

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTHUR ALLEN CAREY,
Appellant,
vs.
FRANKIE SUE DEL PAPA, OFFICE OF
THE ATTORNEY GENERAL, STATE
OF NEVADA,
Respondent.

No. 39432

FILED

JAN 16 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
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 July 3, 2001, the district court convicted appellant, pursuant to a guilty plea, of one count of possession or control of a dangerous weapon by an incarcerated person. The district court sentenced appellant to serve a maximum term of three years with minimum parole eligibility after one year had been served in the Nevada State Prison. The sentence was imposed to run consecutively to the sentence of imprisonment appellant was serving at the time. No direct appeal was taken.

On October 29, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant also filed a motion for the appointment of counsel and a motion for an evidentiary hearing. 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 February

25, 2002, the district court denied appellant's petition. This appeal followed.

In his petition, appellant asserted that his guilty plea was not knowingly and voluntarily entered because he was not advised of his right to remain silent at an earlier prison disciplinary hearing and because he was allegedly promised that in exchange for pleading guilty plea at the prison disciplinary hearing that he would not be referred for criminal prosecution. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.¹ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.² Based upon our review of the record on appeal, we conclude that appellant failed to carry his burden of demonstrating that his plea was not entered knowingly and voluntarily. By pleading guilty appellant waived any claims relating to the deprivation of constitutional rights that occurred prior to the entry of his guilty plea.³ Appellant failed to demonstrate that any of the alleged violations relating to the prior prison disciplinary proceedings rendered his decision to enter a guilty plea in the instant criminal matter involuntary or unknowing.⁴

¹Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

²Hubbard, 110 Nev. at 675, 877 P. 2d at 521.

³Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987); Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975).

⁴To the extent that appellant sought to challenge the prison disciplinary proceedings, appellant's challenge was improperly raised in
continued on next page . . .

Next, appellant asserted that he received 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. 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.⁵ The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁶

First, appellant claimed that his counsel was ineffective for failing to investigate and file a motion to dismiss the charges. Appellant asserted that if his counsel had investigated he would have learned that appellant was not informed of the right to remain silent at the prior prison disciplinary hearing and was allegedly promised that no referral for criminal prosecution would be made. Appellant believed that if the prior prison disciplinary hearing would have been excluded that the results of the proceedings would have been different. We conclude that the district court did not err in denying this claim. Appellant failed to demonstrate his counsel was ineffective because he failed to demonstrate a reasonable probability, that but for his counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. We note that by

... continued

the habeas corpus petition challenging the validity of his judgment of conviction in the criminal matter.

⁵Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

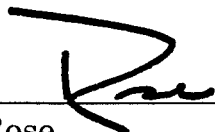
⁶Strickland v. Washington, 466 U.S. 668, 697 (1984).


entry of his guilty plea, appellant avoided the possibility that he would be adjudicated a habitual criminal and receive a harsher sentence.

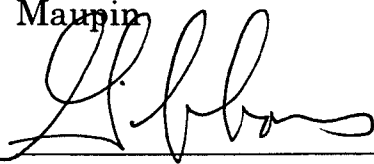
Second, appellant claimed that his attorney induced his guilty plea by informing appellant that if he went to trial the State would seek habitual criminal adjudication and that appellant would be convicted and receive consecutive time as a result. We conclude that the district court did not err in denying this claim. This court has held that "a defendant's desire to plead guilty to an original charge in order avoid to the threat of the habitual criminal statute will not give rise to a claim of coercion."⁷ Thus, appellant failed to demonstrate that his attorney's performance was deficient or that he was prejudiced.

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.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

⁷Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225-26 (1984) (quoting Schmidt v. State, 94 Nev. 665, 667, 584 P.2d 695, 696 (1978)).

⁸Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Richard Wagner, District Judge
Attorney General/Carson City
Arthur Allen Carey
Pershing County Clerk