IN THE SUPREME COURT OF THE STATE OF NEVADA

JACOB A. MONTGOMERY, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 39120
JACOB A. MONTGOMERY A/K/A JAMES ALAN PRITCHARD, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 39206
JACOB A. MONTGOMERY A/K/A JAMES ALAN PRITCHARD, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 39536

FILED

FEB 19 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Docket No. 39120 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Docket No. 39206 is a proper person appeal from an order of the district court denying appellant's motion for a new trial. Docket No. 39536 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. We elect to consolidate these appeals for disposition.[1]

[1]See NRAP 3(b).

On August 30, 2001, the district court convicted appellant, pursuant to an Alford plea,[2] of one count of leaving the scene of an accident and one count of child abuse and neglect. The district court sentenced appellant to serve a term of 28 to 72 months in the Nevada State Prison for leaving the scene of an accident and a concurrent term of one year for child abuse and neglect. No direct appeal was taken.

Docket No. 39120

On October 18, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On November 27, 2001, appellant filed a supplement to the petition.[3] 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 January 3, 2002, the district court denied appellant's petition. This appeal followed.

Appellant first raised several claims challenging the validity of his plea. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[4] This court will not reverse a district court's determination

---

[2]North Carolina v. Alford, 400 U.S. 25 (1970).

[3]The district court did not expressly provide appellant permission to file a supplement. See NRS 34.750(5). However, the order of the district court, prepared by the State, indicates that the district court had considered all "briefs, transcripts, arguments of counsel, and documents on file herein." Thus, this court has considered all of the arguments raised in the supplement.

[4]Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

concerning the validity of a plea absent an abuse of discretion.[5] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[6] In accepting an Alford plea, the district court must determine that there is a factual basis for the plea, and resolve the conflict between waiver of trial and the claim of innocence.[7]

Appellant first claimed that the plea canvass was inadequate. Specifically, appellant claimed that the district court failed to: (1) ask appellant if he understood the waiver of constitutional rights; (2) establish that the plea was not coerced; (3) ask appellant if he understood the consequences of his plea; (4) ask appellant if he was under the influence of alcohol or drugs at the time he entered his plea; (5) ask appellant if he had adequate time to consult with his attorney and if his attorney had explained the elements to him; and (6) explain the elements of the offense and obtain a factual admission to the elements.

Based upon our review of the record, we conclude that appellant failed to carry his burden of demonstrating that his plea was not entered knowingly and voluntarily. The plea canvass was adequate and provided the district court a sufficient factual basis to make a determination that the plea was entered knowingly and voluntarily. During the plea canvass, the district court informed appellant about the

---

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

[6]State v. Freese, 116 Nev. 1097, 1104, 13 P.3d 442, 447 (2000).

[7]Tiger v. State, 98 Nev. 555, 558, 654 P.2d 1031, 1033 (1982); see also State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996).

potential penalties he faced by entry of the plea.[8] The district court further informed appellant that by entry of his plea he waived the right to a speedy and public jury trial, the right to confront and cross-examine witnesses, the right to call witnesses on his own behalf, and the right to remain silent. The State presented a factual basis for the Alford plea, and appellant affirmatively indicated that he was pleading guilty to leaving the scene of an accident and child abuse and neglect in order to avoid prosecution on a charge of battery with the use of a deadly weapon. Appellant answered all of the questions put to him in an appropriate fashion, and there is no indication on the face of the record that appellant was not able to understand the proceedings. The written guilty plea agreement, which appellant signed, stated that appellant was not under the influence of any substance that would impair his ability to understand the plea agreement or the proceedings surrounding entry of his guilty plea. The written guilty plea agreement further stated that appellant's attorney had explained the elements of the offenses and possible defenses and that the plea was not entered under duress or coercion. Therefore, the totality of the circumstances supports the district court's determination

---

[8]During the plea canvass, appellant was informed that he faced a potential penalty of one to six years in the Nevada State Prison for the offense of leaving the scene of an accident. However, the actual potential penalty was a term of two to fifteen years. See NRS 484.219. The discrepancy was noted during the plea canvass, and appellant was informed that the district court would use the lesser term as set forth in the guilty plea agreement. Appellant received a substantial benefit as a result of this concession and may not complain about this discrepancy. See generally Breault v. State, 116 Nev. 311, 314, 996 P.2d 888, 889 (2000).

that appellant's plea was entered knowingly and voluntarily. Thus, the district court did not err in determining that these claims lacked merit.

