IN THE SUPREME COURT OF THE STATE OF NEVADA

LAMARR ROWELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37283

FILED

JUL 09 2001

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 September 9, 1999, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary. The district court sentenced appellant to serve a maximum term of ninety-six months with a minimum parole eligibility of eighteen months in the Nevada State Prison. Appellant was awarded nine days of credit for time served. This court dismissed appellant's untimely direct appeal for lack of jurisdiction.[1]

On June 9, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed numerous documents in support of and to supplement his

[1]Rowell v. State, Docket No. 35959 (Order Dismissing Appeal, May 8, 2000).

petition.[2] 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 January 23, 2001, the district court entered a written order denying "all of Petitioner's petitions and motions." This appeal followed.

Appellant raised several claims that his plea was involuntary. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[3] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[4] Based upon our review of the record on appeal, we conclude that

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[2]These documents include: (1) July 31, 2000 "motion to submit[] amended petition for writ of habeas corpus: (post conviction)"; (2) July 31, 2000 "petition for writ of habeas corpus: (post conviction amendment)"; (3) July 31, 2000 "motion to submit[] affidavit #2 in support of petition for writ of habeas corpus:"; (4) August 2, 2000 "answer/affidavit #3 to states opposition to my petition for writ of habeas corpus (post-conviction)"; (5) August 7, 2000 "motion to submit[] affidavit #4 in support of petition for writ of habeas corpu[s] (post conviction)"; (6) August 21, 2000 "answer/affidavit #5 to state's opposition to amended petition for writ of habeas corpus (post-conviction)"; (7) August 22, 2000 "affidavit #6 in support of petition for writ of habeas corpus: (post-conviction) (amended:)"; (8) August 30, 2000 "affidavit #7 affidavit in support of amended petition for writ of habeas corpus with respect to grounds 2, 3, and 4"; (9) September 12, 2000 "notice of question befor[e] the court and request for answer:"; (10) September 13, 2000 "supplement to amended petition for writ of habeas corpus: (post-conviction)"; and (11) December 1, 2000 " petition for writ of habeas corpus: (post-conviction) (re-amended) NRS 34.360-34.830."

[3]Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

[4]Hubbard, 110 Nev. at 675, 877 P.2d at 521.

appellant failed to carry his burden of demonstrating that his plea was not entered knowingly and intelligently.

First, appellant argued that his plea was invalid because he was threatened with the habitual criminal enhancement. A desire to plead guilty to the original charge to avoid threat of habitual criminal enhancement will not give rise to claim of coercion.[5] Thus, appellant failed to carry his burden on this claim.

Second, appellant argued that his plea was invalid because he did not know that by entry of his plea he waived constitutional rights and privileges. The written guilty plea memorandum thoroughly informed appellant of the rights he waived by entry of his guilty plea. During the plea canvass, appellant acknowledged reading, signing, and understanding the written guilty plea agreement. Appellant further indicated that he did not have any questions about the written guilty plea agreement. Thus, under the totality of the circumstances, appellant failed to carry his burden on this claim.[6]

Third, appellant argued that his plea was invalid because he did not know or understand the elements of the crime of burglary, the State's burden of proof, or how the crime of burglary applied in his case. The written guilty plea memorandum adequately informed appellant of the elements of the

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[5]Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225-26 (1984).

[6]See Bryant, 102 Nev. 268, 721 P.2d 364; see also State v. Freese, 116 Nev. __, 13 P.3d 442 (2000).

crime of burglary. Further, the written guilty plea agreement informed appellant of the State's burden of proof if appellant had proceeded to trial. During the plea canvass, appellant made factual admissions to the crime of burglary.[7] Thus, appellant failed to carry his burden on this claim.

Fourth, appellant argued that his plea was invalid because NRS 205.060, the burglary statute, was unconstitutional. Appellant argued that NRS 205.060 lessened the State's burden of proof regarding intent. Appellant argued that the burglary statute punished an innocent person who both enters a building open to the public and remains in the building without the intent to commit a crime, but who subsequently, in passing, commits a crime. Appellant believed that he should not have been indicted for burglary because his conduct was not criminal.

NRS 205.060 as applied to appellant is not unconstitutional. NRS 205.060 provides that "[a] person who, by day or night, enters any . . . other building . . . with the

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[7]The following exchange occurred:

> The Court: What did you do on or about the 8th day of June of 1997 that causes you to enter a plea of guilty to the charge of burglary?
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> The Defendant: I went into a building and I attempted to steal something.
>
> The Court: And that was a church; is that correct?
>
> The Defendant: Yes.
>
> The Court: And when you entered that church it was with the intent to steal items from within; that is correct?
>
> The Defendant: Yes.

intent to commit grand or petit larceny, assault or battery on any person or any felony, is guilty of burglary." "[T]he offense of burglary is completed when the house or other building is entered with the specific intent designated in the statute. The actual stealing or attempt to steal property therein is only evidentiary to the criminal intent."[8] A review of the grand jury proceedings reveals that appellant was discovered by church employees in a church, after its regular business hours and while its employees were tidying up after the day's activities. The church employees observed appellant in the choir room pushing a cart containing a television, VCR, and computer monitor from a closet towards the door. When confronted by the church employees, appellant stated that he had either been looking at a video or rewinding a video, pushed the cart back into the closet, immediately left the building, and entered his car, which was parked near the bottom of a concrete ramp. Sufficient evidence was presented to the grand jury to indict appellant on the charge of burglary.[9] Further, during the plea canvass, appellant admitted that he entered the church with the intent to steal. Thus, appellant failed to carry his burden of demonstrating his plea was not valid.

