

IN THE SUPREME COURT OF THE STATE OF NEVADA

BILLY RAYMOND JOHNSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36442

FILED

SEP 02 2002

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

On July 30, 1997, appellant Billy Raymond Johnson was indicted on one count each of burglary while in possession of a deadly weapon, first degree kidnapping with use of a deadly weapon, attempted sexual assault with use of a deadly weapon, and robbery with use of a deadly weapon. The Clark County Public Defender's Office was appointed to represent appellant, and he ultimately pleaded guilty pursuant to a written plea agreement to first degree kidnapping (count I) and robbery with use of a deadly weapon (count II). On April 30, 1999, the district court entered its judgment of conviction sentencing appellant to imprisonment for life with a minimum parole eligibility of five years on count I and to two equal and consecutive prison terms of a maximum of one hundred sixty months with a minimum parole eligibility of sixty months on count II. The court ordered that the sentences for counts I and II be served consecutively.

Appellant did not appeal from the judgment of conviction. However, on December 3, 1999, he filed through counsel a post-conviction petition for a writ of habeas corpus. On March 20, 2000, he supplemented the petition with a memorandum of points and authorities. After hearing argument from counsel, the district court entered a twenty-two page Findings of Fact, Conclusions of Law and Order, denying appellant's petition. Appellant timely appealed.

At the outset, we note that although appellant challenges the district court's denial of the claims raised in his petition, including those

claims related to the validity of his guilty plea and his competency to enter the plea, he has failed to provide an adequate record for our review. Specifically, appellant has failed to include in his appendix in this appeal a copy of the petition or the supplemental memorandum filed in the district court. It is therefore impossible for this court to review the adequacy of his pleadings below, and we must rely on the district court's characterization of the claims raised in the pleadings. Appellant has similarly hindered our ability to assess the district court's determinations regarding the validity of the plea and appellant's competence as he has failed to provide this court with trial court transcripts of the entry of the plea or of any hearings at which competency was addressed or found. Appellant has the burden of making a proper appellate record.¹ His failure to do so precludes our review of any deficiently supported claim.² It is in this context that we review the following arguments on appeal.

Appellant first argues that the district court erred in denying relief on his claim that the sentencing court abused its discretion by imposing a sentence that is excessive and disproportional to sentences imposed for other crimes in other cases. Appellant notes that the sentencing court might have been improperly influenced by factors such as the victim's son being a well known attorney, the victim's prior suffering due to an unrelated crime, the victim's testimony that she believed she would die during the instant crimes, and comments made by defense counsel and a defense witness during the sentencing hearing. However, appellant's claims are only appropriate for review on direct appeal;

¹See NRAP 9 (requiring appellant to request preparation of transcripts necessary for appellate review); NRAP 28(e) (requiring references in briefs to matters in the record be supported by citation to appendix or transcript and stating that briefs and memoranda filed in district courts shall not be incorporated by reference in appellate briefs); NRAP 30(b) (requiring inclusion in appellant's appendix of matters essential to the decision of issues presented on appeal); Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant.").

²See Phillips v. State, 105 Nev. 631, 634, 782 P.2d 381, 383 (1989) (recognizing that appellant's failure to include in record on appeal evidence from trial court record relevant to issue raised constitutes a failure to preserve issue for appeal); cf. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (recognizing that this court need not consider claim on appeal which appellant has not demonstrated was raised in petition denied by district court).

appellant did not pursue a direct appeal, and has waived these claims.³ Therefore, the district court properly denied relief.⁴

Appellant also argues that the district court erred in denying his claims that the deputy public defender who assisted him throughout the trial court proceedings provided ineffective assistance at sentencing by: (1) failing to adequately prepare; (2) failing to prepare appellant's sister for her statement in support of appellant, allowing her to offend the sentencing judge by questioning whether the judge would be influenced by political motivations; (3) making similar offensive comments at sentencing; and (4) misstating the sentencing recommendation of the Division of Parole and Probation by adding two to four months to each of the maximum terms recommended. These arguments lack merit.

A claim that counsel provided ineffective assistance is a mixed question of law and fact and is subject to independent review.⁵ But the district court's determinations as to any factual aspects of such claims are entitled to deference on appeal.⁶ To prevail on a claim of ineffective assistance of counsel, a defendant must establish that: (1) counsel's performance was deficient, i.e., it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense, i.e., there is a reasonable probability that but for counsel's errors the

³See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) (holding that all claims appropriate for review on direct appeal, including claims challenging sentence imposed, must be pursued on direct appeal or will be considered waived in subsequent proceedings), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); NRS 34.810(1)(a) (stating that where conviction is based upon guilty plea, only claims that may be raised in post-conviction petition for writ of habeas corpus are claims that the guilty plea was involuntarily or unknowingly entered or was entered without effective assistance of counsel).

⁴Because appellant has waived his claims related to district court error in imposing sentence, we need not address his related argument in favor of overruling case law which holds that this court will not ordinarily interfere with the district court's discretion to impose sentences within the parameters defined in valid statutes. See, e.g., Sims v. State, 107 Nev. 438, 814 P.2d 63 (1991).