Second, appellant claimed that his plea was involuntary because he was not informed about the possibility of pursuing a defense of legal insanity. Appellant appeared to claim that he would not have entered his Alford plea if he had understood that the 1995 legislative amendment abolishing the availability of a plea of not guilty by reason of insanity was unconstitutional.[9] Appellant asserted that he had a history of mental illness.

Based upon our review of the record on appeal, we conclude that appellant failed to demonstrate that his plea was involuntary because he was not informed about the possibility of pursuing a defense of legal insanity. Appellant failed to provide any specific facts in support of this claim.[10] The record does not indicate that appellant attempted and was denied, or even expressed a desire, to enter a plea of not guilty by reason of insanity. Appellant failed to demonstrate that the legislature's attempt to abolish the defense of legal insanity influenced his decision to plead guilty in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant raised several claims of ineffective assistance of counsel.[11] To state a claim of ineffective assistance of counsel sufficient

---

[9]See Finger v. State, 117 Nev. 548, 575, 27 P.3d 66, 84 (2001), cert. denied, 534 U.S. 1127 (2002).

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

[11]To the extent that appellant attempted to raise any of the claims discussed below as independent claims, these claims are not properly raised in the instant habeas corpus petition. See NRS 34.810(1)(a).

continued on next page . . .

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 there is a reasonable probability that, but for counsel's errors, the results of the proceedings would have been different.[12] In a challenge to a conviction based upon a guilty plea, 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.[13] The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.[14]

First, appellant claimed that his trial counsel was ineffective for informing him that the offense of leaving the scene of an accident "is a liability law" and that the State did not have to prove every element of the offense to gain a conviction at trial. It appears that appellant argued that the offense of leaving the scene of an accident required a specific intent. The offense of leaving the scene of an accident does not require that the State prove that appellant possessed a specific intent when he departed the accident scene. Rather, at trial, the State would have had to prove that appellant, the driver of a vehicle involved in an accident, failed to

---

. . . *continued*
However, we will address these claims to the extent that they were raised as claims relating to the effective assistance of counsel.

[12]Strickland v. Washington, 466 U.S. 668, 687 (1984).

[13]Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

[14]Strickland, 466 U.S. at 697.

stop at the scene and instead left the scene of the accident without complying with the requirements of NRS 484.223.[15] By entry of his plea, appellant waived the State's burden of proving the elements of the offense. Further, during the plea canvass, the State provided a factual basis for the plea.[16] Thus, appellant failed to demonstrate that his counsel was ineffective in this regard.

---

[15]NRS 484.219(1) states:

> The driver of any vehicle involved in an accident on a highway or on premises to which the public has access resulting in bodily injury to or the death of a person shall immediately stop his vehicle at the scene of the accident or as close thereto as possible, and shall forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of NRS 484.223.

[16]The State informed the district court that if the case was to go to trial that it would be prepared to show:

> [O]n or about May 24th of the year 2000, here in Clark County, Nevada, that the defendant was driving a Pontiac Firebird Trans Am vehicle, bearing a North Carolina license plate, that the defendant, in the process of driving that vehicle, did intentionally hit a child, being approximately 14 years of age, by the name of Frederick Spangler . . . that after hitting said child, collision resulting in bodily injury to such child, that the defendant did not stop the vehicle, render assistance, but, in fact, fled the scene.

During the plea canvass, appellant admitted that he had left the scene of the accident, although appellant did not admit that he had deliberately hit Spangler with his vehicle.

Second, appellant claimed that his trial counsel was ineffective for obtaining a continuance because the continuance caused a violation of his right to a speedy trial. Appellant's trial counsel requested a continuance because she was not ready for trial as she had not had an opportunity to speak with the victim. Appellant failed to demonstrate that trial counsel's performance was unreasonable. Appellant further failed to demonstrate that absent this alleged mistake that he would not have pleaded guilty and would have insisted on going to trial. Thus, appellant failed to demonstrate that his counsel was ineffective in this regard.

Third, appellant claimed that his trial counsel was ineffective for failing to challenge the plea canvass and refusing to assist appellant in filing a presentence motion to withdraw a guilty plea to challenge the plea canvass. As discussed above, the plea canvass was adequate. Thus, appellant failed to demonstrate that his counsel was ineffective in this regard.

Fourth, appellant claimed that his trial counsel was ineffective for failing to ensure that appellant received all of the presentence credit that he was entitled to receive. Appellant offered no specific facts in support of this claim.[17] Thus, appellant failed to demonstrate that his counsel was ineffective in this regard.

