IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTURO A. PRADERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40246

FILED

SEP 19 2003

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Arturo A. Pradera's post-conviction petition for a writ of habeas corpus.

On October 26, 2000, Pradera was convicted, pursuant to a guilty plea and two Alford pleas,[1] of one count of voluntary manslaughter with the use of a deadly weapon (count I) and two counts of attempted murder (counts II and III).[2] Pradera's guilty plea was part of a package

[1]North Carolina v. Alford, 400 U.S. 25 (1970). Pradera pleaded guilty to counts II and III pursuant to Alford.

[2]Pradera and his codefendant, Jason Werth, were initially charged by way of criminal complaint on July 7, 1997, with one count each of conspiracy to commit murder and murder with the use of a deadly weapon, and six counts each of attempted murder with the use of a deadly weapon. On August 13, 1997, after a grand jury returned a true bill, the criminal indictment charged Pradera and Werth with one count each of conspiracy to commit murder and murder with the use of a deadly weapon, and two counts each of attempted murder with the use of a deadly weapon, or, in the alternative, two counts of battery with the use of a deadly weapon.

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deal whereby his codefendant would also enter a guilty plea. Prior to sentencing, Pradera filed a motion to withdraw his guilty plea. In his motion, Pradera argued that he was factually innocent of the charges and that he was coerced into pleading guilty by "the actual shooter who committed the murder," his codefendant. The State opposed the motion, and without conducting a hearing, the district court denied Pradera's motion. The district court sentenced Pradera to serve two consecutive prison terms of 3-8 years for count I, and two prison terms of 6-16 years for counts II and III; all of the prison terms were ordered to run concurrently.[3] Pradera did not pursue a direct appeal from the judgment of conviction and sentence.

On October 18, 2001, Pradera filed a proper person post-conviction petition for a writ of habeas corpus in the district court. With the assistance of retained counsel, Pradera filed supplemental points and authorities in support of his petition. The State opposed the petition. The district court conducted an evidentiary hearing, and on October 18, 2002, entered an order denying Pradera's petition. This appeal followed.

Pradera contends that the district court erred in finding that his guilty plea was entered freely, knowingly, voluntarily, and intelligently. Pradera specifically relies on United States v. Caro for the

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[3]Codefendant Werth was sentenced to serve two consecutive prison terms of 4-10 years for the voluntary manslaughter with the use of a deadly weapon, and two prison terms of 8-20 years for the two counts of attempted murder, with all of the terms to run concurrently.

proposition that when a guilty plea is conditioned upon a package deal involving the cooperation of two or more defendants, the district court's voluntariness inquiry must be a "more careful examination" because of the additional risk of coercion.[4] Pradera argues that the district court erred by not complying with Caro. We disagree with Pradera's contention and conclude, based upon our review of the entire record on appeal, that Pradera failed to carry his burden of demonstrating that his plea was unknowing or involuntary.[5]

A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[6] This court will not reverse a district court's determination

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[4]997 F.2d 657, 660 (9th Cir. 1993).

[5]Also, unlike the situation in Caro, in the instant case, the district court was fully aware of the "package deal" nature of the plea negotiations. Prior to the entry of the guilty pleas, the prosecutor informed the district court as follows:

> Both [Pradera and Werth] must accept and have indicated their willingness to accept this negotiation and if any party elects to withdraw from the negotiation because of the Court's refusal to abide by any of the stipulated terms, then the negotiation is off and the matter is to be reset for trial.

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

concerning the validity of a plea absent a clear abuse of discretion.[7] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[8] Additionally, this court has stated that "the failure to utter talismanic phrases will not invalidate a plea where a totality of the circumstances demonstrates that the plea was freely, knowingly and voluntarily made."[9]

First, Pradera contends that he was coerced by his codefendant into pleading guilty because the codefendant, a good friend of several years, was facing much greater exposure than Pradera if they went to trial, and the plea agreement required guilty pleas from both defendants. Pradera argues that the district court's canvass prior to the entry of his plea was infirm and failed to carefully inquire into the voluntariness of his plea pursuant to Caro. We disagree and conclude that the district court did not err in denying this claim.

During the plea canvass, the following colloquy took place:

> THE COURT: Okay. Before I accept your pleas of guilty I must be satisfied that your pleas are freely and voluntarily given. Are you making, Mr. Pradera, are you making this plea freely and voluntarily?

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

[8]State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

[9]Freese, 116 Nev. at 1104, 13 P.3d at 447 (citing Bryant, 102 Nev. at 271, 721 P.2d at 367).

DEFENDANT PRADERA: Yes.

Additionally, a written plea agreement was filed in open court during the entry of plea hearing. The written plea agreement contained the standard language regarding the voluntariness of the plea, including:

> I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

During the plea canvass, Pradera confirmed for the district court that he signed, read, understood, and discussed the plea agreement with his counsel. After the evidentiary hearing on Pradera's habeas petition, the district court concluded that the codefendant did not coerce Pradera into pleading guilty, and that Pradera accepted the deal "because it was a very good deal and was of great benefit to him because he would avoid multiple life sentences." Therefore, based on the totality of the circumstances, we conclude that: (1) Pradera failed to demonstrate that he was coerced by his codefendant into pleading guilty, and (2) the district court did not err or abuse its discretion in denying this claim.

