

IN THE SUPREME COURT OF THE STATE OF NEVADA

NAHUM JOSHUA BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40017

FILED

APR 10 2003

JANETTE M. BLOOM,
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is a proper person appeal from a district court order denying a post-conviction petition for a writ of habeas corpus.

On April 19, 2001, appellant Nahum Joshua Brown was convicted, pursuant to an Alford plea,¹ of four counts of robbery. The district court sentenced Brown to serve two consecutive prison terms of 38 to 96 months and two concurrent prison terms of 38 to 96 months. Brown appealed, and this court affirmed his conviction.²

On May 13, 2002, Brown filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent Brown or to conduct an evidentiary hearing. On August 30, 2002, the district court denied Brown's petition.

¹Brown pleaded guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). Under Nevada law, "whenever a defendant maintains his or her innocence but pleads guilty pursuant to Alford, the plea constitutes one of nolo contendere." State v. Gomes, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996).

²Brown v. State, Docket No. 37863 (Order of Affirmance, October 11, 2001).

In the petition, Brown claimed that his guilty plea was not knowing and voluntary because he pleaded guilty based on the district court's representations that: (1) it would order all sentences to run concurrently;³ and (2) he could withdraw his plea if the district court decided to impose consecutive sentences.⁴ The district court rejected Brown's claim regarding the validity of his plea, concluding that it was belied by the record. After reviewing the transcripts of the plea canvass, we conclude that the district abused its discretion in concluding that Brown's plea was knowing and voluntary.

In reviewing the district court's determination of the validity of a plea, this court will review the totality of the circumstances to determine whether the lower court correctly assessed the validity of the plea, and will not reverse the district court's determination absent a clear showing of an abuse of discretion.⁵ To demonstrate a constitutionally

³In a related argument, Brown claimed that his trial counsel was ineffective for informing him, at the plea canvass, that the district court was inclined to follow the terms of the plea agreement and impose concurrent sentences. We conclude that the district court did not err in rejecting that claim because Brown's trial counsel did not act deficiently in merely repeating statements made by the district court. See Strickland v. Washington, 466 U.S. 668 (1984).

⁴In the petition, Brown also claimed that his guilty plea was not knowing and voluntary because the district court failed to canvass him with respect to his constitutional rights. We conclude that the district court did not err in rejecting that claim because Brown was advised of the constitutional rights he was waiving in the plea agreement. See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000).

⁵Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Gomes, 112 Nev. at 1481, 930 P.2d at 706.

valid nolo contendere plea, the record must show that the plea was knowingly and voluntarily entered with real notice of the nature of the charges and direct consequences of the plea.⁶ A guilty or nolo contendere plea, however, is unknowing and involuntary when a defendant is given misinformation regarding the possible sentence at the time he enters his plea.⁷

In this case, the totality of the circumstances indicate that, in pleading nolo contendere, Brown was not clearly advised about whether he had the right to withdraw his plea if the district court decided not to impose consecutive sentences. At the plea canvass, Brown asked, "I was under the [impression] that if you would not – if you would not oblige by the plea agreement that we made [, then] at the time of sentencing, I could withdraw my plea." The district court responded, "Good point," and then informed Brown several times that it was inclined to "follow the negotiations" and impose concurrent sentences. Although the district court thereafter advised Brown that it "might wake up that morning and decide to slap [him] with 60 years," the record of the plea canvass reveals that Brown pleaded guilty believing that if the district court did so, he would be allowed to withdraw his plea. After acknowledging that the district court could impose consecutive sentences, Brown stated: "And my understanding is that, . . . if you do, I can still take my deal back." The district court answered:

No, we'll have to discuss it at that time. But right now all I'm saying is that's the possible exposure.

⁶NRS 174.035; Gomes, 112 Nev. at 1480, 930 P.2d at 706.

⁷Sierra v. State, 100 Nev. 614, 691 P.2d 431 (1984).

Right now I'm telling you I'm inclined to follow the recommendation. . . . That's my current inclination.

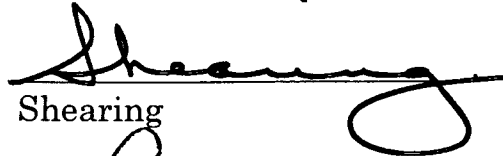
The totality of the circumstances reveal that, at the time he pleaded guilty, Brown believed his plea was conditional: that he could "take the deal back" if the district court imposed consecutive sentences.⁸ The district court never expressly stated otherwise, despite Brown's repeated concerns and questions about the sentencing range and the conditional nature of his plea. Accordingly, we conclude that the record does not bely Brown's claim that his nolo contendere plea was not knowing and voluntary, and that he misunderstood the terms of the plea agreement. To the contrary, the record supports a finding that a misunderstanding existed and that it was based, in part, upon representations made by the district court at the plea canvass.⁹ Because the record does not affirmatively demonstrate a full understanding of the direct consequences of the nolo contendere plea, we reverse the judgment of the district court and remand this matter to the district court with instructions to allow Brown to withdraw his nolo contendere plea.


⁸In fact, at allocution, Brown recounted his interpretation of the district court's advisement at the plea canvass, stating: "And the court did stipulate that [it] would be inclined to go with the stipulations and/or I can pull my deal back."

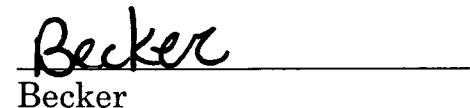
⁹Cf. Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975) (holding that appellant's mere subjective belief as to a potential sentence unsupported by any representation by the State or the district court is insufficient to invalidate his guilty plea as involuntary and unknowing).

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and further briefing are unwarranted in this matter.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹¹

 J.
Shearing

 J.
Leavitt

 J.
Becker

cc: Hon. John S. McGroarty, District Judge
Nahum Joshua Brown
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁰See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹¹We have considered all proper person documents filed or received in this matter, and we conclude that no further relief is warranted. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.