid, the court must consider the entire record and the totality of the facts and circumstances of a case. See id. at 271, 721 P.2d at 367; see also *Mitchell v. State*, 109 Nev. 137, 140-41, 848 P.2d 1060, 1061-62 (1993). This court "will presume that the lower court correctly assessed the validity of the plea, and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion." *Riker v. State*, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995) (quoting *Bryant*, 102 Nev. at 272, 721 P.2d at 368).

Whether a criminal defendant may plead guilty entails a two part-inquiry: (1) whether he is competent to enter a plea; and (2) whether the guilty plea is knowing and voluntary. See *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993). A defendant is competent to enter a plea if he has: (1) "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding"; and (2) "a

rational as well as factual understanding of the proceedings against him.'" Id. at 396 (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)); see also Riker, 111 Nev. at 1325, 905 P.2d at 711. A plea is knowing and voluntary if the trial court satisfies itself that the defendant actually does understand the significance and consequences of his decision to enter the plea, such as waiving his right to a jury trial and the possible punishment faced, and that the plea is not coerced. See Godinez, 509 U.S. at 401 n.12.

Appellant testified at the evidentiary hearing that the medication he was taking when he entered his guilty plea caused various side effects including dry mouth, dizziness, blurred vision and hallucinations. Appellant further testified that as a result of the medication he could not recall what had happened when he entered his guilty plea and he did not knowingly and voluntarily plead guilty.

The two attorneys who represented appellant at the time he entered his guilty plea also testified. The attorney who represented appellant in the attempted robbery case, Jenny Hubach, testified that she did not have any specific recollection of appellant's mental state at the time she represented him but that she would have investigated and requested an evaluation if there had been a problem. Hubach explained that she would make that determination based on her observations of and conversations with the client and whether the client was on medication or had problems with drug and

alcohol abuse. The attorney who represented appellant in the possession of stolen property case, Debby Lumkes, testified that there was nothing unusual about appellant's demeanor when she met with him and that he appeared to know what was going on, was able to carry on a conversation, and appeared to understand what she said to him. Lumkes further testified that appellant never gave her any reason to believe that he did not understand the nature of the charges or that he would be unable to assist in his defense.

The district court found that the testimony of appellant's former counsel was credible. The district court further found that appellant's testimony "was not sufficiently credible to lead the court to find that he actually suffered the side effects he described." The district court also found that appellant's conclusory testimony that the medications made him overly compliant and unable to exercise his own will was "incredible." Finally, the district court concluded that appellant knowingly and voluntarily pleaded guilty and that he was competent to do so.

"On matters of credibility this court will not reverse a trial court's finding absent a clear showing that the court reached the wrong conclusion." *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990). Appellant has not demonstrated that the district court clearly reached the wrong conclusion. In addition to the testimony set forth above, we note that appellant participated in the plea canvass and

responded to the district court's questions in a coherent and appropriate manner. We therefore conclude that the record supports the district court's determination that appellant knowingly and voluntarily pleaded guilty and that he was competent to do so. Accordingly, we affirm the district court's order denying appellant's post-conviction petition for a writ of habeas corpus.<sup>1</sup>

It is so ORDERED.

Young J.  
Young

Maupin J.  
Maupin

Becker J.  
Becker

cc: Hon. Peter I. Breen, District Judge  
Attorney General  
Washoe County District Attorney  
Ian E. Silverberg  
Washoe County Clerk

<sup>1</sup>We note that in his petition below, appellant also argued that trial counsel provided ineffective assistance by failing to request a psychological evaluation to determine whether appellant was competent. Although appellant does not specifically mention this issue on appeal, he does refer to counsel's failure to request an evaluation. To the extent that appellant challenges the district court's rejection of this claim, we conclude that the district court did not err. The district court found that the testimony of appellant's trial counsel was credible and that she had no reason to question appellant's competence or request an evaluation. Appellant therefore failed to demonstrate that counsel's performance fell below an objective standard of reasonableness. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984).