

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT THOMAS BURNHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40250

FILED

AUG 15 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

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 June 15, 2001, the district court convicted appellant, pursuant to an Alford plea,¹ of one count of robbery. The district court sentenced appellant to serve a term of sixty to one hundred and eighty months in the Nevada State Prison. This court affirmed appellant's judgment of conviction.²

On March 21, 2002, appellant filed a 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

¹North Carolina v. Alford, 400 U.S. 25 (1970).

²Burnham v. State, Docket No. 38032 (Order of Affirmance, September 27, 2001).

district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On August 13, 2002, the district court denied appellant's petition. This appeal followed.

In his petition, appellant first contended that his guilty plea was not entered knowingly, intelligently and voluntarily. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.³ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.⁴ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.⁵

Appellant claimed that his plea was not entered knowingly, intelligently and voluntarily because: (1) he did not have knowledge of the options available; (2) he did not fully understand the potential consequences of the plea; and (3) the plea canvass was inadequate due to the fact that the district court failed to clarify information in the guilty plea agreement leading appellant to enter his plea under a misconception

³Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

⁴Hubbard, 110 Nev. at 675, 877 P. 2d at 521.

⁵State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

about the possible sentence. Based upon our review of the record on appeal, we conclude that the district court did not err in denying this claim. The totality of the circumstances reveals that appellant was made aware of the consequences of his plea. The written guilty plea agreement correctly informed appellant of the potential penalty he faced and the constitutional rights that he waived by entry of his guilty plea. The written guilty plea agreement further informed appellant that sentencing decisions were matters left within the district court's discretion. The district court informed appellant during the oral canvass that matters of sentencing were left entirely to the district court. The State provided a factual basis for the plea, and appellant affirmatively indicated that he was entering his plea because it was in his best interests. Appellant failed to indicate what information in the written guilty plea agreement misled him about the potential penalty he faced by entry of his plea. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing.⁶ Thus, appellant failed to carry his burden of demonstrating that his plea was not entered knowingly, intelligently and voluntarily.

Next, appellant raised several claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a

⁶See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

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.⁷ The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.⁸

Appellant first claimed that his trial counsel was ineffective for failing to request an evidentiary hearing when the victim stated that he did not see a gun and no weapon was found. He further claimed that his trial counsel was ineffective for failing to challenge a jury instruction relating to the alleged gun. These claims appear to relate to appellant's first trial, which resulted in a hung jury. Appellant failed to demonstrate how either of these alleged errors impacted his decision to enter an Alford plea. Thus, the district court did not err in determining that this claim lacked merit.

Second, appellant claimed that his trial counsel was ineffective for persuading appellant to accept the State's plea offer despite appellant's protestations of innocence. Appellant claimed that his trial counsel informed him that he did not have a chance to win upon retrial

⁷See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁸See Strickland v. Washington, 466 U.S. 668, 697 (1984).

because the State would be aware of the defense strategy and that if he lost he would be adjudicated a habitual criminal. Appellant further claimed that his trial counsel informed him that he should take the deal because he was unsure about the district court judge. Appellant failed to demonstrate that his trial counsel's advice was unreasonable given the facts in the instant case. Appellant failed to demonstrate that he was coerced into accepting the State's offer. Appellant's criminal history included five prior felony convictions. It would not, therefore, be incorrect for trial counsel to advise appellant of the possibility that he faced habitual criminal adjudication. Appellant received a benefit by entry of his plea and avoided additional charges that would have exposed him to greater time. Thus, the district court did not err in determining that appellant's counsel was not ineffective.

Third, appellant claimed that his trial counsel informed him that he would receive probation and a term of two to five years. Appellant further claimed that his trial counsel informed him that the district court was required to inform appellant that the potential penalty was a term of two to fifteen, but that this was only a formality. The written guilty plea agreement correctly informed appellant of the potential penalty. During the plea canvass, and in the written guilty plea agreement, appellant was further informed that sentencing was a matter left in the district court's discretion. No representations were made that appellant would receive any particular sentence. Again, appellant's mere subjective belief about

his potential sentence, unsupported by any promise from the State or indication by the court, is insufficient to invalidate his guilty plea as unknowing and involuntary.⁹ Thus, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel informed him that he had a good chance of receiving OR release or a reduction in his bail because the first trial resulted in a hung jury. He further claimed that his trial counsel lied that he was present at a hearing on the motion. Appellant failed to demonstrate how these alleged errors impacted his decision to enter a guilty plea. Further, the minutes indicate that counsel was present for the hearing. Thus, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to conduct research to determine if appellant's conduct supported the charges. Appellant entered an Alford plea to the offense of robbery. The State provided a factual basis for the plea. Appellant's trial counsel was not obligated to conduct any further research. Appellant failed to indicate what further research would have revealed that would have made a difference to his decision to enter an Alford plea. Thus, we conclude that the district court did not err in denying this claim.

⁹Rouse, 91 Nev. 677, 541 P.2d 643.

Next, appellant claimed that he received ineffective assistance of appellate counsel. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)."¹⁰ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹¹ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹² "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."¹³

Appellant claimed that his appellate counsel failed to perfect an appeal on his behalf. In support, appellant claimed that his appellate counsel failed to provide this court with a copy of a presentence motion to withdraw the guilty plea and failed to provide a factually specific argument supported by legal authority. We conclude that appellant failed to show that either of these alleged errors would have had a reasonable probability of success on appeal. The district court did not abuse its

¹⁰*Kirksey*, 112 Nev. at 998, 923 P.2d at 1113.

¹¹*Jones v. Barnes*, 463 U.S. 745, 751 (1983).

¹²*Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

¹³*Kirksey*, 112 Nev. at 998, 923 P.2d at 1114.

discretion in denying appellant's presentence motion to withdraw a guilty plea. Appellant's presentence motion to withdraw a guilty plea failed to set forth any reason that was fair and just to permit withdrawal of the guilty plea.¹⁴

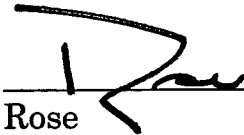
Finally, appellant claimed that his sentence was illegal and that the State improperly used the presentence investigation report as proof of prior convictions to show that appellant was a habitual criminal. These claims were waived because appellant failed to raise them on direct appeal, and appellant failed to demonstrate good cause for his failure to do so. Moreover, as a separate and independent ground to deny relief, these claims lacked merit. Appellant's sentence was facially legal.¹⁵ Appellant was not adjudicated a habitual criminal in the instant case. Appellant was informed in the written guilty plea agreement that the presentence investigation report would include his criminal history. The State further retained the right to argue at sentencing, and thus, did not act improperly by referring to appellant's criminal history during sentencing. Thus, the district court did not err in concluding that relief was not warranted.

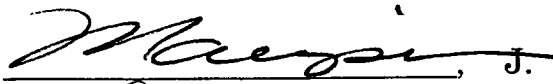
¹⁴See Crawford v. State, 117 Nev. 718, 30 P.3d 1123 (2001); Woods v. State, 114 Nev. 468, 958 P.2d 91 (1998); State v. District Court, 85 Nev. 381, 455 P.2d 923 (1969).

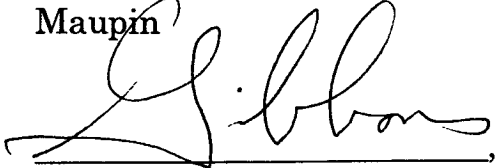
¹⁵See NRS 200.380.

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.¹⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Donald M. Mosley, District Judge
Robert Thomas Burnham
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).