

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN A. MICHAUD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39005

FILED

DEC 13 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
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.

Appellant was initially convicted, pursuant to a guilty plea, of first degree kidnapping and sexual assault, and sentenced to two consecutive terms of life in the Nevada State Prison with the possibility of parole after ten years. On appeal, this court determined that appellant's plea canvass was inadequate and remanded the case with instructions to the district court to allow appellant to withdraw his guilty plea.¹

On August 2, 2000, the district court, pursuant to a guilty plea, entered an amended judgment of conviction for first degree kidnapping and sexual assault, and again sentenced appellant to two consecutive terms of life in the Nevada State Prison with the possibility of parole after ten years. Appellant was credited with 2,776 days time served. Appellant did not file a direct appeal challenging the amended judgment of conviction or sentence.

¹Michaud v. State, Docket No. 26066 (Order of Remand, May 27, 1999).

On July 26, 2001, 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 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On December 4, 2001, the district court denied appellant's petition. This appeal followed.

In his petition, appellant first 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.² 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.³

First, appellant claimed that his counsel was ineffective for failing to object to the amended information that was allegedly illegally filed. Specifically, appellant contended that he was never permitted to withdraw his original guilty plea, and thus, was subjected to double jeopardy when the State filed an amended information. The record belies appellant's contentions.⁴ Appellant's original guilty plea was withdrawn

²See Strickland v. Washington, 466 U.S. 668 (1984); see also Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

³See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey, 112 Nev. 980, 923 P.2d 1102.

⁴See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

and an amended information was filed.⁵ Thereafter, appellant knowingly and voluntarily signed a second guilty plea agreement, was given a thorough plea canvass, and was convicted and sentenced. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed his counsel was ineffective for having appellant's motion to dismiss removed from the district court's calendar. Specifically, appellant contended that the motion would have been successful because it presented the argument that the delay in deciding appellant's direct appeal violated his right to a speedy trial and left him unable to locate potential witnesses for his new trial. We conclude that the district court did not err in denying this claim. The record indicates that appellant's counsel had appellant's motion removed from the district court's calendar because some of the facts alleged in appellant's motion were inaccurate. Further, appellant failed to specify the names or potential testimony of any prospective defense witnesses he intended to call. Thus, we conclude that appellant failed to demonstrate that the motion would have been successful.⁶

⁵See NRS 173.095(1) ("The court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced").

⁶See Lopez v. State, 105 Nev. 68, 86-87, 769 P.2d 1276, 1288-1289 (1989) (holding that to be entitled to relief for an excessive delay in processing an appeal, the defendant must show that he is unable to present an adequate appeal because of the delay, or that he will be unable to adequately defend in the event the conviction is reversed and retrial is ordered).

Third, appellant claimed his counsel was ineffective for advising him to waive his right to a speedy trial. Specifically, appellant contends that by waiving his right to a speedy trial, the prosecutor was allowed additional time to file an amended information seeking a habitual criminal sentence enhancement immediately before appellant's trial date. This claim lacks merit. NRS 207.016(2) specifically permits the State to file a notice of intent to seek habitual criminal sentence enhancement even after the defendant has been convicted of the primary offense.⁷ In the instant case, appellant had the benefit of such notice prior to trial and voluntarily decided to plead guilty to avoid being potentially subjected to the habitual criminal sentence enhancement. Therefore, appellant suffered no prejudice.

Fourth, appellant claimed his counsel was ineffective at sentencing for failing to (1) present witnesses on appellant's behalf including housing officers, counselors, and free staff who would have allegedly testified that appellant was non-violent, participated in religious activities, and posed no threat to society, and (2) have appellant psychiatrically evaluated and have the results presented in court. We conclude that appellant is not entitled to relief on this claim. Appellant failed to specify the names of any of the witnesses that he claimed should have been called, and failed to demonstrate that the results of a

⁷See generally Oyler v. Boles, 368 U.S. 448, 452 (1962) (stating that due process does not require notice regarding sentence enhancement prior to the trial on the substantive offense; rather, it is enough that a defendant receive notice and the opportunity to be heard relative to the recidivist charge).

psychiatric evaluation would have benefited the defense or changed the results of the proceedings.

