IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN G. HOUSER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37006

FILED

DEC 14 2001

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

ORDER OF AFFIRMANCE

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

On November 14, 1997, appellant Kevin G. Houser appeared in district court and entered a plea of guilty to one count of first-degree murder and one count of first-degree kidnapping with substantial bodily harm. Houser was seventeen years old at the time. The district court canvassed Houser regarding his decision to plead guilty and accepted the guilty plea. Prior to sentencing, however, Houser indicated that he wanted to withdraw his guilty plea. The district court appointed new counsel to represent Houser and, on March 10, 1998, counsel filed a motion to withdraw the guilty plea on various grounds. After conducting an evidentiary hearing, the district court denied the motion and sentenced Houser to serve two consecutive terms of life in prison with the possibility of parole. The district court entered the judgment of conviction on April 16, 1998.[1] This court affirmed the conviction on appeal, concluding that the district court did not abuse its discretion in denying the presentence

[1]Judge Joseph Bonaventure conducted the plea canvass, the evidentiary hearing on the motion to withdraw, and the sentencing. The case was transferred to Judge Sally Loehrer prior to the filing of the post-conviction petition.

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motion to withdraw the guilty plea.[2] The remittitur issued on August 3, 1999.

On April 28, 2000, Houser 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 Hauser or to conduct an evidentiary hearing. On August 14, 2000, the district court denied the petition. This appeal followed.

In his petition, Houser claimed that the district court erred by failing to suppress his post-arrest statements to police, and by denying Houser's motion to sever his trial from that of his co-defendant. We conclude that the district court did not err in rejecting these claims. NRS 34.810(1)(a) provides that a post-conviction petition that challenges a judgment of conviction based on a guilty plea may only allege that "the plea was involuntarily or unknowingly entered or that the plea was entered without the effective assistance of counsel." These claims of trial court error fall outside the scope of a post-conviction petition challenging a judgment of conviction based on a guilty plea. Moreover, Houser waived these claims by pleading guilty.[3]

Houser also claimed that his guilty plea was involuntarily entered because the district court participated in the plea negotiations. We conclude that this claim is belied by the record. The district court judge indicated that the parties requested that he be at the courthouse on November 14, 1997, because the case might be negotiated. The district court judge further indicated that he sat in chambers for four hours while the attorneys tried to negotiate a plea. There is absolutely no indication in the record that the district court improperly participated in the negotiations or coerced Houser into accepting the plea negotiations.

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[2]Houser v. State, Docket No. 32317 (Order Dismissing Appeal, July 6, 1999).

[3]See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975).

Rather, the record demonstrates that Houser accepted the plea negotiations after extensive discussions with his two attorneys and his mother. Houser's petition is similarly devoid of any allegations that the district court participated in the plea negotiations in a manner that coerced Houser to accept the proposed agreement.[4] For these reasons, we conclude that the district court did not err in rejecting this claim.[5]

Houser next challenged the validity of his guilty plea on the ground that the district court failed to advise him of his constitutional rights during the plea canvass. Houser is correct that the district court did not specifically advise him of the constitutional rights he was waiving by entering the guilty plea. However, this information was contained in the written plea agreement, which Houser acknowledged reading and understanding. Counsel also stated on the record that he had reviewed the written plea agreement "line by line" with Houser. Moreover, Houser was familiar with the criminal justice system as he had pleaded guilty to a felony offense in an unrelated case over one year before entering the guilty plea in this case. Finally, in our order on direct appeal, we concluded that the record demonstrated that Houser "understood the rights he was waiving and the nature and consequences of his plea."[6] Our decision on direct appeal constitutes the law of the case. This issue therefore cannot be relitigated.[7]

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[4]Compare Standley v. Warden, 115 Nev. 333, 990 P.2d 783 (1999).

[5]To the extent that Houser also claimed that trial and appellate counsel were ineffective for failing to raise this issue, we conclude that those claims lack merit. The record belies any suggestion that the trial court improperly participated in the plea negotiations and, therefore, there was nothing to which trial counsel could object or that appellate counsel could raise on appeal.

[6]Houser v. State, Docket No. 32317 (Order Dismissing Appeal at 2, July 6, 1999).

[7]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

To the extent that Houser also raised this issue as ineffective assistance of trial and appellate counsel, we conclude that it lacks merit.

Houser also claimed that the district court erred by failing to order a psychological examination to determine his competency to stand trial. To the extent that this claim challenged Houser's competency to plead guilty, we conclude that it was properly raised in the post-conviction petition. We further conclude that the claim lacks merit. A defendant is competent to enter a plea if he has: (1) "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding'"; and (2) "'a rational as well as factual understanding of the proceedings against him.'"[8] The record indicates that Houser's trial counsel obtained an order to transport Houser for a complete psychological examination. But the papers filed by counsel clearly indicate that counsel sought the examination to develop information and evidence for the penalty phase of the capital trial and to possibly support an argument that because of his personality, Houser was less culpable than his co-defendant. Counsel never suggested that they had a reasonable doubt as to Houser's competency to stand trial. Moreover, the transcripts of the plea canvass and the evidentiary hearing on the presentence motion to withdraw indicate that Houser was competent. Houser has not supported the claim in his petition with any specific factual allegations that would have raised a reasonable doubt as to his competence and required the district court to order a competency hearing.[9] The only factual assertions in the petition are that he had a low I.Q. and may have been taking PCP at the time of the murder. These allegations, even if true, are not

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

[9]See Jones v. State, 107 Nev. 632, 638, 817 P.2d 1179, 1182 (1991) (explaining that the district court is not required to order a competency examination unless it has a reasonable doubt as to the defendant's competency).

sufficient to entitle Houser to relief on this claim.[10] We therefore conclude that the district court did not err in rejecting it.[11]

Houser further claimed that the State withheld evidence that could have been used to impeach its key witness.[12] In particular, Houser alleged that the State withheld information that the witness had been arrested for grand theft auto and may have received a deal in exchange for his testimony in this case. This appears to be a claim that the State violated Brady v. Maryland. Several circuit courts of appeal have concluded that "a defendant can argue that his guilty plea was not voluntary and intelligent because it was made in the absence of withheld Brady material."[13] Taking this approach, Houser's claim is properly raised in the post-conviction petition.[14] But there are two problems with Houser's claim.

First, it is based on pure speculation. Second, even assuming that the alleged impeachment evidence exists and that the State withheld it from the defense, Houser failed to demonstrate that the undisclosed information would have been material to his decision to plead guilty.[15] The Ninth Circuit has explained that the standard for materiality "in a case involving a guilty plea is whether there is a reasonable probability that but for the failure to disclose the Brady material, the defendant

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[10]See Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (explaining that the court should look to the following three facts in determining whether a competency hearing is required: any history of irrational behavior by the defendant, his demeanor before the court, and any prior medical opinion of his competency).

[11]To the extent that Houser also raised this issue as a claim of ineffective assistance of appellate counsel, we conclude that it lacks merit.

[12]See Brady v. Maryland, 373 U.S. 83 (1963).

[13]Sanchez v. U.S., 50 F.3d 1448, 1453 (9th Cir. 1995) (citing cases from Eighth Circuit, Second Circuit, and Sixth Circuit).

[14]See NRS 34.810(1)(a).

[15]See Sanchez, 50 F.3d at 1454.

would have refused to plead and would have gone to trial."[16] Houser has not alleged that if he had known of the alleged Brady material, he would have gone to trial. Moreover, we conclude that such a claim would have no merit. The alleged Brady material is de minimus in nature. Furthermore, the State had admissions from Houser that would have bolstered the eyewitness's credibility. Finally, it seems unlikely that the allegedly undisclosed information would have affected Houser's decision, as he faced substantially more severe penalties if he proceeded to trial and was convicted of the original charges of first-degree murder with the use of a deadly weapon and conspiracy to commit murder.[17] Under the circumstances, we conclude that Houser's Brady claim lacks merit, and that the district court did not err in rejecting it.

In his petition, Houser also claimed that trial and appellate counsel provided ineffective assistance in numerous respects. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced the defense.[18] To establish prejudice where the judgment of conviction is based on a guilty plea, the petitioner must show that but for trial counsel's mistakes, there is a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial.[19] "To establish prejudice based on the deficient assistance of appellate counsel, a petitioner must show that the

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[16]Id.

[17]We note that the State had filed notice of its intent to seek the death penalty shortly after Houser was bound over for trial in the district court.

[18]Strickland v. Washington, 466 U.S. 668, 697 (1984); accord Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[19]Hill v. Lockhart, 474 U.S. 52, 59 (1985); accord Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

omitted issue would have a reasonable probability of success on appeal."[20] The court need not consider both prongs of the ineffective-assistance test if the petitioner makes an insufficient showing on either prong.[21] We will address each ineffective assistance claim in turn.

