

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY J. GUARINI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40734

FILED

JAN 27 2004

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

On September 14, 2000, the district court convicted appellant, pursuant to a guilty plea, of three counts of lewdness with a minor and two counts of attempted sexual assault on a minor. The district court sentenced appellant to serve three consecutive terms of life in the Nevada State Prison for the lewdness counts and two consecutive terms of thirty-two to one hundred and forty-four months for the attempted sexual counts. The district court imposed the terms for the attempted sexual assault counts to run concurrently to the terms for the lewdness counts. This court affirmed appellant's judgment of conviction on appeal.¹

On June 3, 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, the district court declined to appoint counsel to represent appellant. On January 24, 2003,

¹Guarini v. State, Docket No. 36871 (Order of Affirmance, June 13, 2001).

after conducting an evidentiary hearing, the district court denied appellant's petition.² This appeal followed.

In his petition, appellant argued that his guilty plea was not entered knowingly and voluntarily due to the ineffective assistance of counsel. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.³ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.⁴ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.⁵ 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.⁶ Factual findings of the district court that are

²Because an evidentiary hearing was conducted in the instant matter, we conclude that the district court properly permitted the expansion of the record to include the affidavit of appellant's trial counsel. See NRS 34.790(1),(2).

³Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

⁴Hubbard, 110 Nev. at 675, 877 P.2d at 521.

⁵State v. Freese, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 272, 721 P.2d at 368.

⁶See Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal.⁷

First, appellant claimed that his plea was invalid because his trial counsel failed to inform him of legitimate defenses and possible challenges to the arrest, search and seizure. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant failed to indicate the possible defenses available and the basis for a challenge to the arrest, search and seizure. Appellant's trial counsel, in his affidavit, stated that he discussed the possible defense with appellant and that to his knowledge there were no viable legal challenges to the arrest, search and seizure in the instant case. We conclude that appellant failed to demonstrate that his guilty plea was invalid in this regard.

Second, appellant claimed that his guilty plea was invalid because his trial counsel was ineffective for failing to inform him that he was required to pass a psychiatric panel before he is eligible for parole. The record does not support this claim. The written guilty plea agreement expressly informed appellant about the psychiatric panel requirement for parole eligibility. Appellant informed the district court during the plea canvass that he had signed, read and understood the plea agreement. We conclude that appellant failed to demonstrate that his guilty plea was invalid in this regard.

Third, appellant claimed that his guilty plea was invalid because his trial counsel advised him to sign the written guilty plea agreement despite the fact that appellant was taking an anti-depressant, which caused him to experience side effects that made him incapable of

⁷See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

making an intelligent decision. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The district court specifically found that appellant's demeanor and responses during the plea canvass did not indicate that appellant was incapacitated when he entered his guilty plea. Appellant failed to provide any testimony at the evidentiary hearing that he was incapable of making an intelligent decision at the time he entered his plea. Appellant's trial counsel, in his affidavit, stated that he did not believe that appellant was under the influence of any medication that impaired his ability to understand the guilty plea agreement. The district court's factual determination that this claim lacked merit is supported by substantial evidence and is not clearly wrong. Thus, we conclude that appellant failed to demonstrate that his plea was invalid in this regard.

Fourth, appellant claimed that his guilty plea was invalid because his trial counsel failed to investigate the alleged victims or witnesses to support appellant's claim of innocence. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to present any testimony or evidence in support of this allegation. Appellant's trial counsel stated that he reviewed the State's file prior to appellant entering his guilty plea. Trial counsel testified that, although there were some inconsistencies in the statements of the victims and their parents, in his opinion, plea negotiations were in appellant's best interests. Appellant failed to demonstrate what information would have been discovered with further investigation that would have altered his decision to enter a guilty plea. Appellant received a significant benefit by entry of his plea. In exchange for pleading guilty to three counts of lewdness with a minor and two counts of attempted sexual assault on a minor, appellant avoided ten charges of sexual assault on a minor and five additional charges of

lewdness with a minor. Appellant faced significantly more time if he went to trial and was convicted of all of the charged offenses. Appellant informed the district court during the plea canvass that entry of the plea was in his best interests. We conclude that appellant failed to demonstrate that his plea was invalid in this regard.

Fifth, appellant claimed that his guilty plea was invalid because his trial counsel refused to allow a private psychiatrist to evaluate appellant and refused to allow appellant to participate in a lie detector test. Appellant's trial counsel testified that he may have refused to allow a private psychiatrist to evaluate appellant.⁸ He explained that if he did refuse to allow appellant to be evaluated by a private psychiatrist that he may have done this because he did not know anything about the doctor. Appellant's trial counsel stated, in his affidavit, that appellant was evaluated by several mental health professionals during the course of the trial proceedings. The district court found that appellant failed to show how a private psychiatric examination or a lie detector test would have changed the result in his case. We conclude that appellant failed to demonstrate that his plea was invalid in this regard.

Sixth, appellant claimed that his guilty plea was invalid because his trial counsel made psychologically detrimental statements to appellant to convince him to enter a guilty plea. Appellant's trial counsel stated that many of appellant's examples were taken out of context. Appellant's trial counsel testified that he had several conversations expressing the serious nature of the charges with appellant and trial counsel's opinion of the probability of success at trial. An attorney's candid advice about the merits of a case does not render the attorney

⁸Appellant indicated that he wanted his wife's psychiatrist to evaluate him.

ineffective. Given the seriousness of the charges and the benefit received in the plea agreement, appellant failed to demonstrate that he would have insisted on going to trial. Thus, we conclude that appellant failed to demonstrate that his plea was invalid in this regard.

Seventh, appellant claimed that the guilty plea was invalid because the district court failed to inform appellant on the record about whether probation was available. The record belies this claim. The written guilty plea agreement expressly set forth the availability of probation for the different charges. During the plea canvass, the availability of probation was specifically discussed. Appellant was specifically informed during the plea canvass that he was stipulating to a sentence of life with the possibility of parole after ten years had been served. We conclude that appellant failed to demonstrate that his plea was invalid in this regard.

Finally, appellant claimed that his trial counsel was ineffective at sentencing for failing to enter a positive psychiatric report and refusing to allow his family and friends to testify on his behalf. Appellant claimed that he would have received a more favorable sentence if the above actions had been taken by his counsel. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's counsel stated, in his affidavit, that he did submit a positive psychiatric report, by fax, to the district court for consideration at sentencing. Appellant failed to offer any testimony from potential character witnesses during the evidentiary hearing or indicate the content of the testimony such that it would have made a difference in the outcome of sentencing. We conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

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.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁰

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

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

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁰We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.