

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAFAEL ALVAREZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40401

**FILED**

AUG 20 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
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 September 13, 2001, the district court convicted appellant, pursuant to a guilty plea, of one count of mid-level trafficking in a controlled substance. The district court sentenced appellant to serve a term of sixty to one hundred and fifty months in the Nevada State Prison. No direct appeal was taken.

On July 10, 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 district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On December 11, 2002, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised several claims of ineffective assistance of counsel. 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. 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.<sup>1</sup> The court need not consider both prongs of the test if the petitioner makes an insufficient showing on either prong.<sup>2</sup>

First, appellant claimed that his trial counsel failed to adequately meet with him. Appellant claimed that his trial counsel only met with him to discuss payment and failed to inform appellant of all aspects of his case, discuss possible defenses, or provide any consultation regarding the written guilty plea agreement. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant failed to support this claim with specific facts, which if true, would have entitled him to relief.<sup>3</sup> Appellant failed to indicate the information counsel failed to provide him with or the possible defenses. The record belies appellant's claim that his counsel failed to consult with him about the written guilty plea agreement. During the plea canvass, counsel informed the district court that an interpreter read the written guilty plea agreement to appellant and that counsel explained the agreement to appellant "once again." Further, appellant affirmatively indicated that the guilty plea agreement was read to him by an interpreter and that he had a chance to discuss the plea agreement with his counsel before he signed the plea agreement. Therefore, we conclude that the

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

<sup>2</sup>Strickland v. Washington, 466 U.S. 668, 697 (1984).

<sup>3</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

district court did not err in concluding that appellant failed to demonstrate that his counsel was ineffective in this regard.

Second, appellant claimed that his trial counsel coerced him into entering a plea. Appellant claimed that his trial counsel wanted appellant to enter a guilty plea from the beginning and coerced appellant into waiving his preliminary hearing. Appellant claimed that his trial counsel failed to file any pre-trial motions and threatened appellant with a sentence of life imprisonment if he did not take the plea. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. The record does not support appellant's allegations. There is no indication in the record that appellant's trial counsel coerced him into waiving his preliminary hearing. In fact, appellant's case originated with an indictment returned by the grand jury. Appellant failed to indicate what type of pre-trial motions counsel should have filed.<sup>4</sup> Appellant was originally charged with high-level trafficking; thus, appellant's trial counsel properly advised appellant that he faced a potential life sentence as originally charged.<sup>5</sup> Appellant received a substantial benefit by entering his plea. In addition to a reduction in the trafficking charge, the State agreed to the dismissal of another district court case. Therefore, we conclude that the district court did not err in determining that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Third, appellant claimed that his trial counsel misinformed him about the potential sentence. Appellant claimed that his trial counsel informed him that he would receive a sentence of two to five years and

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<sup>4</sup>See Hargrove, 100 Nev. 498, 686 P.2d 222.

<sup>5</sup>See NRS 453.3385(3).

that any immigration issues would be resolved in the written guilty plea agreement. The record indicates that appellant was correctly advised of the sentencing range, two to fifteen years, in the written guilty plea agreement and during the plea canvass.<sup>6</sup> Further, in both the written guilty plea agreement and during the plea canvass, appellant was informed that a term of the negotiation was his stipulation to a minimum sentence of five years. The district court further informed appellant that sentencing decisions were matters left in the hands of the district court. Appellant failed to identify the immigration issues that were not resolved in the written guilty plea agreement.<sup>7</sup> Therefore, we conclude that the district court did not err in concluding that appellant failed to demonstrate that his counsel was ineffective in this regard.

Next, appellant claimed that his guilty plea was not entered knowingly and voluntarily. Appellant claimed that his counsel misinformed him of the consequences of the plea and that he did not understand the meaning of the word "stipulation." Appellant further claimed that he did not have an adequate time to consult with his counsel about the contents of the written guilty plea agreement and that he was only following counsel's directions in answering the district court during the plea canvass.

A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and

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<sup>6</sup>See NRS 453.3385(2).

<sup>7</sup>See Hargrove, 100 Nev. 498, 686 P.2d 222.

intelligently.<sup>8</sup> Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.<sup>9</sup> In determining the validity of a guilty plea, this court looks to the totality of the circumstances.<sup>10</sup>

A totality of the circumstances reveals that appellant's guilty plea was entered knowingly and voluntarily. Appellant was informed in the written guilty plea agreement of the terms of the plea negotiations, the elements of the offense, the potential sentence and the constitutional rights that he waived by entry of his plea. Appellant's counsel informed the district court that an interpreter had read the guilty plea agreement to appellant and that counsel had then explained it "once again." During the plea canvass, the district court asked appellant if he could read, write and understand English. Appellant indicated that he understood English but that he could only read and write "a little" English. Appellant indicated that the guilty plea agreement was read to him by the interpreter and that he had a chance to discuss the agreement with his counsel before he signed it. During the plea canvass, appellant was informed of the potential sentence that he faced by entry of his plea, and appellant made a factual admission. Appellant was specifically asked whether he understood that pursuant to the negotiations that he agreed to a minimum term of five years, and appellant answered, "Yeah, I understand

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<sup>8</sup>Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

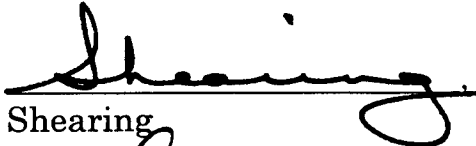
<sup>9</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

<sup>10</sup>State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.


that, 5 years.” Appellant further indicated that he was not being forced into entering a plea. Appellant’s mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing.<sup>11</sup> Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

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.<sup>12</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Shearing

 J.  
Leavitt

 J.  
Becker

cc: Hon. Kathy A. Hardcastle, District Judge  
Rafael Alvarez  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>11</sup>See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

<sup>12</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).