

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID E. DUDO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38476

FILED

SEP 30 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

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 March 4, 1999, the district court convicted appellant, pursuant to an Alford¹ plea, of first degree kidnapping. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole. Appellant did not file a direct appeal. The district court's denial of appellant's post-conviction motion to withdraw his plea was affirmed by this court.²

On January 21, 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, the district court

¹See North Carolina v. Alford, 400 U.S. 25 (1970).

²Dudo v. State, Docket No. 34983 (Order of Affirmance, July 12, 2001).

appointed counsel to represent appellant. Counsel filed a supplemental brief on behalf of appellant. The State responded to the supplemental brief, and later filed an opposition to the supplemental brief, to which appellant replied. On July 19, 2001, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that his plea was unknowingly and involuntarily entered. Specifically, appellant argued that, pursuant to NRS 178.415, the district court was required to have him found competent by two psychiatrists and/or two psychologists before accepting his plea. Appellant essentially raised this claim in a prior motion, and this court considered and rejected it on the merits on appeal. The doctrine of the law of the case prevents further litigation of this issue.³

Appellant also claimed that, because he was incompetent, the district court lacked jurisdiction to convict and sentence him. As discussed, appellant's competency claim was determined to lack merit.

Next, appellant raised eleven claims of ineffective assistance of counsel. 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, and that the deficient performance

³Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

prejudiced the defense.⁴ When the conviction is the result of a guilty plea, in order to show prejudice 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.⁵ This court need not consider both prongs of the test if the petitioner makes an insufficient showing on either prong.⁶

First, appellant claimed that his counsel was ineffective for failing to ensure that appellant received two psychiatric evaluations pursuant to NRS 178.415. As previously determined, reasonable doubt did not exist as to appellant's competence, and accordingly the statutory procedure required by NRS 178.415 was not triggered. Therefore, appellant failed to demonstrate that counsel's performance fell below an objective standard of reasonableness, and counsel was not ineffective in this regard.

Second, appellant claimed that his counsel was ineffective for: (1) allowing appellant to "plead guilty and be sentenced while incompetent;" and (2) failing to present evidence that appellant was not competent in the form of expert witnesses and appellant's testimony at the

⁴Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

⁵Kirksey, 112 Nev. at 988, 923 P.2d at 1107 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

⁶Strickland, 466 U.S. at 697.

status check held on November 30, 1998. To the extent that this claim is supported by factual allegations, it is belied by the record.⁷ Because appellant was on medication, in "an abundance of caution" counsel requested that the district court appoint a psychiatrist to determine if appellant was legally competent. The district court did so, and appellant was found competent. Therefore, appellant failed to demonstrate that counsel's performance fell below an objective standard of reasonableness, and counsel was not ineffective in this regard.

Third, appellant claimed that his counsel was ineffective because prior to entry of appellant's guilty plea, counsel informed appellant of the method by which the Nevada State Prison system applies good time and work time credits to shorten prison sentences. The plea agreement stated that appellant could be sentenced to life with the possibility of parole or a term of five to fifteen years. Accordingly, counsel's discussion with appellant regarding the application of good time and work credit in the event the district court imposed the lesser sentence was appropriate. Therefore, appellant failed to demonstrate that counsel's performance fell below an objective standard of reasonableness, and counsel was not ineffective in this regard.

Fourth, appellant claimed that his counsel was ineffective because he "promised" appellant "a plea deal" whereby appellant could plead guilty to battery with substantial bodily harm and receive a

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

sentence of one to six years, and told appellant that "he would absolutely not receive a life sentence under the plea bargain." Appellant signed the plea agreement which stated that he was pleading guilty to first degree kidnapping, he was subject to a sentence of either life with the possibility of parole or a term of five to fifteen years, that the sentence would be determined by the district court, and that he had not been promised a particular sentence. The district court conducted a thorough plea canvass at which appellant confirmed that he understood the charge, the potential sentence, that his sentence would be determined by the district court, and that he was entering his plea freely and voluntarily.⁸ Accordingly, appellant failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness. Additionally, in exchange for his plea, the State dropped the original charges of robbery with the use of a deadly weapon and coercion with the use of a deadly weapon, and dropped the deadly weapon enhancement to the kidnapping charge.⁹ Appellant confirmed during the plea canvass that one of the reasons he was entering the plea was to avoid a possible harsher penalty if he went to trial on the

⁸See Lundy v. Warden, 89 Nev. 419, 422, 514 P.2d 212, 213-14 (1973) ("When an accused expressly represents in open court that his plea is voluntary, he may not ordinarily repudiate his statements to the sentencing judge.").

⁹On August 10, 1998, the district court had granted in part appellant's pre-trial petition for a writ of habeas corpus and dismissed a count of battery with substantial bodily harm.

original charges and was convicted. Accordingly, appellant did not show that but for any alleged errors he would not have pleaded guilty and insisted on going to trial, and counsel was not ineffective in this regard.

Fifth, appellant claimed that his counsel was ineffective for failing to investigate whether the victim was an unwilling witness and had tried to withdraw her complaint against appellant. According to appellant, because of this failure to investigate, counsel did not "formulate a viable trial defense and insist upon a jury trial." Appellant failed to show that such an investigation would have produced evidence which would have led counsel to change his recommendation as to the plea.¹⁰ Appellant claimed the victim told counsel that the State was going forward on the charges against her wishes, and that the incident was the result of a "misunderstanding." Even assuming the victim did so inform counsel, that information would not have "removed criminal intent" as appellant claimed. The basis of the Alford plea was what the State could prove at trial. At the plea hearing, the State informed the district court that it was prepared to prove beyond a reasonable doubt that appellant

¹⁰See Hill, 474 U.S. at 59 ("[W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.").

kidnapped the victim, beat her, held a knife to her throat, took her money and jewelry, made her take off her clothes and told her to wait in the car while he went into a store to pay for gas and buy cigarettes, then chased her when she ran naked and bleeding into a neighboring convenience store screaming that appellant was going to kill her. Accordingly, appellant failed to show that but for counsel's alleged lack of investigation appellant would not have pleaded guilty and insisted on going to trial. Therefore, counsel was not ineffective in this regard.

Sixth, appellant claimed that his counsel's ineffectiveness resulted in appellant being "left with no representation," and therefore he was "forced . . . to plead guilty to an offense he wasn't guilty of." To the extent that this claim is supported by factual allegations, it is belied by the record.¹¹ Appellant himself acknowledged that he and counsel had been in communication. Counsel filed a pre-trial petition for a writ of habeas corpus on behalf of appellant which resulted in one of the original charges being dismissed. As discussed, counsel was aware of the fact that appellant had been placed on medication and as a result requested that the district court order a psychiatric evaluation. Counsel appeared at all of the district court proceedings and negotiated a plea agreement. Moreover, as also discussed, the record reflects that appellant's plea was valid. Therefore, appellant did not demonstrate that counsel's

¹¹See Hargrove, 100 Nev. 498, 686 P.2d 222.

performance fell below an objective standard of reasonableness, and counsel was not ineffective in this regard.

Seventh, appellant claimed that his counsel was ineffective for failing to have the victim testify at either the plea hearing or at the sentencing hearing. This claim is without merit. The purpose of the plea canvass is for the district court to address "the defendant personally and determin[e] that the plea is made voluntarily with understanding of the nature of the charge and consequences of the plea," not to take testimony.¹² At the sentencing hearing, the victim is afforded an opportunity to appear and reasonably express any views concerning the crime.¹³ It is the victim's decision whether or not to appear at sentencing; the defense could not compel her to do so. Therefore, appellant failed to demonstrate that counsel's performance fell below an objective standard of reasonableness, and counsel was not ineffective in this regard.

Eighth, appellant claimed that his counsel was ineffective for failing to call witnesses and present mitigating evidence at the sentencing hearing. Specifically, appellant named twenty-nine people he claimed would have testified to appellant's good character and history of mental illness. At a sentencing hearing, the district court has "the authority . . . to consider any reliable and relevant evidence."¹⁴ The district court must

¹²See NRS 174.035(1).

¹³See NRS 176.015(3).

¹⁴NRS 176.015(6).

"[a]fford counsel an opportunity to speak on behalf of the defendant" and "[a]ddress the defendant personally and ask him if he wishes to make a statement on his own behalf and to present any information in mitigation of punishment."¹⁵ At sentencing, appellant's counsel argued that the district court should impose the lesser sentence because of appellant's history of mental illness, his "tragic family circumstances," and the fact that he did not have an extensive criminal record. Counsel also related his personal observation that due to the steady psychiatric care and medication appellant had received since his arrest, appellant was a "markedly different person" than he had been when counsel met him. Appellant was also given the opportunity to make a statement during which he addressed his history of mental instability. Appellant failed to demonstrate that, even if the district court had allowed the defense to call any of the twenty-nine character witnesses referred to by appellant, their testimony would have supplied the district court with any additional information resulting in a lesser sentence. Accordingly, appellant failed to show that he was prejudiced, and counsel was not ineffective in this regard.

Ninth, appellant claimed that his counsel was ineffective for failing to ensure that appellant appeared before the district court "in a non-drugged natural state." Specifically, appellant argued that he was "so heavily medicated" he was unable to show remorse which resulted in the

¹⁵NRS 176.015(2).

district court imposing an "extreme and harsh sentence." Appellant did not allege that he did not consent to the medication he received; contrary to appellant's assertions, there is no general due process right to appear before the court in a non-medicated condition.¹⁶ Additionally, appellant's claim that he was unable to show remorse is belied by the record.¹⁷ At the sentencing hearing, appellant stated that he could not "apologize enough" and expressed his remorse repeatedly. Moreover, the record reflects that the district court knew that appellant was on medication. In fact, in sentencing appellant, the court noted appellant's own statements that he had committed the crime because he had not been on medication, and that this was not the first time he had acted out as a result of failing to take his medication. The district court stated that appellant needed supervision and the threat of punishment as motivation to avoid such behavior, and that the court was sentencing appellant accordingly. Therefore, appellant failed to show that the defense was prejudiced, and counsel was not ineffective in this regard.

Tenth, appellant claimed that his counsel was ineffective for failing to advise appellant of his right to file a direct appeal. The written plea agreement informed appellant of his limited right to appeal.¹⁸ Counsel does not have "an absolute duty to advise a defendant who pleads

¹⁶See generally Washington v. Harper, 494 U.S. 210 (1990).

¹⁷See Hargrove, 100 Nev. 498, 686 P.2d 222.

¹⁸See Davis v. State, 115 Nev. 17, 19, 974 P.2d 658, 659 (1999).

guilty of the right to appeal," and under these circumstances counsel did not have an obligation to so inform appellant.¹⁹ Accordingly, appellant failed to demonstrate that counsel's performance fell below an objective standard of reasonableness, and counsel was not ineffective in this regard.

Eleventh, appellant claimed that his counsel was ineffective for failing to assist appellant in his post-conviction motion to withdraw his guilty plea, and failing to give appellant a copy of the psychiatric evaluation. Appellant cannot show that but for these alleged errors he would not have pleaded guilty and insisted on going to trial. Therefore, appellant failed to show that the defense was prejudiced, and counsel was not ineffective in this regard.

Finally, appellant claimed that the district court improperly informed appellant that he could not file a direct appeal. We conclude that the district did not err in dismissing this claim because it did not challenge the validity of appellant's guilty plea or allege ineffective assistance of counsel.²⁰ Moreover, as a separate and independent ground to deny relief, the record does not reflect that the district court ever

¹⁹See Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223-24 (1999).

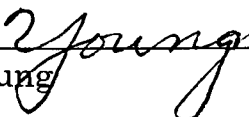
²⁰See NRS 34.810(1)(a) (this court shall dismiss a petition if "[t]he petitioner's conviction was upon a plea of guilty . . . and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.").

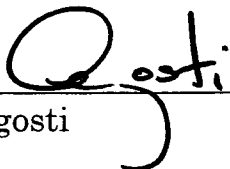
informed appellant that he could not file a direct appeal.²¹ Additionally, as noted, appellant was informed of his limited right to appeal by the written plea agreement.

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.²² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

cc: Hon. Joseph T. Bonaventure, District Judge
Attorney General/Carson City
Clark County District Attorney
David E. Dudo
Clark County Clerk

²¹See Hargrove, 100 Nev. 498, 686 P.2d 222.

²²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).