Fifth, appellant claimed that his trial counsel was ineffective for failing to file an appeal on his behalf "after holding a conversation with defendant." Appellant claimed that his trial counsel informed him that he would not offer any assistance on appeal issues. Our preliminary review

---

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

of the record on appeal revealed that the district court may have erroneously denied appellant's petition without holding an evidentiary hearing. Appellant was entitled to an evidentiary hearing if he raised claims that, if true, would have entitled him to relief and if his claims were not belied by the record.[18] This court has held that if a criminal defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on defendant's behalf.[19] Accordingly, on January 13, 2004, this court ordered the State to show cause why the matter should not be remanded to the district court for an evidentiary hearing to determine whether or not counsel's performance fell below an objective standard of reasonableness. The State responded and stated that it did not oppose an order of remand for the limited purpose of determining whether trial counsel was ineffective for failing to pursue a direct appeal. Accordingly, we remand this matter to the district court for the limited purpose of conducting an evidentiary hearing to determine whether appellant's counsel failed to file a direct appeal after appellant expressed an interest in a direct appeal. If the district court determines that appellant was denied his right to a direct appeal, the district court shall appoint counsel to represent appellant and shall permit appellant to file a petition for a writ of habeas corpus raising issues appropriate for direct appeal.[20]

Finally, appellant contended that the judgment of conviction contained an error because it stated that the conviction was pursuant to a

---

[18]See id.

[19]Thomas v. State, 115 Nev. 148, 151, 979 P.2d 222, 224 (1999); Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

[20]See Lozada v. State, 110 Nev. 349, 359, 871 P.2d 944, 950 (1994).

guilty plea, when in actuality, appellant entered an Alford plea. Under Nevada law, "whenever a defendant maintains his or her innocence but pleads guilty pursuant to Alford, the plea constitutes one of nolo contendere."[21] A plea of nolo contendere authorizes a court to treat the defendant as if he were guilty.[22] Thus, the failure of the district court to specify the nature of the plea in the judgment of conviction is of no significance given the facts in the instant case.

Accordingly, we affirm the district court's order in part and reverse and remand in part for further proceedings as specified above.

Docket No. 39206

On November 27, 2001, appellant filed a proper person motion for a new trial in the district court. On January 2, 2002, appellant filed a supplement to the motion. The State opposed the motion. On January 22, 2002, the district court summarily denied appellant's motion. This appeal followed.

Because appellant's conviction was based upon a guilty plea, a motion for a new trial is not the appropriate vehicle to seek relief from his conviction.[23] To the extent that appellant's motion may be construed to be a post-conviction petition for a writ of habeas corpus, appellant's petition was successive, and appellant failed to demonstrate good cause.[24] Therefore, we affirm the order of the district court denying appellant's motion.

---

[21]Gomes, 112 Nev. at 1479, 930 P.2d at 705.

[22]Id.

[23]See NRS 176.515.

[24]See NRS 34.810(2); Lozada, 110 Nev. at 353, 871 P.2d at 946.

Docket No. 39536

On February 7, 2002, appellant filed a second 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 April 16, 2002, the district court denied the petition. This appeal followed.

Appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus raising the same claims and those claims were decided on the merits.[25] Therefore, appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice.[26] Appellant did not attempt to show cause why he should be permitted to raise the same claims in a successive petition. Thus, we affirm the order of the district court denying appellant's petition.

Conclusion

Having reviewed the records on appeal, and for the reasons set forth above, we conclude that briefing and oral argument are unwarranted.[27] Accordingly, we

ORDER the judgment of the district court in Docket No. 39120 AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order and

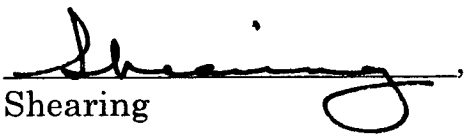
---

[25]NRS 34.810(2).

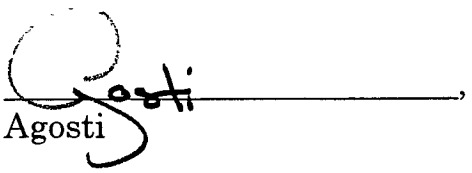
[26]See NRS 34.810(3).

[27]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

ORDER the judgments of the district court in Docket Nos. 39206 and 39536 AFFIRMED. [28]


Shearing, C.J.


Becker, J.


Agosti, J.

cc: Hon. Michael L. Douglas, District Judge
Jacob A. Montgomery
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

---

[28]We have considered all proper person documents filed or received in these matters. We conclude that appellant is entitled only to the relief described herein. This order constitutes our final disposition of these appeals. Any subsequent appeal shall be docketed as a new matter.