

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JUSTIN EDMISTEN A/K/A JUSTIN  
JAMES EDMINSTON,  
Appellants,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 66757

**FILED**

**MAR 17 2015**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an 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; Linda Marie Bell, Judge.

In his petition filed on August 11, 2014, appellant claimed that his counsel was ineffective. 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). Both components of the inquiry must be shown. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). We give deference to the court's factual findings if supported by

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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).

substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant claimed that counsel was ineffective for failing to inform him that the State had a "conscience indifference to procedural rules" when it sought an indictment after the charges were dismissed by the justice court before the preliminary hearing. Appellant fails to demonstrate that counsel was deficient or that he was prejudiced. The State is allowed to seek an indictment after charges are dismissed before a preliminary hearing. See NRS 178.562(2). Further, appellant failed to demonstrate a reasonable probability that he would not have pleaded guilty had counsel informed him in this manner. Appellant received a large benefit from pleading guilty because he was originally charged with four felonies all with weapon enhancements. Appellant pleaded guilty to one count of robbery with no weapon enhancement and with a stipulation for probation. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for failing to challenge the victims' identification of him at the grand jury proceedings. Appellant fails to demonstrate that counsel was deficient or that he was prejudiced. One of the victims did not identify appellant at the grand jury proceedings and the fact that that victim identified someone else was presented to the grand jury. As to the other two victims, they identified appellant at the scene of appellant's arrest. The State presented the fact that appellant was handcuffed and next to police officers to the grand jury. Appellant failed to demonstrate a reasonable probability that he would not have pleaded guilty had counsel challenged the identification. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for failing to pursue an alibi defense or to further investigate the charges. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Appellant failed to support this claim with specific facts that, if true, entitled him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that counsel was ineffective for failing to suppress his statements made to the police. Appellant failed to demonstrate that he was prejudiced because he failed to demonstrate a reasonable probability that he would not have pleaded guilty had counsel filed the motion to suppress. Appellant did not allege that he was not given the *Miranda*<sup>2</sup> warnings, only that the State failed to demonstrate at the grand jury proceedings that he was given them. In addition, there was sufficient evidence that appellant committed the robbery at the Walgreens to sustain a conviction independent of his confession. Further, as stated above, appellant received a substantial benefit by pleading guilty. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that counsel was ineffective for failing to file a motion to suppress the BB gun because it was found during an impermissible search incident to arrest. Appellant fails to demonstrate that counsel was deficient or that he was prejudiced. The BB gun was not found during a search incident to arrest. Instead the BB gun was found in a canal where appellant threw it as he was running from the police. Further, appellant failed to demonstrate a reasonable probability that he

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<sup>2</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).

would not have pleaded guilty had counsel filed the motion. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that counsel was ineffective for failing to inform appellant that he could not enter into a guilty plea agreement with a stipulation for probation because he had been previously convicted of a violent felony. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. The court has discretion to sentence appellant to probation, *see* NRS 176A.100(1)(c), and appellant received probation. Further, appellant failed to demonstrate a reasonable probability he would not have pleaded guilty had NRS 176A.100 been further explained to him. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that counsel was ineffective for failing to inform him that a BB gun was not a firearm and that the State did not provide sufficient evidence to the grand jury to support the charge of burglary while in possession of a firearm. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. A BB gun is a firearm. *See* NRS 202.265(5)(b); *Funderburk v. State*, 125 Nev. 260, 265, 212 P.3d 337, 340 (2009). The State supported the burglary while in possession of a firearm charge with evidence that appellant entered the store with the BB gun, took a sandwich, and threatened to use the BB gun when he was confronted by the store clerks. Further, appellant failed to demonstrate a reasonable probability that he would not have pleaded guilty given the benefit he received. Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that trial counsel was ineffective for failing to file a sentencing memorandum. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Appellant received the sentence stipulated to by the parties. Therefore, he failed to

demonstrate a reasonable probability of a different result had the memorandum been filed, and the district court did not err in denying this claim.

Next, appellant claimed that his plea was invalid because the district court did not ask him all of the appropriate questions, the district court did not provide him the law on robbery, and there was no factual basis given for the plea.

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 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.

Appellant failed to demonstrate his plea was invalid. While the district court did not ask him if he was under the influence of drugs or alcohol, it is clear from the record that appellant was able to understand the plea based on his answers to questions by the district court.<sup>3</sup> As to the law on robbery, the elements were laid out in the plea agreement and appellant acknowledged that he read and understood the plea agreement. Further, appellant provided his own factual account as to one of the robberies he committed. As to the other robbery, which was charged in

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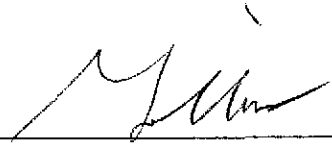
<sup>3</sup>We note that contrary to appellant's claim, he was asked if he reads, writes, and understands the English language.


the alternative, the State provided a factual basis that was adopted by appellant. Therefore, the district court did not err in denying this claim.

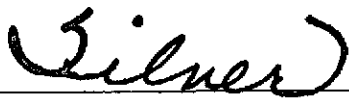
Finally, appellant claimed that the grand jury was not informed that appellant's failure to exercise his right not to testify must not be considered by the grand jury. This claim is outside the scope of claims that may be raised in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based on a guilty plea. NRS 34.810(1)(a). Therefore, the district court did not err in denying this claim.

Having considered appellant's contention and concluded they are without merit, we

ORDER the judgment of the district court AFFIRMED.<sup>4</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tau

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Linda Marie Bell, District Judge  
Justin Edmisten  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>4</sup>We have reviewed all documents that appellant has submitted to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted.