

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS GALLARDO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40275

FILED

AUG 20 2003

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant Luis Gallardo's post-conviction petition for a writ of habeas corpus.

On June 26, 2001, the district court convicted Gallardo, pursuant to a guilty plea, of one count of sexual assault on a minor under sixteen years of age in violation of NRS 200.366. The district court sentenced Gallardo to serve a term of life in the Nevada State Prison with a possibility of parole in twenty years. No direct appeal was taken.

On June 12, 2002, Gallardo 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 district court declined to appoint counsel to represent Gallardo or to conduct an evidentiary hearing. On September 12, 2002, the district court denied Gallardo's petition. This appeal followed.

In his petition, Gallardo contended that (1) his guilty plea was involuntary because his counsel's alleged lack of preparation for trial had the effect of forcing him into entering the plea, and (2) his counsel was ineffective because he failed to argue that the district court had the

authority to disregard the stipulated sentence in the plea agreement and also failed to present mitigating evidence at the sentencing hearing.

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 his counsel's performance fell below an objective standard of reasonableness.<sup>1</sup> A petitioner must further demonstrate a reasonable probability that, but for counsel's errors, the results of the proceedings would have been different.<sup>2</sup>

Further, a guilty plea is presumptively valid, and the burden is on the petitioner to show that it was not freely, knowingly, and voluntarily made under a totality of the circumstances from the record.<sup>3</sup> Once a guilty plea is entered, constitutional claims that arise prior to the entry of the guilty plea are waived, except those claims that involve the involuntariness of the plea itself.<sup>4</sup>

First, Gallardo contended that his guilty plea was involuntary because his counsel's alleged lack of preparation for trial had the effect of forcing, or coercing, him to enter into a guilty plea. Specifically, Gallardo contended that his counsel arrived late to court on his trial date, did not give an opening statement, and otherwise failed to prepare any defense,

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<sup>1</sup>See Hill v. Lockhart, 474 U.S. 52, 57 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

<sup>2</sup>See Strickland v. Washington, 466 U.S. 668, 691 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505-06 (1984).

<sup>3</sup>Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Freese v. State, 116 Nev. 1097, 1104, 13 P.3d 442, 447 (2000).

<sup>4</sup>Lyons, 100 Nev. at 432, 683 P.2d at 505.

which impaired Gallardo's ability to receive a fair trial to such an extent that he had no choice but to accept a plea agreement offer from the State.

Our review of the record, however, reveals that Gallardo signed a written plea agreement with the State and was orally canvassed by the district court before the guilty plea was accepted. In the plea agreement, Gallardo acknowledged, "I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion . . . ." During the subsequent oral canvass, when asked by the district court whether his guilty plea was freely and voluntarily made, Gallardo replied, "Yes, sir." Gallardo further stated that he was not made any promises or threatened in exchange for the plea, and that he understood the nature and contents of the plea agreement. Gallardo's allegation that he was coerced into entering the guilty plea is belied, or repelled, by his own representations to the court.<sup>5</sup>

Additionally, Gallardo did not specifically allege how his counsel's performance was so deficient as to become forceful or coercive, rendering his guilty plea involuntary. Gallardo contended that his counsel's untimely arrival to court and failure to give an opening statement were deficient acts. These acts, however, do not fall below an objective standard of reasonableness. Gallardo also contended that his counsel failed to investigate witnesses or otherwise provide a defense; Gallardo, however, did not name these witnesses or proffer how they would have aided his defense, nor did he state what defense his counsel

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<sup>5</sup>Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

should have provided. We conclude, therefore, that Gallardo's contentions are unsupported by any facts entitling him to relief.<sup>6</sup>

Second, Gallardo contended that his trial counsel was ineffective because he failed to argue that the district court had the authority to disregard the stipulated sentence in the plea agreement, and because he failed to present mitigating evidence at the sentencing hearing. Specifically, Gallardo contended that he was prejudiced because the district court was prevented from sentencing him with "an open mind."

In the plea agreement, Gallardo stipulated to a sentence of "20-LIFE." During the oral canvass, and before the district court accepted Gallardo's plea, the court stated, "So, the negotiations in this case are that my hands are tied rather than the options that are normally available under the statute, I must give you life imprisonment which means that you will be eligible for parole in 20 years. Do you understand that?" Gallardo replied, "Yes, sir."

Even if the district court erroneously believed it lacked the authority to depart from the agreement, Gallardo failed to show any prejudice. By signing the agreement, Gallardo agreed that the stipulated sentence was fair and in his best interest. His sentence was within the statutory limits,<sup>7</sup> and was also the sentence recommended in his pre-sentence investigation report.<sup>8</sup> Therefore, Gallardo failed to show that his counsel was ineffective in this regard.

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<sup>6</sup>Id. at 503, 686 P.2d at 225.

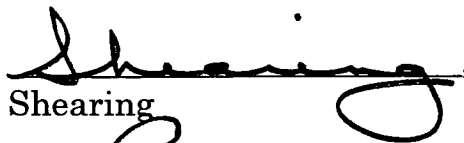
<sup>7</sup>NRS 200.366(3)(b).


<sup>8</sup>See Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996).


Moreover, although Gallardo could have presented mitigating evidence at his sentencing hearing,<sup>9</sup> he failed to specify in his petition what this evidence would have been and how it would have resulted in a different sentence.<sup>10</sup> We conclude, therefore, that Gallardo's contention that his counsel was ineffective is without merit.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Gallardo is not entitled to relief and that briefing and oral arguments are unwarranted.<sup>11</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>12</sup>

 J.  
Shearing

 J.  
Leavitt

 J.  
Becker

cc: Hon. Jackie Glass, District Judge  
Luis Gallardo  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>9</sup>NRS 176.015(2)(b).

<sup>10</sup>See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

<sup>11</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>12</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.