

IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDRICK J. BENSON A/K/A  
FREDDIE BENSON, JR., A/K/A  
FREDERICK BENSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40463

FILED

JAN 28 2004

ORDER OF AFFIRMANCE

JANETTE N. BLAUM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, entered pursuant to a guilty plea, of one count of first degree murder, a felony in violation of NRS 200.010 and 200.030. The district court sentenced appellant Fredrick Benson to a term of life in the Nevada State Prison without the possibility of parole.

On August 21, 2000, the State filed an amended information charging Benson with conspiracy to commit robbery, robbery with the use of a deadly weapon, and murder with the use of a deadly weapon. The State also filed a notice of intent to seek the death penalty. On April 29, 2002, the district court denied Benson's pretrial motion to suppress an inculpatory statement he made to police. The following day, April 30, 2002, Benson entered into plea negotiations with the State. In exchange for Benson's agreement to plead guilty to one count of first degree murder, the State agreed not to pursue the death penalty, the deadly weapon enhancement, and the charges of conspiracy to commit robbery and robbery with the use of a deadly weapon. The district court conducted a plea canvass and accepted Benson's guilty plea. Subsequently, Benson filed a presentence motion to withdraw his guilty plea. New counsel was

appointed to represent Benson on the motion, and following a hearing, the district court denied Benson's motion. Thereafter, the district court sentenced Benson. On October 11, 2002, the district court entered a formal judgment of conviction. This appeal followed.

Benson contends that the district court erred in rejecting his claim that the guilty plea was not knowingly, intelligently, or voluntarily entered. Specifically, Benson argues that he did not have an opportunity to fully discuss the ramifications of his plea with counsel and that he was denied the effective assistance of counsel because he was misinformed by counsel of his rights to appeal.<sup>1</sup>

"A district court may, in its discretion, grant a defendant's [presentence] motion to withdraw a guilty plea for any 'substantial reason' if it is 'fair and just.'"<sup>2</sup> In considering whether a defendant has "advanced a substantial, fair, and just reason to withdraw a [guilty] plea, the district court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently."<sup>3</sup> The district court "has a duty to review the entire record to determine

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<sup>1</sup>We note that appellant's counsel has failed to provide this court with a transcript of the hearing conducted on the motion to withdraw guilty plea. Additionally, the district court's order denying the motion does not include specific findings of fact or conclusions of law. Thus, the record that appellant's counsel has provided this court does not disclose what occurred at the hearing, whether appellant's former counsel were called to testify, whether any other evidence was presented, or why the district court denied the motion.

<sup>2</sup>Woods v. State, 114 Nev. 468, 475, 958 P.2d 91, 95 (1998) (quoting State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969)); see also NRS 176.165.

<sup>3</sup>Crawford v. State, 117 Nev. 718, 722, 30 P.3d 1123, 1125-26 (2001).

whether the plea was valid . . . . [and] may not simply review the plea canvass in a vacuum."<sup>4</sup>

An order denying a presentence motion to withdraw a guilty plea is reviewable on direct appeal from the judgment of conviction as an intermediate order in the proceedings.<sup>5</sup> In reviewing the district court's determination, we will presume that the lower court correctly assessed the validity of the plea, and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion.<sup>6</sup> If the motion to withdraw is based on a claim that the guilty plea was not entered voluntarily, knowingly, and intelligently, the burden to substantiate the claim remains with the appellant.<sup>7</sup>

The record before this court does not support Benson's assertion that his guilty plea agreement was not entered knowingly and intelligently.<sup>8</sup> In the written guilty plea agreement, Benson acknowledged that he agreed to plead guilty, understood the consequences of his plea, understood the rights and privileges he waived by pleading guilty, and that he was signing the agreement voluntarily after consulting with counsel. During the district court's oral plea canvass, Benson

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<sup>4</sup>Mitchell v. State, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993).

<sup>5</sup>NRS 177.045; Hart v. State, 116 Nev. 558, 562 n.2, 1 P.3d 969, 971 n.2 (2000) (citing Hargrove v. State, 100 Nev. 498, 502 n.3, 686 P.2d 222, 225, n.3 (1984)).

<sup>6</sup>Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

<sup>7</sup>See id.

<sup>8</sup>See Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding a defendant is not entitled to relief "on factual allegations belied or repelled by the record").

acknowledged that he understood the charge against him, understood the plea agreement, and understood the rights he was waiving. He also acknowledged that he had reviewed the plea agreement with counsel, counsel had answered his questions, the plea agreement was in his best interest, and he entered the plea agreement of his own free will. Thus, based on the totality of the circumstances, we conclude that Benson's guilty plea agreement was entered voluntarily, knowingly, and intelligently.

Benson's claim of ineffective assistance of counsel is without merit. To establish ineffective assistance of counsel, a claimant must demonstrate that his counsel's performance fell below an objective standard of reasonableness.<sup>9</sup> Further, a claimant who has entered a guilty plea must demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."<sup>10</sup> This court presumes that counsel fully discharged his or her duties; "[t]his presumption can only be overcome by strong and convincing proof to the contrary."<sup>11</sup>

Benson claims only that his counsel incorrectly advised him as to whether he could appeal the facts of this case. His claim is not supported by the record, nor has he stated specifically how counsel advised him and why counsel's advice was wrong. Because the record that Benson

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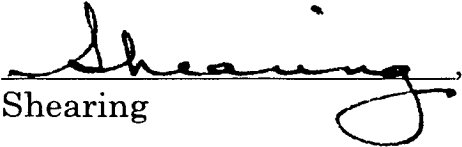
<sup>9</sup>Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

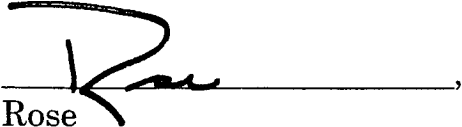
<sup>10</sup>Hill v. Lockhart, 474 U.S. 52, 59 (1985); see Kirksey, 112 Nev. at 988, 923 P.2d 1107 (1984).

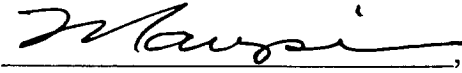
<sup>11</sup>Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996) (internal quotations and citations omitted)

has provided this court does not contain strong and convincing proof to the contrary, we must conclude that the district court correctly assessed counsel's performance and determined that they were effective and fully discharged their duties. In sum, Benson has failed to demonstrate that the district court erred in denying his presentence motion to withdraw his guilty plea. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
Shearing, C.J.

  
Rose, J.

  
Maupin, J.

cc: Hon. Kathy A. Hardcastle, District Judge  
Law Office of Betsy Allen  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk