IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID WENDELL LOUX,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36139

FILED

FEB 08 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On April 15, 1999, appellant David Wendell Loux was convicted, pursuant to a guilty plea, of felony driving under the influence. The district court sentenced Loux to serve a term of 28-72 months in prison, and ordered him to pay a fine in the amount of $5,000.00 and restitution in the amount of $614.38; he was given credit for 65 days time served. On May 7, 1999, Loux filed a notice of appeal from his conviction, which he later voluntarily withdrew.[1]

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[1]Loux v. State, Docket No. 34187 (Order Dismissing Appeal, August 11, 1999).



02-02614

On July 14, 1999, Loux filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss Loux's petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent Loux or conduct an evidentiary hearing. On November 13, 1999, the district court dismissed Loux's petition. This appeal followed.

Loux contended that he would not have entered a guilty plea if he had known the district court would not follow the State's sentencing recommendation. We conclude that Loux is not entitled to relief.[2]

The guilty plea memorandum stated that as a consequence of his plea, Loux could be sentenced to serve 12-72 months in prison and ordered to pay a fine of $2,000.00 to $5,000.00. In exchange for Loux's plea, the State agreed to recommend that he serve a prison term of 12-36 months, and pay a fine of $2,000.00. The negotiated agreement also stated that "the Court is not bound by the agreement of the parties and that the matter of sentencing is to be determined solely by the Court."[3]

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[2]Loux also contended that "Parole and Probation did not put in the report what I said." Any error or omission in the presentence investigation report prepared by the Division of Parole and Probation was brought to the attention of the district court and corrected by Loux's defense counsel at the beginning of his sentencing hearing. Therefore, this argument has no merit and we will not address it any further.

[3]The transcript of the plea canvass in the district court was not submitted in the record on appeal.

At the sentencing hearing, the prosecution specifically performed its part of the plea agreement and made the negotiated recommendation to the district court. The probation officer representing the Division of Parole and Probation, however, recommended a stiffer sentence and fine "based on the fact that the defendant has been arrested 15 times for DUI, not to mention 23 times over all. He does have 12 prior DUI convictions and he has obviously not learned anything from what's been imposed to him so far." The district court subsequently made the following statement:

> THE COURT: This is a, I have to say the most appalling criminal history this Court has seen as it relates to alcoholism and drunk driving.
>
> The choice of the defendant to get behind a 3,000 pound death machine, not once, not twice, not three times, but according to this report behind the wheel of this vehicle with a .319 percent blood alcohol level, his 15th DUI arrest and his 12th conviction for driving under the influence of alcohol, the defendant chooses to repeatedly put his fellow man at risk of total destruction or injury, and for those reasons the Court sentences as follows . . . .

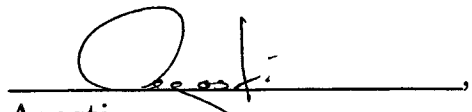
As noted above, the district court then departed upward from the State's sentencing recommendation.

The record reflects that the plea agreement fully informed Loux that the district court was not bound by the State's sentencing recommendation. Therefore, we conclude the district court did not err in dismissing Loux's petition. 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.[4] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[5]

_____, J.
Young



_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Janet J. Berry, District Judge
Attorney General/Carson City
Washoe County District Attorney
David Wendell Loux
Washoe District Court Clerk

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

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