

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC EUGENE BOONE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40562

FILED

JAN 08 2004

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 Eric Boone's post-conviction petition for a writ of habeas corpus.

On July 21, 1999, the district court convicted Boone, pursuant to a guilty plea, of one count of first-degree kidnapping with the use of a deadly weapon (count I) and one count of robbery with the use of a deadly weapon (count II). The district court sentenced Boone to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole in five years for count I, and two consecutive terms of fifteen years in the Nevada State Prison with the possibility of parole in five years for count II. Count II was imposed to run concurrently with count I. Boone filed a proper person direct appeal to this court from his judgment of conviction. The appeal was dismissed for being untimely filed.¹

On July 13, 2000, Boone 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

¹Boone v. State, Docket No. 35658 (Order Dismissing Appeal, March 29, 2000).

court declined to appoint counsel to represent Boone, but conducted an evidentiary hearing outside of Boone's presence on the allegations raised in his petition. Thereafter, on November 14, 2000, the district court issued an order denying Boone's petition.

On appeal, this court reversed and remanded the matter to the district court to conduct a second evidentiary hearing on Boone's petition because Boone was not present at the first evidentiary hearing.² On October 15, 2002, the district court conducted a second evidentiary hearing on Boone's petition with Boone being present. On October 28, 2002, the district court issued an order denying Boone's petition. This appeal followed.

A post-conviction habeas corpus petition based on a guilty plea may only allege that the plea was entered without the effective assistance of counsel, or was entered unknowingly and involuntarily.³ To state a claim of ineffective assistance of counsel sufficient to invalidate a guilty plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness.⁴ A petitioner must further show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."⁵

²Boone v. State, Docket No. 36994 (Order of Reversal and Remand, August 22, 2002).

³See NRS 34.810(1)(a).

⁴See Hill v. Lockhart, 474 U.S. 52, 57 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

⁵See Kirksey, 112 Nev. at 988, 923 P.2d at 1107 (quoting Hill, 474 U.S. at 59).

In his petition, Boone contended that his counsel was ineffective for failing to file a timely notice of direct appeal from his judgment of conviction, despite his request to do so.

Counsel has "a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction."⁶ This duty applies even if counsel considers the issues that could be raised on direct appeal to be without merit.⁷

Our review of Boone's second evidentiary hearing reveals that Boone's former counsel testified that she had no recollection of Boone requesting her to file a notice of appeal from his judgment of conviction. Boone's former counsel added that she would have filed such a notice had Boone requested her to do so, even though she was unaware at the time that a defendant could file a direct appeal from a judgment of conviction based on a guilty plea. Although Boone's testimony contradicted that of his former counsel, the district court specifically found that Boone's former counsel was the more credible witness. On this basis, the district court concluded that Boone's former counsel was not ineffective for failing to file a timely notice of appeal, and that his allegation was belied by the record.

We conclude that the district court's factual findings were supported by the record and not clearly wrong. As such, they are afforded deference and will not be disturbed on appeal.⁸ Therefore, the district court did not err by denying Boone's petition on this allegation.

⁶Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994).

⁷See Lozada, 110 Nev. at 356-57, 871 P.2d at 949; see also Ramos v. State, 113 Nev. 1081, 1084-85, 944 P.2d 856, 858 (1997).

⁸See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Boone also contended in his petition that his guilty plea was invalid because it was accepted by the district court without Boone verbally admitting to the elements of the crimes charged against him. Specifically, Boone contended that he was unable to verbally admit to the elements of the crimes during his plea canvass because of memory loss.

The failure of the district court to require the petitioner to verbally admit to the elements of the crimes to which he is pleading guilty does not render a guilty plea per se invalid.⁹ Rather, a guilty plea is presumptively valid, and the burden is on the petitioner to show that it was not freely, knowingly, and voluntarily entered under a totality of the circumstances from the record.¹⁰

Our review of the record reveals that Boone signed a written plea agreement admitting to the facts proffered by the State supporting each element of the crimes. Boone acknowledged in the agreement that he had discussed the elements of the crimes with his counsel. Boone also acknowledged that he was entering the plea voluntarily, without duress, all of his questions were answered, and he was not under the influence of any substance impairing his ability to understand the agreement.

During Boone's plea canvass, when asked by the district court if he had read and understood the plea agreement before he signed it, Boone answered, "Yes." Boone indicated that he thought signing the agreement was in his best interest and it was signed freely and voluntarily. Boone also made factual admissions to the crimes.


⁹See Freese v. State, 116 Nev. 1097, 1107, 13 P.3d 442, 449 (2000).


¹⁰Id. at 1104, 13 P.3d at 447; Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).


Moreover, during the second evidentiary hearing, Boone's former trial counsel testified that she did in fact explain to Boone the elements of the crimes. At no time during Boone's plea canvass did he indicate that he was suffering from memory loss or any condition impairing his ability to understand the proceedings, despite ample opportunity to do so. Thus, the district court properly denied Boone's allegation on this issue.

Having review the record on appeal, and for the reasons set forth above, we conclude that Boone is not entitled to relief and that briefing and oral argument are unwarranted.¹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹²


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

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

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

cc: Hon. Donald M. Mosley, District Judge
Eric Eugene Boone
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk