

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH A. LOPEZ,

Appellant,

vs.

WARDEN, NEVADA STATE PRISON, JOHN
IGNACIO,

Respondent.

No. 36095

FILED

NOV 22 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

The district court convicted appellant, pursuant to a guilty plea, of one count each of kidnaping in the first degree (count I), robbery (count II), and burglary (count III). The district court sentenced appellant to serve a prison term of 60-170 months for count I, a consecutive term of 35-156 months for count II, and a concurrent term of 22-96 months for count III; appellant was given credit for 174 days time served. Appellant initially pursued a direct appeal but eventually filed a motion to withdraw his appeal; appellant's motion was granted by this court. See Lopez v. State, Docket No. 32452 (Order Dismissing Appeal, May 3, 1999).

On June 10, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On April 26, 2000, the district court denied appellant's petition. This appeal followed.¹

¹Appellant is represented by counsel on appeal.

First, appellant contends he received ineffective assistance of counsel therefore resulting in an unintelligent guilty plea. Appellant argues that his counsel was ineffective for not (1) advising him of possible defenses; (2) explaining the distinct elements required for both kidnaping and robbery; and (3) sufficiently investigating the case. We disagree.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, an appellant must demonstrate that his counsel's performance fell below an objective standard of reasonableness. Further, an appellant must demonstrate a reasonable probability that, but for counsel's errors, appellant would not have pleaded guilty and would have insisted on going to trial. See *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (1996); see also *Hill v. Lockhart*, 474 U.S. 52 (1985). Tactical decisions of counsel are "virtually unchallengeable absent extraordinary circumstances." *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990). A guilty plea is presumptively valid, and an appellant carries the burden of establishing that the plea was not entered knowingly and intelligently. See *Paine v. State*, 110 Nev. 609, 619, 877 P.2d 1025, 1031 (1994) (citing *Bryant v. State*, 102 Nev. 268, 721 P.2d 364 (1986)).

Based on our review of the record on appeal, we conclude that the district court did not err in determining that appellant's claims were without merit. Appellant failed to demonstrate that he was prejudiced by the errors, if any, of counsel, or that he would have insisted on going to trial. In particular, we note that by accepting the State's offer and pleading guilty, appellant drastically limited his exposure by avoiding a possible habitual criminal adjudication and potential sentence of life without parole.

Second, appellant contends the district court erred by not conducting an evidentiary hearing before denying his habeas petition. Appellant argues that an evidentiary hearing was necessary to find out what his counsel advised him and whether counsel conducted a satisfactory investigation. We disagree.

A petitioner for a post-conviction writ of habeas corpus is not entitled to an evidentiary hearing if the factual allegations are belied or repelled by the record. See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). Moreover, a petitioner must set forth claims that, if true, would entitle him to relief. Id. at 502, 686 P.2d at 225.

Appellant contends that an evidentiary hearing was necessary for him to prove that his counsel's investigation was deficient in failing "to prove that the gun wielded by him was in fact a child's toy gun." The district court order denying appellant's petition, however, states that appellant's counsel was aware of the possibility that the weapon used might have been a toy gun. Furthermore, appellant's guilty plea did not include a deadly weapon enhancement. We conclude that appellant's allegation is either belied by the record or does entitle him to relief even if true, and therefore the district court did not err by not conducting an evidentiary hearing.

Third, appellant contends that his guilty plea was not freely and voluntarily given. Appellant argues that he was not properly canvassed by the district court at the plea hearing, and that he was not properly advised in regard to his plea by counsel. We disagree.

Our review of the amended criminal information, signed memorandum of plea negotiations, and transcript of the arraignment hearing and subsequent entering of the guilty plea and canvass, reveals that appellant sufficiently understood the

elements of the crimes for which he was pleading guilty. We therefore conclude that appellant's contentions are belied by the record, see Hargrove, 100 Nev. at 503, 686 P.2d at 225, and that appellant's guilty plea was freely and voluntarily given, see Bryant, 102 Nev. at 271, 721 P.2d at 367.

Having considered appellant's contentions and concluded that they are without merit, we affirm the order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

It is so ORDERED.²

Rose, C.J.
Rose

Young, J.
Young

Becker, J.
Becker

cc: Hon. Michael R. Griffin, District Judge
Attorney General
Carson City District Attorney
Roeser & Roeser
Carson City Clerk

²We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.