IN THE SUPREME COURT OF THE STATE OF NEVADA

THEODORE R. BURKETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38086

FILED

MAR 14 2002

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL IN PART

AND AFFIRMING IN PART

This is a proper person appeal from an order of the district court denying appellant's August 24, 1982 motion to withdraw a guilty plea, appellant's November 14, 2000 more definite statement in support of petition for post-conviction relief, and appellant's March 8, 2001 motion to expedite more definite statement.

On December 2, 1981, the district court convicted appellant, pursuant to a guilty plea, of one count of first degree kidnapping and one count of sexual assault. The district court sentenced appellant to serve two concurrent terms of life in the Nevada State Prison with the possibility of parole. Appellant did not file a direct appeal.

On August 24, 1982, appellant submitted and filed a letter in the district court seeking withdrawal of his plea. On September 9, 1982, the district court, at a hearing, considered the letter to be a petition to change plea and orally denied the relief requested. No written order was ever filed.

In 1985, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court

denied appellant's petition, and this court dismissed appellant's subsequent appeal.[1]

On June 16, 1997, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On October 14, 1997, the district court denied appellant's petition. Appellant appealed. In 1999, appellant filed two additional habeas corpus petitions in the district court. The 1999 petitions were denied, and appellant timely appealed. This court consolidated the appeals from the orders denying the three petitions and dismissed the appeals.[2]

On November 14, 2000, appellant filed a document labeled "more definite statement in support of petition for post-conviction relief." Appellant attempted to construe his August 24, 1982 letter as a petition for post-conviction relief and claimed that he was supplementing the petition. On March 8, 2001, appellant filed a motion to expedite his more definite statement. The State opposed these motions on the grounds that appellant's 1982 letter was not construed a petition for post-conviction relief in 1982 as claimed by appellant and that these later documents were merely attempts to obtain reconsideration of the district court's oral denial of appellant's August 24, 1982 letter. On May 24, 2001, the district court entered an order construing appellant's 1982 letter to be a motion to withdraw a guilty plea and denying the motion to withdraw a guilty plea.

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[1]Burkett v. Director, Docket No. 21850 (Order Dismissing Appeal, June 27, 1991).

[2]Burkett v. State, Docket Nos. 32273, 34706, 35637 (Order Dismissing Appeals, August 16, 2000).

The district court further considered the two later documents to be attempts to obtain reconsideration of the district court's oral decision regarding the letter and denied the relief sought in those documents. This appeal followed.

First, we address appellant's appeal from that portion of the order denying the relief sought in his 1982 letter. Preliminarily, we conclude that the district court properly construed appellant's August 24, 1982 letter to be a motion to withdraw a guilty plea at the hearing in 1982 and in the order denying the motion in 2001. Appellant's attempt to re-characterize his letter as a petition for post-conviction relief was wholly without merit. NRS 176.165, contrary to appellant's assertions below, permits a motion to withdraw a guilty plea after sentencing to correct manifest injustice.[3] In his two and one-half page letter, appellant clearly stated that he sought to withdraw his guilty plea. During the September 1982 hearing on the letter, the district court construed the letter to be a petition to change plea and rejected defense counsel's attempt to characterize the letter as a petition for post-conviction relief. Appellant's letter was not verified, thereby preventing any inference that the letter was a petition for post-conviction relief.[4] Further, we note that in his 1985 petition appellant represented, under penalty of perjury, that his 1982 letter was not meant to be a petition or motion but was merely an attempt to ask the district court's advice. Appellant's attempt to characterize his letter as a petition for post-conviction relief must fail under these facts.

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[3]See also Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) (recognizing a post-conviction motion to withdraw a guilty plea).

[4]See 1973 Nev. Stat., ch. 349, § 2, at 436.

Thus, we conclude that the district court properly construed appellant's 1982 letter to be a motion to withdraw a guilty plea.

In his motion to withdraw a guilty plea, appellant claimed that he felt that his trial counsel had coerced his plea and that he was innocent. He stated that he was 17 at the time and very frightened. He claimed that the victim could not identify him in a police line-up and that his attorney knew that the victim had left the area and would not have been available to testify against appellant at trial. Appellant further claimed that his trial counsel prepared a statement for him at sentencing and informed appellant that if he did not agree to the statement that he would never see the outside of a prison. Thus, appellant sought withdrawal of his plea.

A guilty plea is presumptively valid, and the defendant has the burden of establishing that the plea was not entered knowingly and intelligently.[5] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[6] "The question of an accused's guilt or innocence is generally not at issue in a motion to withdraw a guilty plea."[7]

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's motion. Appellant was thoroughly canvassed by the district court. The district court reviewed the potential sentences appellant faced by entry of his plea

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

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

[7]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 226 (1984).

and the waiver of constitutional rights. Appellant indicated that his plea was not the product of any promises or threats. Appellant made factual admissions during the plea canvass. The victim's inability to identify appellant during a police line-up was brought out by appellant's trial counsel during the preliminary hearing, and appellant was present at the preliminary hearing. Thus, there is no indication that this information was withheld from appellant. Further, there is no indication in the record on appeal, beyond appellant's unsupported assertion, that the victim would not have been available to testify at trial. Appellant's claims regarding his trial counsel's performance at sentencing did not affect the validity of his plea. Under these facts and circumstances, we conclude that appellant failed to carry his burden to demonstrate that his plea was invalid. Therefore, we affirm that portion of the district court's order denying appellant's motion to withdraw a guilty plea.

Next, we address appellant's appeal from that portion of the district court's order denying his document providing more definite statement and the motion to expedite the document for more definite statement. Our review of this portion of the appeal reveals a jurisdictional defect. The right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists.[8] No statute or court rule provides for an appeal from an order denying a document labeled "more definite statement in support of petition for post-conviction relief" or an order denying a motion to expedite a more definite statement. Further, to the extent that these documents were seeking reconsideration of the district court's oral decision denying his earlier motion, we lack

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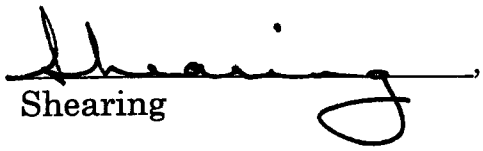
[8]Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990).

jurisdiction to consider the appeal.[9] Therefore, we dismiss this portion of the appeal.

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.[10] Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART and the appeal DISMISSED IN PART.[11]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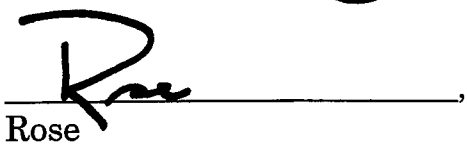
Shearing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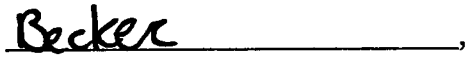
Rose


_____, J.
Becker

cc: Hon. Michael A. Cherry, District Judge
Attorney General/Carson City
Clark County District Attorney
Theodore R. Burkett
Clark County Clerk

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[9]See Phelps v. State, 111 Nev. 1021, 900 P.2d 344 (1995).

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

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