First, Houser claimed that trial counsel provided ineffective assistance by failing to file a timely pretrial petition for a writ of habeas corpus challenging the probable cause determination and by failing to appeal the district court's order denying the pretrial petition. We conclude that both claims lack merit. First, counsel obtained an extension of time to file the pretrial habeas petition[22] and, although the State argued that the petition should be denied as untimely, the district court considered and rejected the petition on its merits. Accordingly, counsel's failure to file the petition within the time period specified by NRS 34.700(1)(a) did not prejudice Houser. Second, counsel was not deficient for failing to appeal the district court's order because no statute or court rule provides for an appeal from an order denying a pretrial habeas petition.[23] Moreover, by entering a guilty plea, Houser waived any challenge to the probable cause determination.[24]

Second, Houser claimed that trial counsel provided ineffective assistance by failing to request a competency hearing. As explained above, Houser failed to allege any specific facts that would have warranted a competency hearing. Accordingly, we conclude that he has not

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[20]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[21]Strickland, 466 U.S. at 697.

[22]NRS 34.700(3) permits the district court to extend the time to file a pretrial petition upon a showing of good cause.

[23]See Gray v. Sheriff, 96 Nev. 78, 605 P.2d 212 (1980); NRS 34.575.

[24]See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975) (recognizing that guilty plea waives all errors occurring prior to entry of the plea); Bounds v. Warden, 91 Nev. 428, 429, 537 P.2d 475, 476 (1975) (stating that guilty plea relieves the State of its obligation to prove every element of the offense beyond a reasonable doubt).

demonstrated that counsel were ineffective for failing to request such a hearing.

Third, Houser claimed that trial counsel provided ineffective assistance by failing to interview witnesses who could support his claim of voluntary intoxication. Houser failed to identify the witnesses whom counsel should have interviewed or to describe their intended testimony. We therefore conclude Houser has not demonstrated that trial counsel were deficient for failing to interview these unnamed witnesses or that, but for counsels' failure to interview these witnesses, he would not have pleaded guilty and would have insisted on going to trial. Accordingly, the district court did not err in rejecting this claim.

Fourth, Houser claimed that trial counsel provided ineffective assistance by failing to investigate the State's key witness to determine whether he had entered an agreement with the State in exchange for his testimony. We conclude that this claim is belied by the record. Trial counsel filed numerous discovery motions related to the State's witnesses. Moreover, contrary to Houser's assertions, there is nothing in the preliminary hearing transcript that would suggest that the State made a deal with the specific witness in exchange for his testimony. Under the circumstances, we conclude that the district court did not err in rejecting this claim.

Fifth, Houser claimed that trial counsel provided ineffective assistance by failing to reserve in writing his right to appeal any adverse pretrial rulings. Houser's trial counsel filed numerous pretrial motions. Houser specifically mentions only two of the motions in his petition: the motion to sever the trials, and the motion to suppress his statements to police. Houser's claim presupposes that the State would have agreed to such a reservation; the State's agreement is required by NRS 174.035(3). Nonetheless, even assuming that the State would have agreed to such a reservation, we conclude that counsel were not ineffective for failing to obtain it for several reasons. First, the motion to sever was largely moot because the co-defendant also accepted a guilty plea. The two deals were

not conditioned on each other. Thus, it is clear that Houser did not plead guilty to avoid the joint trial and that the potential for a joint trial was eliminated as a result of the co-defendant's guilty plea. Second, the district court had not yet ruled on the motion to suppress Houser's statements, but had reserved ruling until it could conduct an evidentiary hearing. Thus, there was no adverse determination of the motion from which counsel could have reserved the right to appellate review. Moreover, the fact that the district court had not ruled on the motion belies any suggestion that but for counsels' failure to reserve the right to appellate review, Houser would not have pleaded guilty and would have insisted on going to trial. For these reasons, we conclude that Houser has not demonstrated that counsel were deficient in this respect or that Houser was prejudiced.

Finally, Houser claimed that appellate counsel provided ineffective assistance by failing to raise meritorious issues on appeal. Houser only identifies a few issues that counsel should have raised. The claims that appellate counsel should have raised the district court's failure to hold a competency hearing, participation in the plea negotiations, and failure to advise Houser of his constitutional rights are dealt with elsewhere in this order. The only remaining specific allegation of ineffective assistance of appellate counsel is that counsel should have challenged the district court's ruling on the motion to suppress Houser's statements. As previously noted, the district court did not rule on the motion. Moreover, Houser waived any constitutional challenges to his statements by entering a guilty plea.[25] We conclude that appellate counsel was not deficient for failing to raise issues that had been waived by entry of the guilty plea and that Houser was not prejudiced by counsel's failure to raise such issues.

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[25]See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975).

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.[26] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Rose

_____, J.
Becker

cc: Hon. Sally L. Loehrer, District Judge
Kevin G. Houser
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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