⁵Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

⁶Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

result of the proceeding would have been different.⁷ When a conviction has resulted from a guilty plea, the defendant must show that there is a reasonable probability that but for counsel's deficient performance he would not have pleaded guilty and would have insisted on going to trial.⁸ "A reasonable probability is a probability sufficient to undermine confidence in the outcome."⁹

The district court rejected each of appellant's allegations of ineffective assistance. The court concluded that the allegations numbered (1) to (3) above did not warrant relief as these were naked claims and were belied by the record.¹⁰ No evidence before this court demonstrates that the district court erred in reaching these conclusions. Further, we note that the sentencing transcript shows that the sentencing judge specifically rejected the suggestion that political concerns might influence his sentencing decision. Nothing in the record shows a reasonable probability exists that appellant was prejudiced by counsel's comments at or any lack of preparation for sentencing. The district court also concluded that counsel's slight misstatement of the Division's sentencing recommendation did not rise to the level of deficient performance sufficient to undermine confidence in the outcome of the proceeding. We agree. Our review of the record shows that the sentencing judge stated he had reviewed the presentence investigation report prepared by the Division but was basing the sentence to be imposed on the facts of the case and the danger appellant posed to the public. The judge then imposed sentences that exceeded the Division's recommendation even as misstated by counsel. Thus, appellant has failed to show that a reasonable probability exists that he was prejudiced by counsel's misstatement.

⁷Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107 (citing Strickland v. Washington, 466 U.S. 668, 687, 689, 694 (1984)).

⁸Kirksey, 112 Nev. at 988, 923 P.2d at 1107 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

⁹Id. at 988, 923 P.2d at 1107 (quoting Strickland, 466 U.S. at 694).

¹⁰See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that district court may properly deny on the pleadings claims which are unsupported by specific factual assertions that would warrant relief if true or claims which are belied by the record).

Appellant further argues that the district court erred in concluding that the trial court had properly permitted him to enter a guilty plea after determining that appellant was competent to stand trial. Appellant contends that he was incompetent to enter a guilty plea. In support, he relies on evidence showing that he stated at various times that he could not remember the crimes, he used methamphetamine prior to the crimes and was hearing voices at the time of the crimes, he was suicidal after his arrest and during his detention in jail, and he was diagnosed as having problems including Tourette's Syndrome and Attention Deficit Hyperactive Disorder which led him to use methamphetamine and to experience problems affecting his education, work, marriages, physical health and mental health. Appellant also relies on two competency evaluations done in the months following the crimes and indicating that he was incompetent to stand trial. Appellant notes that these evaluations resulted in his transfer to Lakes Crossing Center, where he was treated for toxic psychosis resulting from methamphetamine use. Appellant has failed to demonstrate error.

The standard for competence to stand trial or to plead guilty is "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'"¹¹ A district court's competency determination will be sustained on appeal where substantial evidence exists to support it.¹²

We conclude that the lower courts' competency determinations are supported by substantial evidence in the record. The record shows that prior to appellant's return from Lakes Crossing Center, a sanity commission was empanelled and three doctors evaluated appellant during the period of December 1997 through January 1998. All three doctors found appellant to be competent to stand trial. Within a week prior to entry of his guilty plea, another evaluation was performed at counsel's request which also indicated that appellant was competent to stand trial. These evaluations constitute substantial evidence to support the trial

¹¹Godinez v. Moran, 509 U.S. 389, 396-97 (1993) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)).

¹²Ogden v. State, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980).

court's conclusion that appellant was competent to enter a guilty plea and adequately support the district court's denial of appellant's post-conviction claim.

Appellant also appears to argue that his guilty plea was unknowingly and involuntarily entered because he did not understand the nature and consequences of his plea and did not remember committing the crimes he pleaded guilty to, and because his counsel told him that his case was hopeless and appellant felt he had no other choice than to plead guilty given that the alternative was conviction of more charges and facing longer prison terms. Again, appellant has not shown error.

A guilty plea is presumptively valid, and a defendant has the burden of demonstrating that his plea was not entered knowingly and voluntarily.¹³ On appeal, "we 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."¹⁴ Here, the district court determined that the record, including the plea canvass and plea memorandum, demonstrated a knowing and voluntary plea. Appellant has failed to provide this court with any evidence in the record showing that the district court erred in its determination.

Finally, in an apparent effort to demonstrate either that he was incompetent to enter or did not enter a valid guilty plea, appellant points to evidence showing that he was in a drug-induced psychosis at the time of the crimes. Based on this evidence, appellant argues that none of the reports from his competency evaluations indicated whether he was legally sane at the time of the crimes and therefore could be held responsible for his crimes. However, whether appellant was sane at the time of the crimes is irrelevant to whether he was competent to enter a guilty plea.¹⁵ Moreover, by pleading guilty to the amended indictment, appellant admitted guilt as to all elements of the crimes charged therein, including any mens rea elements, and waived all defenses.¹⁶ Appellant

¹³Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

¹⁴Id.


¹⁵See Ogden, 96 Nev. at 698, 615 P.2d at 252.

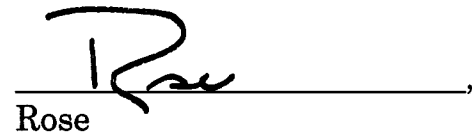
¹⁶See id.

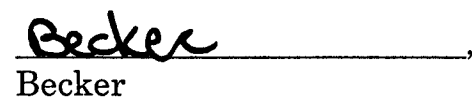
has not shown how the possible existence of a waived mens rea defense affects his competence to enter a plea or renders his guilty plea invalid.

Having considered each of appellant's contentions and concluded that they lack merit,¹⁷ we

ORDER the judgment of the district court AFFIRMED.

 J.
Shearing

 J.
Rose

 J.
Becker

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General/Carson City
Clark County District Attorney
Edward M. Bernstein & Associates/Las Vegas
Clark County Clerk

¹⁷Appellant also requests that this court "vacate the sentence and remand . . . with instructions that a different district judge specifically enforce the plea bargain, but with a proviso that during the time of [his] incarceration he be treated and educated for his disorders." However, appellant fails to state any cognizable basis upon which this remedy might be warranted and has not demonstrated that the plea agreement was not fully performed. Accordingly, we decline to grant the relief he seeks.