Second, Pradera contends that he was coerced by the district court judge into pleading guilty. Citing to Standley v. Warden[10] and United States v. Bruce[11] for support, Pradera argues that the district court

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[10]115 Nev. 333, 990 P.2d 783 (1999).

[11]976 F.2d 552 (9th Cir. 1992).

improperly participated in the plea negotiation process and "repeatedly suggested" and "evinced an unacceptable, unmistakable desire" that he plead guilty. We disagree and conclude that the district court did not err in denying this claim.

Initially, we note that although Pradera raised this issue in his petition below and again on appeal, it was not specifically raised or argued during the evidentiary hearing on his petition, and the district court's order denying Pradera's petition did not address the issue of judicial coercion. We also note, however, that Standley and Bruce are distinguishable from the instant case. In both of those cases, the judicial involvement in the plea negotiations, amounting to coercion, occurred prior to the defendants' acceptance of any offer. The appellate courts concluded that the district court judges effectively convinced the defendants to accept the offers.[12] In the instant case, however, Pradera had already accepted the plea offer when he appeared in the district court for the entry of his guilty plea. Moreover, our review of the record reveals that the district court's involvement in the entry of Pradera's guilty plea consisted of properly canvassing Pradera to ensure that he was entering his plea freely and voluntarily and with full understanding of the consequences. Accordingly, we conclude that the district court did not coerce Pradera into pleading guilty.

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[12]See Bruce, 976 F.2d at 555; Standley, 115 Nev. at 336-37, 990 P.2d at 785.

Third, Pradera contends that his guilty plea was not entered knowingly and intelligently because the terms of the negotiated plea agreement changed during the entry of plea hearing. Pradera argues that his plea changed from a straight guilty plea to an Alford plea even though he was never informed by counsel about the consequences of such a plea, and, as a result, his guilty plea did not conform to the language in the written plea agreement. Pradera's argument is without merit and belied by the record.[13]

Although Pradera ultimately pleaded guilty pursuant to Alford to the two counts of attempted murder, the actual sentence imposed remained identical to the negotiated terms agreed upon by Pradera, as stated by the prosecutor at the beginning of the hearing, and as reflected in the written plea agreement. Moreover, at the evidentiary hearing on Pradera's petition, his former counsel credibly testified that he had discussed all aspects of the Alford plea with Pradera prior to the entry of his plea. The district court concluded that Pradera understood the consequences of the Alford plea and that Pradera "was advised that the Alford plea meant he was pleading to a lesser charge to avoid a harsher penalty should he have gone to trial on the original charges." Accordingly, we conclude that the district court did not err in denying this claim.[14]

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

[14]Pradera also argues that there was an insufficient factual basis for his Alford plea because he never made any factual admissions on the record. The United States Supreme Court in Alford stated that an express

continued on next page . . .

Finally, Pradera contends that the district court erred in finding that he did not receive ineffective assistance of counsel during the plea negotiations. Pradera argues that his counsel was ineffective in failing to alert the district court to the requirements of Caro. We disagree.[15]

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that there was a reasonable probability that the outcome would have been different.[16] The court need not consider both prongs of the Strickland test if the petitioner fails to make a showing on either prong.[17] A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not

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. . . *continued*
admission of factual guilt is not required for a guilty plea leading to a prison sentence. See Alford, 400 U.S. at 37.

[15]Pradera also asks this court to "See also Additional Grounds in Petition for Writ of Habeas Corpus" in support of his allegations of ineffective assistance of counsel. NRAP 28(e) prohibits briefs filed in this court from incorporating by reference briefs or memoranda filed in district court.

[16]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

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

clearly wrong.[18] Further, the right to the effective assistance of counsel also applies "when deciding whether to accept or reject a plea bargain."[19]

Initially, we note that this court has stated that "the decisions of the federal district court and panels of the federal circuit court of appeal are not binding upon this court. . . . Our state constitution binds the courts of the State of Nevada to the United States Constitution as interpreted by the United States Supreme Court."[20] Therefore, Pradera has failed to provide any authority for the proposition that his counsel was ineffective for failing to require the district court to follow Caro. Further, as we discussed above, the district court's canvass of Pradera prior to the entry of his guilty pleas was not infirm and satisfied the "totality of the circumstances" test enunciated in State v. Freese.[21] And finally, the district court determined that Pradera's former counsel was not ineffective during the plea negotiation phase. Accordingly, we conclude that the district court's factual finding was supported by substantial evidence, and that the district court did not abuse its discretion in denying this claim.

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[18]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[19]See Larson v. State, 104 Nev. 691, 693 n.6, 766 P.2d 261, 262 n.6 (1988) (citing McMann v. Richardson, 397 U.S. 759 (1970)).

[20]Blanton v. North Las Vegas Mun. Ct., 103 Nev. 623, 633, 748 P.2d 494, 500 (1987), aff'd by Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) (citations omitted).

[21]116 Nev. 1097, 13 P.3d 442.

Having considered Pradera's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. Lee A. Gates, District Judge
Patti & Sgro
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk