IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDA IRVEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39587

FILED

APR 21 2003

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Brenda Irvey's post-conviction petition for a writ of habeas corpus. Irvey was convicted, pursuant to a guilty plea, of one count of conspiracy to rob a victim 65 or more years of age, one count of robbery of a victim 65 or more years of age, and one count of failing to stop upon the signal of a police officer. Irvey was sentenced to consecutive and concurrent terms totaling twelve years in the Nevada State Prison. She did not file a direct appeal.

Irvey contends first that her guilty plea was not entered knowingly, intelligently, or voluntarily because her counsel provided ineffective assistance. She argues particularly that counsel was ineffective for failing to investigate: (1) the nature of the charged offenses, (2) her state of mind from the time the police caught her to the time she entered her guilty plea, and (3) other legal options available to her besides the plea offer made by the State. She also argues that counsel was ineffective for failing to challenge the constitutionality of her confession to the police. We conclude that these claims lack merit.

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 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.[1]

We agree with the district court that Irvey did not demonstrate that her counsel's performance fell below an objective standard of reasonableness. The record demonstrates that counsel adequately investigated the nature of the crimes, Irvey's state of mind, and other legal alternatives available to Irvey besides pleading guilty. Specifically, the record shows that Irvey stated in her plea canvass that she understood the nature of the charges against her and understood the guilty plea memoranda she signed. The record also shows that counsel investigated Irvey's state of mind and potential defenses relating to it. Counsel filed a sentencing memorandum with the district court containing Irvey's psychological examination report and a recommendation that Irvey be given probation and be sent to an inpatient substance abuse program rather than be given a prison term. Therefore, we conclude that Irvey's claims are belied by the record.[2]

The record shows that counsel also reasonably concluded that the circumstances of Irvey's arrest and confession to the police passed constitutional muster. Although Irvey admitted to being a drug addict, she did not claim to be under the influence of drugs at the time she was apprehended or when she confessed to the crimes. Instead, she claims

---

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

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

that she was experiencing withdrawal symptoms which may have impaired her ability to cooperate with the police. This court has held that an accused's intoxication, without more, will not prevent the admission of a confession, unless the accused was so intoxicated as to be unable to understand the meaning of his or her statements.[3] Irvey did not claim to be intoxicated, and the district court observed that her argument that she may have been impaired by withdrawal effects was "quite a lot of speculating." We conclude that the district court properly found counsel's decision not to challenge the confession to be reasonable.

The district court observed that given the facts of this case, Irvey's former counsel assisted Irvey as best he could. Irvey was caught driving a getaway car identified shortly after a robbery by one of the elderly victims. When a police car signaled Irvey to pull the car over to the side of the road, she sped up instead and instigated a high-speed chase through a neighborhood before being apprehended. A police search of the car revealed several credit cards reported stolen by the elderly victims, and Irvey admitted her participation in the robberies to police.

Even assuming, however, that counsel failed to investigate these matters adequately, Irvey has not demonstrated prejudice, i.e., that further investigation would have yielded information causing her not to plead guilty and to insist on going to trial.[4] We therefore conclude that the district court did not err in denying Irvey's claims of ineffective assistance of counsel.

---

[3]Tucker v. State, 92 Nev. 486, 488, 553 P.2d 951, 952 (1976).

[4]See Ford v. State, 105 Nev. 850, 852-53, 784 P.2d 951, 952-53 (1989); see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

Irvey argues next that her guilty plea was not entered knowingly and intelligently because she was experiencing withdrawal symptoms from her drug addiction at the time she entered her plea. She argues that these symptoms clouded her judgment and that the district court erred by not specifically asking her if she was under the influence of any controlled substances at the time she entered her plea. We disagree.

A guilty plea is presumptively valid, and the defendant bears the burden of establishing that the plea was not entered knowingly and intelligently.[5] "On appeal from the district court's determination, we will presume that the lower court correctly assessed the validity of the plea, and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion."[6] Moreover, a written plea memorandum, combined with an oral canvass conducted by the district court, may establish by the totality of the circumstances that a plea is validly made.[7]

We conclude that Irvey's plea was knowingly and intelligently entered. Her guilty plea memoranda stated that she was not under the influence of any controlled substances at the time she signed them. She stated during her plea canvass that she had read and understood the memoranda and had no questions to ask about them. She also made factual admissions that she and her codefendants committed the robberies, and she stated that she felt the plea negotiations were in her best interest. The district court also made note of its observation, in its

---

[5]Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

[6]Id.

[7]State v. Freese, 116 Nev. 1097, 1106-07, 13 P.3d 442, 448-49 (2000).

order denying Irvey's petition, that she had not appeared to be impaired by drug withdrawal symptoms when she entered her plea.[8] We conclude that the district court did not err in accepting her plea.

Irvey contends next that her guilty plea was not entered voluntarily because the State overcharged her. Particularly she argues that because she was originally charged with nineteen counts, she could not risk going to trial because of the lengthy prison terms to which she might be sentenced. Thus, she argues, she was forced to take the State's plea offer to limit her exposure. She also argues that she felt compelled to accept the plea offer because if she had proceeded to trial on nineteen counts, the jury may have convicted her on the basis that she must be guilty of something because she was charged with so many counts. She claims the State's overcharging tactics amounted to a due process violation.

Appellant's counsel has failed to cite any authority for the proposition that to be charged with numerous counts violates due process.[9] Moreover, the proper procedure for relief from unsubstantiated charges is to file a pretrial petition or motion, or to challenge on direct appeal the

---

[8]A defendant is competent to enter a plea if she has (1) "'sufficient present ability to consult with [her] lawyer with a reasonable degree of rational understanding,'" and (2) "'a rational as well as factual understanding of the proceedings against [her].'" Godinez v. Moran, 509 U.S. 389, 396 (1993) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)). Moreover, a district court's competency determination will be sustained on appeal where substantial evidence exists to support it. Ogden v. State, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980).

[9]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

sufficiency of the evidence supporting a jury verdict.[10] Irvey did not file any pretrial petitions or motion on this issue and waived her right to challenge the sufficiency of the evidence supporting a jury verdict by pleading guilty.[11]

Irvey contends next that, in rejecting her allegations of ineffective assistance of counsel, the district court improperly relied on factual assertions in affidavits presented by her former counsel. She further contends that the district court's failure to hold an evidentiary hearing after former counsel submitted the affidavits improperly prevented her from cross-examining her former counsel.

Initially, we note that Irvey's post-conviction counsel below never objected to the admission of former counsel's affidavits without an evidentiary hearing. Moreover, a petitioner for post-conviction relief is entitled to an evidentiary hearing only when claims are presented that: (1) are supported by specific factual allegations; (2) are not belied or repelled by the record, and (3) if true, would entitle the petitioner to relief.[12] Even without the admission of former counsel's affidavits refuting her claims of ineffective assistance, as the discussion above illustrates, Irvey's claims

---

[10]See NRS 172.155(2); NRS 173.025. See also Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992) (stating that standard of review of sufficiency of evidence on appeal is "whether jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt").

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

[12]Hargrove, 100 Nev. at 503, 686 P.2d at 225; see also Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981), overruled on other grounds by Bejarano v. Warden, 112 Nev. 1466, 929 P.2d 922 (1996).

did not entitle her to an evidentiary hearing under this standard.[13] As this court recently held in Mann v. State,[14] it is true that the record in this case should not have been expanded with former counsel's affidavits without an evidentiary hearing. In this case, however, because Irvey's claims were otherwise belied by the record or without merit, we conclude that any unnecessary expansion of the record in this regard was harmless.

Having considered Irvey's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Donald M. Mosley, District Judge
Yampolsky, Ltd.
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

---

[13]Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[14]118 Nev. ___, 46 P.3d 1228 (2002) (the habeas corpus statutes do not permit the State to expand the record unless the district court orders an evidentiary hearing).