IN THE SUPREME COURT OF THE STATE OF NEVADA

SVEIN ROBERT DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36598

FILED

MAY 30 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On April 27, 1998, the district court convicted appellant, pursuant to a guilty plea, of one count of mayhem. The district court sentenced appellant to serve a maximum term of ninety-six months in the Nevada State Prison with a minimum parole eligibility of twenty-four months, and credited appellant one hundred three days for time served. Appellant's direct appeal was dismissed by this court.[1]

On May 18, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On July 27, 2000, the district court denied appellant's petition. This appeal followed.

[1]Davis v. State, Docket No. 32351 (Order Dismissing Appeal, May 25, 1999).

Appellant contended that his plea was unknowing and involuntary. A guilty plea is presumptively valid, and the appellant bears the burden of establishing it was not.[2] Absent an abuse of discretion, this court will not reverse a district court's decision on the validity of a guilty plea.[3] Appellant is not required to make a factual admission when entering an Alford plea.[4] However, in accepting an Alford plea, the district court must determine that there is a factual basis for the plea, and resolve the conflict between waiver of trial and the claim of innocence.[5] During the plea canvass appellant's counsel stated that the plea was being entered in exchange for dismissing two other charges which carried a greater range of sentencing. The district court conducted a thorough plea canvass of appellant during which it stated the elements of the charge that would have to be proved by the State beyond a reasonable doubt for a jury to find him guilty. Appellant stated that he understood and that he entered his plea voluntarily. Moreover, appellant signed a written plea agreement which included the information stating the relevant elements of mayhem. Therefore, based on our review of the entire record and the totality of the circumstances, we conclude that the district court did not

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

[3]Id.

[4]North Carolina v. Alford, 400 U.S. 25 (1970).

[5]Tiger v. State, 98 Nev. 555, 558, 654 P.2d 1031, 1033 (1982); see also State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996).

abuse its discretion in finding that appellant's plea was knowingly and voluntarily entered.[6]

Appellant also raised five claims of ineffective assistance of counsel. 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.[7] 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.[8]

First, appellant contended that his counsel was ineffective for allowing appellant to enter an Alford plea knowing that the State could not prove the mayhem charge at trial and even if it could, such conviction would not be upheld on appeal. To the extent this contention is supported by factual claims, it is belied by the record.[9] Appellant claimed that his counsel knew that the State's evidence was inadmissible hearsay. However, at the preliminary hearing, the district court ruled that the evidence was admissible under hearsay exceptions. Therefore, counsel did not "know" that the evidence would not have been admissible at trial, or that to do so would be reversible error. Appellant also claimed that his counsel knew the State could not prove the elements of mayhem as

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[6]See Gomes, 112 Nev. at 1481, 930 P.2d at 706; Bryant, 102 Nev. at 272, 721 P.2d at 368.

[7]Strickland v. Washington, 466 U.S. 668 (1984).

[8]Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

[9]See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

opposed to battery with substantial bodily harm.[10] However, the evidence presented at the preliminary hearing indicated that appellant used a razor blade to slit the victim's face, starting at her upper lip and slicing upwards two and one half inches into her cheek.[11] Accordingly, counsel did not "know" that the State would be unable to prove mayhem, or that if it did the judgment would be reversed on appeal. Therefore, appellant has failed to demonstrate that his counsel was ineffective.

Second, appellant contended that his counsel was ineffective for failing to ensure that appellant understood the proceedings and whether promises were made to him in exchange for the plea. To the extent this contention is supported by factual claims, it is belied by the record.[12] Appellant maintained that he twice told the district court during the plea canvass he had been promised release on his own recognizance in exchange for pleading guilty. During the plea canvass appellant did state that he expected he would be released on his own recognizance if he pleaded guilty, and his counsel informed the district court that he had promised appellant that he would ask for such a release. The district court emphasized to appellant that his attorney's promise to ask for release was not a guarantee that the court would grant it, stating five

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[10]Appellant was originally charged mayhem as well as with battery with substantial bodily harm and battery with the use of a deadly weapon; the later two charges were dropped in exchange for his pleading guilty to mayhem.

[11]See Sheriff v. Middleton, 112 Nev. 956, 961, 921 P.2d 282, 285 (1996) (stating that at a preliminary hearing the State need only present marginal or slight evidence to establish probable cause that a crime occurred and the defendant is the person who committed the crime).

[12]See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

times that there was no promise he would be released on his own recognizance if he pleaded guilty. Appellant responded three times that he understood. Therefore, appellant has failed to demonstrate that his counsel was ineffective.

Third, appellant contended that his counsel was ineffective for failing to inform appellant of the elements of mayhem and that by pleading guilty he was waiving his right to require the State to prove its case beyond a reasonable doubt. To the extent this contention is supported by factual claims, it is belied by the record.[13] During the plea canvass the district court asked appellant if he understood that in order to prove mayhem, "the State would have to show that . . . [appellant] willfully, unlawfully and feloniously with malice sliced the upper lip of [the victim] with a razor."[14] Appellant answered in the affirmative. Where, as here, the record as a whole shows that a defendant understood the true nature of the charge, the court is not required to elicit a statement from the defendant regarding the specific elements of the crime to which he pleads guilty.[15] In addition, appellant signed a plea

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[13]See id.

[14]NRS 200.280 provides in pertinent part that:

> Mayhem consists of unlawfully depriving a human being of a member of his body, or disfiguring or rendering it useless. If a person cuts out or disables the tongue, puts out an eye, slits the nose, ear or lip, or disables any limb or member of another, or voluntarily, or of purpose, puts out an eye, that person is guilty of mayhem . . .

(Emphasis added).

[15]See Bryant, 102 Nev. at 273, 721 P.2d at 368.

agreement which stated the consequences of the plea, including the rights being waived, and appellant was specifically canvassed by the district court on whether he waived the State's burden to prove him guilty beyond a reasonable doubt. Appellant stated that he understood. Therefore, appellant has failed to demonstrate that his counsel was ineffective.

Fourth, appellant contended that his counsel was ineffective for failing to appeal the district court's denial of appellant's pretrial writ of habeas corpus or to inform appellant of his right to do so. This contention is without merit. Because the writ was filed prior to appellant's conviction and there was a pending criminal action against him, he had no right to appeal.[16]

Finally, appellant contended that his counsel was ineffective for refusing appellant's request to file a motion to withdraw appellant's guilty plea. In order to withdraw a guilty plea, the defendant must show that his guilty plea was not entered knowingly and intelligently.[17] As discussed, appellant failed to show that his plea was not entered knowingly and intelligently. Nevertheless, the district court may grant a presentence motion to withdraw a guilty plea at its discretion for any substantial reason and if it is fair and just.[18] 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."[19] Appellant told the district court that he wanted to

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[16]See NRS 34.575(1).

[17]Bryant, 102 Nev. at 272, 721 P.2d at 368.

[18]State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969).

[19]Bryant, 102 Nev. at 272, 721 P.2d at 368.

withdraw his guilty plea because "the deal was . . . for probation."[20] However, the record shows that appellant was correctly informed of the potential penalties and was not promised probation in exchange for his plea: appellant signed a plea agreement which stated that he understood the consequences of his plea, that whether he received probation would be at the discretion of the district court, and that he was not guaranteed any particular sentence, nor promised leniency in exchange for his plea. As discussed, the district court's plea canvass emphasized this point to appellant and appellant said he understood. Therefore, appellant did not make any specific allegations that would warrant withdrawal of the guilty plea.[21] Under these circumstances, we conclude that counsel was not ineffective for refusing to file a motion to withdraw the guilty plea.[22] Moreover, in exchange for his plea the State agreed not to oppose the dismissal of two additional cases pending against appellant, and dropped two of the charges in this case. Thus, appellant has failed to show a reasonable probability that, but for any alleged errors of counsel, he would not have pleaded guilty and insisted on going to trial.

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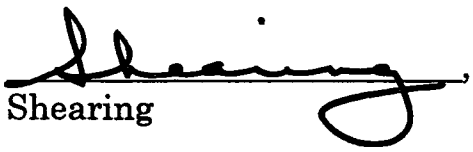
[20]See Lundy v. Warden, 89 Nev. 419, 422, 514 P. 2d 212, 213 (1973) ("An allegation that a guilty plea is entered because of the expectation of a lesser penalty is, of itself, insufficient to invalidate the plea.").

[21]Appellant twice related to the district court that he wanted to withdraw his guilty plea, at the hearings on appellant's request to replace counsel held on March 5, 1998, and March 26, 1998. Appellant told the district court he wanted a new attorney because his current counsel would not file a motion to withdraw the guilty plea. Counsel informed the district court that he did not want to file the motion because it was meritless. The district court denied appellant's motion to replace counsel.

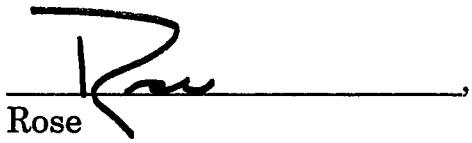
[22]See Hargrove, 100 Nev. at 503, 686 P.2d at 225-26 (pleading guilty to avoid a harsher sentence is not grounds for withdrawing a guilty plea).

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.[23] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[24]



Shearing, J.



Rose, J.

Becker, J.

cc: Hon. Mark W. Gibbons, District Judge
Attorney General/Carson City
Clark County District Attorney
Svein Robert Davis
Clark County Clerk

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[23]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

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