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[8]State v. Patchen, 36 Nev. 510, 516-17, 137 P. 406, 408 (1913).

[9]See NRS 172.155(1) ("The grand jury ought to find an indictment when all the evidence before them, taken together, establishes probable cause to believe that an offense has been committed and the defendant has committed it.").

Fifth, appellant argued that his plea was invalid because the indictment was illegally obtained. Appellant argued that the indictment was illegally obtained because he did not receive actual notice of the grand jury proceedings.[10] Appellant argued that it was improper to serve notice on his counsel of record and to not serve notice on appellant personally. Appellant argued that if he had received notice he never would have been indicted because he would have testified before the grand jury and convinced the grand jury that he had not done anything criminal.

Appellant failed to carry his burden of demonstrating his plea was invalid on this basis because appellant received adequate notice of the grand jury proceedings. NRS 172.241(2), in pertinent part, provides:

> A district attorney or a peace officer shall serve reasonable notice upon a person whose indictment is being considered by a grand jury. . . . The notice is adequate if it:
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> (a) Is given to the person, his attorney of record or an attorney who claims to represent the person and gives the person not less than 5 judicial days to submit his request to testify to the district attorney.

(Emphasis added.) Appellant's counsel of record was provided notice of the grand jury proceedings. The statute does not require appellant to be personally served with notice if his counsel of record is served with adequate notice. Appellant's failure to keep in contact with his counsel of record and

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[10]See Sheriff v. Marcum, 105 Nev. 824, 783 P.2d 1389 (1989).

failure to make court appearances does not alter the State's burden of serving notice. Further, appellant failed to demonstrate any prejudice resulting from the notice effected in this case because, as discussed above, sufficient evidence was presented to the grand jury to support the burglary indictment.

Appellant next raised several claims of ineffective assistance of counsel. To state a claim of 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 fell below an objective standard of reasonableness. Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.[11] Based upon our review of the record on appeal, we conclude that the district court did not err in rejecting appellant's claims.

First, appellant argued that his counsel was ineffective for advising him to plead guilty because the burglary statute was unconstitutional and because his conduct was not criminal. Further, appellant argued that his counsel failed to adequately explain the meaning of burglary to appellant. As discussed above, the burglary statute was not unconstitutional as applied to appellant. In exchange for his guilty plea in the instant case, appellant avoided a charge of

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

burglary in another district court case and a potential habitual criminal enhancement. The written guilty plea agreement informed appellant of the elements of burglary. Further, appellant made factual admissions to the crime of burglary during the plea canvass. Thus, appellant failed to demonstrate that his counsel's conduct was unreasonable or that he was prejudiced in this regard.

Second, appellant argued that his counsel was ineffective for advising him to plead guilty when the indictment was illegally obtained. Further, appellant argued that his counsel was ineffective in failing to preserve his right to appeal the denial of his pretrial habeas corpus petition challenging the validity of the indictment. As discussed above, the indictment was not illegally obtained and there was sufficient evidence to support the indictment. Thus, appellant failed to demonstrate that his counsel's conduct was unreasonable or that he was prejudiced in this regard.

Third, appellant argued that his counsel was ineffective for failing to file an appeal immediately after the district court denied his pretrial habeas corpus appeal. No appeal lies from an order denying a pretrial petition for a writ of habeas corpus.[12] Thus, appellant's counsel was not ineffective in this regard.

Fourth, appellant argued that his counsel was ineffective for: (1) incompetence during oral argument, (2)

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[12]Gary v. Sheriff, 96 Nev. 78, 605 P.2d 212 (1980).

failing to file motions to show appellant's innocence, (3) failing to challenge his false arrest and malicious prosecution, and (4) failing to challenge the State's use of trickery at the grand jury proceedings. Appellant failed to support these claims with sufficient specific factual allegations that would entitle him to the relief requested.[13]

Fifth, appellant argued that his counsel was ineffective in failing to inform him of his right to a direct appeal. Appellant argued that he would have challenged the insufficiency of the grand jury notice and the constitutionality of the burglary statute. Appellant was informed of his limited right to a direct appeal through the written guilty plea agreement.[14] Thus, we conclude that the district court did not err in denying this claim.

Finally, to the extent appellant raised his challenges to the constitutionality of the burglary statute and the indictment as claims separate and apart from his involuntary plea and ineffective assistance of counsel claims, these claims fell outside the narrow scope of claims permissible in a habeas corpus petition challenging a conviction based upon a guilty plea.[15]

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not

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[13]Hargrove, 100 Nev. 498, 686 P.2d 222.

[14]See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

[15]NRS 34.810(1)(a).

entitled to relief and that briefing and oral argument are unwarranted.[16] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[17]

Young, J.

Leavitt, J.

Becker, J.

cc: Hon. Donald M. Mosley, District Judge
Attorney General
Clark County District Attorney
Lamarr Rowell
Clark County Clerk

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

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