

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH TOBIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40418

FILED

AUG 27 2003

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

ORDER OF AFFIRMANCE

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 November 9, 2000, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary while in possession of a firearm (Count 1), one count of robbery with the use of a deadly weapon (Count III), and one count of sexual assault with the use of a deadly weapon (Count V). The district court sentenced appellant to serve two consecutive terms of life in the Nevada State with Prison with the possibility of parole after a total of thirty years had been served for Count V. The remaining terms were imposed to run concurrently with Count V. No direct appeal was taken.

On August 9, 2001, 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 June 4, 2002, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that the district court abused its discretion in applying the deadly weapon enhancement because a deadly weapon was a necessary element of the offenses and the enhancement required a factual finding made by a jury. Appellant's claim fell outside the scope of claims permissible in a habeas corpus petition challenging a judgment of conviction based upon a guilty plea.¹ Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that his trial counsel failed to file an appeal on his behalf. Appellant failed to demonstrate that he was entitled to relief on this claim. Appellant failed to support this claim with specific facts, which if true, would have entitled him to relief.² Moreover, there is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal unless the defendant inquires about an appeal or there exists a direct appeal claim that has a reasonable likelihood of success.³ Appellant does not allege that he asked counsel to file a direct appeal and nothing in the record suggests that a direct appeal in appellant's case had a reasonable likelihood of success. Moreover, the written guilty plea agreement, which appellant acknowledged reading, signing and understanding, informed

¹See NRS 34.810(1)(a).

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

³See Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470 (2000).

appellant of his limited right to a direct appeal.⁴ Therefore, appellant failed to demonstrate that his counsel was ineffective in this regard.⁵

Finally, appellant claimed that his guilty plea was not entered knowingly and voluntarily. Appellant claimed that he was not informed that a jury was required to make a factual finding in order for his sentence to be enhanced pursuant to NRS 193.165 (the deadly weapon enhancement).

A guilty plea is presumptively valid, and a defendant carries the burden of establishing that the plea was not entered knowingly and intelligently.⁶ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.⁷

Based upon our review of the record on appeal, we conclude that appellant failed to carry his burden of demonstrating that his plea was entered unknowing or involuntarily. By entry of his guilty plea, appellant waived the right to a jury trial, and thus, waived the right to have the jury make any factual findings regarding the deadly weapon enhancement. Appellant was informed in the written guilty plea agreement of the elements of the offenses, the waiver of the right to a jury trial, and the potential sentences he faced by entry of his plea.

⁴See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

⁵Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

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

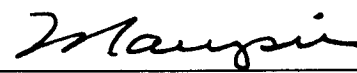
⁷See Hubbard, 110 Nev. at 675, 877 P.2d at 521.

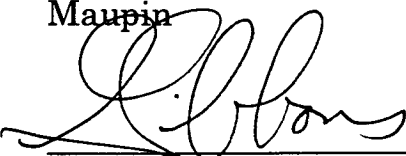
Furthermore, the written guilty plea set forth the recommended sentences to be imposed in the instant case—sentences which included the deadly weapon enhancement. The district attorney also set forth the recommended sentences during the guilty plea canvass. The district court imposed the sentences as recommended by the parties. Appellant acknowledged reading, understanding and signing the written guilty plea agreement during the plea canvass. Appellant received a substantial benefit by entry of his plea; appellant avoided additional charges and the possibility of being adjudicated a habitual criminal. Thus, 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.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Sally L. Loehrer, District Judge
Keith Tobin
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk