

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID L. SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39424

FILED

SEP 30 2002

ORDER OF AFFIRMANCE

JANICE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
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 September 11, 2000, the district court convicted appellant, pursuant to a guilty plea, of one count of voluntary manslaughter with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of four to ten years in the Nevada State Prison. This court affirmed the judgment of conviction on appeal.¹

On January 3, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, and appellant filed a reply. 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 March 26, 2002, the district court denied appellant's petition.² This appeal followed.

¹Smith v. State, Docket No. 36870 (Order of Affirmance, February 21, 2001).

²The March 11, 2002 minutes indicate that the district court received a response to the petition submitted by appellant's former trial counsel. This response is not a part of the record on appeal. This court

continued on next page . . .

In his petition, appellant first contended that his trial counsel was ineffective for negotiating and endorsing his guilty plea to voluntary manslaughter with the use of a deadly weapon. Appellant claimed that the deadly weapon enhancement was improper because it was a “legal fiction.” Appellant asserted that he did not use a deadly weapon to commit the killing but rather inadvertently choked the victim with his forearm. Appellant further claimed that the deadly weapon enhancement was not set forth in the original information and that he objected to the “legal fiction” of the deadly weapon enhancement at many points in the proceedings. We conclude that the district court did not err in concluding that appellant failed to demonstrate that his counsel’s performance was deficient or that he was prejudiced.³ Appellant benefited by and received consideration for accepting the negotiated plea. In exchange for his guilty plea to voluntary manslaughter with the use of a deadly weapon, appellant avoided going to trial on the charge of open murder and risking the imposition of a greater penalty. Additionally, the State agreed to

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recently held that a petitioner’s statutory rights are violated when the district court improperly expands the record with the use of an affidavit in lieu of conducting an evidentiary hearing when an evidentiary hearing is required. Mann v. State, 118 Nev. ___, 46 P.3d 1228 (2002). Although we conclude that the district court erred to the extent that it considered the response submitted by appellant’s former trial counsel, appellant was not prejudiced by the error because appellant was not entitled to an evidentiary hearing on the claims that he raised in the petition.

³Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); see also Hill v. Lockhart, 474 U.S. 52 (1985).

dismiss another district court case involving the same victim.⁴ During the plea canvass, it was discussed that a deadly weapon had not been used during the crime but that appellant was waiving any deficiencies pursuant to the negotiations. Appellant indicated that he understood the waiver and the negotiations and that he was entering his plea to voluntary manslaughter with the use of a deadly weapon in order to take advantage of a favorable plea bargain. This waiver is also contained in the written guilty plea agreement signed by appellant. Pursuant to the negotiations, the information was properly amended to one count of voluntary manslaughter with the use of a deadly weapon. Under these circumstances, appellant will not now be heard to complain that the deadly weapon enhancement was improper. Therefore, we conclude that appellant is not entitled to relief on this claim.

Second, appellant claimed that the district court failed to inform him that the State would have had to prove beyond a reasonable doubt that a deadly weapon was used in order to enhance his sentence had the case gone to trial. This claim fell outside the scope of claims permissible in a habeas corpus petition based upon a guilty plea.⁵ To the extent that appellant was challenging the validity of his plea, appellant failed to carry his burden of demonstrating that his plea was invalid.⁶ The district court was not required to canvass appellant on the burden of proof regarding the deadly weapon enhancement because in this case the deadly

⁴In the other district court case, appellant was charged with domestic violence for a prior choking incident involving the same victim.

⁵NRS 34.810(1)(a).

⁶Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

weapon enhancement was only made applicable as a part of the plea negotiations. Appellant affirmatively indicated during the plea canvass that he understood that the deadly weapon enhancement was a legal fiction that he was utilizing in order to avoid the risk of going to trial on the original charge of open murder. Therefore, appellant is not entitled to relief on this claim.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court abused its discretion when it accepted his guilty plea because the deadly weapon enhancement was a legal fiction, was not charged in the original information, and was denied by appellant.⁷ We conclude that the district court did not err in denying this claim because appellant failed to demonstrate that his counsel's performance was deficient or that these issues had a reasonable probability of success on appeal.⁸ The district court did not abuse its discretion in accepting appellant's guilty plea.⁹ Appellant was thoroughly canvassed regarding the plea negotiations and the waiver of deficiencies regarding the deadly weapon enhancement. Appellant knowingly and voluntarily entered a guilty plea to the crime of voluntary manslaughter

⁷To the extent that appellant raised any of these issues independently from his ineffective assistance of appellate counsel claim, appellant waived these issues. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). We nevertheless address appellant's issues in connection with his contention that appellate counsel should have raised the issues on direct appeal.

⁸Kirksey, 112 Nev. 980, 923 P.2d 1102; see also Jones v. Barnes, 463 U.S. 745 (1983).

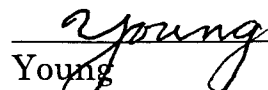
⁹See Breault v. State, 116 Nev. 311, 996 P.2d 888 (2000).

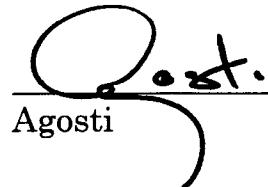
with the use of a deadly weapon.¹⁰ The information was properly amended to include notice of the deadly weapon enhancement pursuant to the plea negotiations. Therefore, appellant was not entitled to relief.

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.¹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

cc: Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
David Leo Smith
Clark County Clerk

¹⁰Bryant, 102 Nev. 268, 721 P.2d 364.

¹¹Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).