Fifth, appellant claimed his counsel was ineffective for allegedly informing appellant that he had no right to a direct appeal. The record on appeal belies appellant's claim, and therefore appellant is not entitled to relief.⁸ Appellant was informed about his limited right to appeal in the written guilty plea agreement and affirmed that he understood he had the right to appeal during the plea canvass.

Next, appellant contended that his guilty plea was involuntarily and unknowingly entered because he received ineffective assistance of counsel. Specifically, appellant claimed that his counsel was ineffective because he failed to explain the elements of the charged offenses and the habitual criminal statute to him, which allowed appellant to be tricked and coerced into pleading guilty.

A guilty plea is presumptively valid, and the petitioner has the burden of establishing that the plea was not entered knowingly and intelligently.⁹ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.¹⁰ We conclude that the record on appeal belies appellant's contention that he was not informed of the elements of the charged offenses and the habitual criminal statute.¹¹ The guilty plea agreement

⁸See Hargrove, 100 Nev. 498, 686 P.2d 222.

⁹Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

¹⁰See id. at 272, 721 P.2d at 368.

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

stated that trial counsel explained the elements of the offenses, the consequences of the plea, and the waiver of rights set forth in the plea agreement. During the plea canvass, appellant admitted to the specific facts of the offenses, and affirmed that he had read and understood the plea agreement and discussed the elements of the offenses and possible defenses with his attorney. Additionally, with regard to the habitual criminal sentence enhancement, the third amended information informed appellant that upon finding appellant guilty of the primary charge, the State intended to pursue the habitual criminal sentence enhancement and present the court with appellant's prior felony convictions for armed burglary, armed robbery with a firearm, burglary of a dwelling, and sexual battery. Further, during the plea canvass, the district court thoroughly explained the fact that had the State pursued a habitual criminal sentence enhancement, appellant would have been subjected to a potential term of life in prison without the possibility of parole. "A defendant's desire to plead guilty to an original charge in order to avoid the threat of the habitual criminal statute will not give rise to a claim of coercion."¹² Moreover, an appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing.¹³ Thus, appellant failed to demonstrate that his counsel was ineffective or that his plea was not knowingly and voluntarily entered. Moreover, since by pleading guilty appellant avoided the possibility of

¹²Hargrove, 100 Nev. 498, 503, 686 P.2d 222, 225-26 (quoting Schmidt v. State, 94 Nev. 665, 667, 584 P.2d 695, 696 (1978)).


¹³See State v. Langarica, 107 Nev. 932, 934, 822 P.2d 1110, 1112 (1991) (quoting Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975)).


being sentenced as a habitual criminal, we conclude that appellant suffered no prejudice.

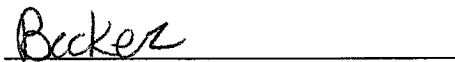
Finally, appellant contended that his guilty plea was involuntary because he entered it while he was confined without bail under oppressive, cruel, and unusual conditions. We conclude that appellant is not entitled to relief on this claim. With regard to bail, by pleading guilty, appellant waived all errors, including the deprivation of constitutional rights that occurred prior to entry of his guilty plea.¹⁴ Moreover, appellant failed to provide facts demonstrating how his confinement was oppressive, cruel or unusual, or that his guilty plea was coerced in any way.¹⁵

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.¹⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, V.C.J.
Maupin


_____, J.
Shearing


_____, J.
Becker

¹⁴See Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975).

¹⁵See Hargrove, 100 Nev. 498, 686 P.2d 222.

¹⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Michael A. Cherry, District Judge
Attorney General/Carson City
Clark County District Attorney
John A. Michaud
Clark County Clerk