IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN RUSSELL THOMPSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 38191

FILED

OCT 30 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 29, 1998, appellant entered a guilty plea to one count of using and/or being under the influence of a controlled substance, a category E felony pursuant to NRS 453.411. On October 13, 1998, a stipulation and order of reference to diversion was entered in the district court whereby appellant entered the Washoe County Drug Court Program. Appellant failed to complete that program. The district court sentenced appellant to serve a term of twelve (12) to thirty-four (34) months in the Nevada State Prison. On November 28, 2000, the district court entered a judgement of conviction. Appellant did not file a direct appeal.

On April 16, 2001, appellant filed a motion for modification of sentence. The State opposed the motion. Appellant filed a reply to the State's opposition. On May 18, 2001, the district court denied appellant's motion. Appellant did not appeal from this decision.

On May 1, 2001, 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 a reply to the State's opposition. 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 2, 2001, the district court denied appellant's petition. This appeal followed.

In his petition, appellant first contended that he received ineffective assistance of counsel prior to the entry of his guilty plea,

01-18188

"thereby preventing (him) from entering a voluntary, knowing, (and) intelligent plea." Specifically, appellant argued that his counsel, at the time appellant entered his guilty plea, was unaware of the provisions of NRS 176A.100(1)(b)(3), and failed to make appellant aware of these provisions.[1] This, appellant alleged, "led (him) to believe that mandatory probation would be had . . . due to the fact that (he) had no prior 'felony' conviction for a possession charge."

The record belies appellant's contention.[2] In his guilty plea agreement, appellant misrepresented his criminal history when he represented that he had no prior felony convictions whatsoever.[3] Further, appellant did not allege that he made his counsel aware of his true criminal record. Thus, appellant's counsel would correctly assume that appellant must receive mandatory probation pursuant to NRS 176A.100(1)(b). Appellant therefore failed to demonstrate either that his attorney "was unaware" of this statute, or that his performance fell below an objective standard of reasonableness.[4] Moreover, even assuming that appellant's attorney failed to inform appellant about the provisions of NRS 176A.100(1)(b)(3), appellant suffered no prejudice from such an omission.[5] Appellant purported that he had never before been convicted of a felony. Thus, reading the statute would not have altered appellant's belief that he would necessarily receive probation, and nothing supports a conclusion

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[1]Pursuant to NRS 176A.100(1)(b), probation is mandatory "if a person is found guilty in a district court upon verdict or plea of a category E felony," and the conviction is for a first or second-time offense. Probation is discretionary, however, "if, at the time the crime was committed, the person [h]ad previously been two times convicted, whether in this state or elsewhere, of a crime that under the laws of the situs of the crime or this state would amount to a felony." See NRS 176A.100(1)(b)(3).

[2]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (explaining that a defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record).

[3]In fact, appellant had two prior felony convictions, a fact not revealed until appellant withdrew from the drug court program and a pre-sentence investigation report was generated.

[4]See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

[5]See Kirksey v. State, 112 at 987, 923 P.2d at 1107.

that had appellant been aware of NRS 176A.100(1)(b)(3) he would not have pleaded guilty and would have insisted on going to trial.[6]

Moreover, we find that appellant's guilty plea was knowingly and voluntarily entered. The totality of the circumstances demonstrates that appellant was thoroughly informed, through both his plea canvass as well as the written guilty plea agreement, of the consequences of his plea.[7] We therefore conclude that the record belies appellant's contention regarding ineffective assistance of counsel prior to the entry of his guilty plea, and that appellant's plea was voluntarily and knowingly entered.

Next, appellant contended that he received ineffective assistance of counsel prior to his voluntary withdrawal from the drug court program. Specifically, appellant claimed that had his attorney informed appellant that mandatory probation was not available pursuant to NRS 176A.100(1)(b), that he would have remained in the drug court program. Again, appellant's argument is belied by the record.[8] Appellant withdrew from the drug court program on August 3, 2000. The pre-sentence investigation report is dated August 29, 2000 and nothing suggests that appellant made his counsel aware of his true criminal record at this point in the proceedings. Thus, appellant's attorney could not know at the time of appellant's withdrawal that he did in fact have prior felony convictions, and therefore did not qualify for mandatory probation under NRS 176A.100(1)(b)(3). Further, appellant signed a drug court agreement stating that "any failure on (appellant's) part of the treatment program . . . may result in a Failure to Comply Hearing before the Court which could result in a term of incarceration." Thus, although appellant attached significance to the fact that his withdrawal was voluntary, the above-quoted language notified him that not completing the program could result in his receipt of jail time. Also, appellant's signed guilty plea agreement provided (1) that the State reserved the right to present

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[6]See id.

[7]See State v. Freese, 116 Nev. 337, 342, 13 P.3d 442, 448 (2000) ("This court will not invalidate a plea as long as the totality of the circumstances . . . demonstrates that the plea was knowingly and voluntarily made and that the defendant understood the nature of the offense and the consequences of the plea.").

[8]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

arguments, facts, and/or witnesses at sentencing, (2) that the State could withdraw from the agreement and argue for an appropriate sentence if appellant misrepresented his prior criminal history, and (3) that as a consequence of his plea, appellant could be imprisoned for a period of one to four years. Therefore, appellant knew or should have known that a term of incarceration could result from his withdrawal from the drug court program. Thus, we conclude that appellant's claim of ineffective assistance of counsel at the time of his withdrawal from the drug court program is without merit.

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.[9] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Young, J.
Young

Agosti, J.
Agosti

Leavitt, J.
Leavitt

cc: Hon. Steven P. Elliott, District Judge
Attorney General
Washoe County District Attorney
John Russell Thompson
Washoe County Clerk

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