IN THE SUPREME COURT OF THE STATE OF NEVADA

FERNANDO ARREOLA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41034

FILED

JAN 13 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Fernando Arreola's post-conviction petition for a writ of habeas corpus.

On August 14, 2001, Arreola was convicted, pursuant to a guilty plea, of one count of trafficking in a controlled substance in violation of NRS 453.3385(3), a category A felony. The district court sentenced Arreola to serve a prison term of 10-25 years. Arreola did not pursue a direct appeal from the judgment of conviction and sentence.

On January 31, 2002, Arreola filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Arreola, and counsel subsequently filed a supplemental petition. The State filed a motion for the partial dismissal of the two petitions, which Arreola opposed. Without conducting an evidentiary hearing, the district court granted the State's motion. An order granting the State's motion for partial dismissal was entered on June 12, 2002. The district court conducted an evidentiary hearing on Arreola's remaining claims, and on February 5, 2003, entered an order denying the petition. This timely appeal followed.

First, Arreola contends that he received ineffective assistance of counsel due to counsel's failure to file a motion to suppress evidence of

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the methamphetamine seized from his vehicle, and investigate the circumstances surrounding his arrest. Arreola argues that the search of his vehicle, "due to a misdemeanor citation," was unconstitutional and "unreasonably lengthy and unreasonably intrusive."[1] Arreola also notes the discrepancy in the testimony of the arresting officers regarding the amount of drugs found in his vehicle, and the further discrepancy in their testimony compared to the evidence list composed by a criminalist from Washoe County Sheriff's Office, Forensic Science Division. We disagree with Arreola's contentions.[2]

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 counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial.[3] In order to demonstrate trial counsel was ineffective for failing to file a motion to suppress, a petitioner must demonstrate that the motion

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[1]See generally U.S. Const. amends. IV, VI, and XIV; NRS 171.123.

[2]Arreola also contends that a motion to suppress would have been meritorious because of an alleged violation of his Miranda rights. Miranda v. Arizona, 384 U.S. 436 (1966). This argument was not raised in his petitions below or addressed by the district court, and on appeal, Arreola has not alleged any cause or prejudice for failing to raise it earlier. Accordingly, we will not address this issue. See Hill v. State, 114 Nev. 169, 179, 953 P.2d 1077, 1084 (1998) (this court will consider an error of constitutional dimensional raised for the first time on appeal if "'the record is sufficiently developed to provide an adequate basis for review'" (quoting Jones v. State, 101 Nev. 573, 580, 707 P.2d 1128, 1133 (1985))); see also NRS 178.602 (plain error rule).

[3]See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

would have been meritorious, and that there was a reasonable likelihood that the exclusion of the evidence would have changed the result of the proceeding.[4]

We conclude that Arreola has failed to demonstrate that he received ineffective assistance of counsel. Moreover, Arreola has failed to articulate any way in which the district court erred in fashioning a ruling on the petition. The district court conducted a hearing on Arreola's petition, and heard the testimony of the two arresting officers, Arreola's prior counsel, and Arreola himself. The district court concluded that a motion to suppress would not have been meritorious because the officers did not search Arreola's vehicle. Testimony adduced at the evidentiary hearing indicated that the vehicle owned by Arreola, in which he was a passenger, was pulled over when it was discovered that the license plate belonged to another vehicle. Upon stopping the vehicle, the driver informed the officer that he did not have a valid driver's license or registration for the vehicle. Arreola informed the officer that he was the owner of the vehicle, but that he also did not have a valid driver's license or insurance for the vehicle. The officer arrested the driver and cited Arreola for not having insurance. Because the vehicle could not be lawfully driven, the officers prepared to have the vehicle towed. At that point, the officer testified, "Then [Arreola] made the statement to me that, something to the effect I want to come clean and that there's drugs hidden in the car." Arreola proceeded to voluntarily retrieve the drugs, and on his own initiative, gave them to the officer.

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[4]See Doyle v. State, 116 Nev. 148, 154, 995 P.2d 465, 469 (2000) (citing Kirksey, 112 Nev. at 990, 923 P.2d at 1109).

Additionally, the district court concluded that it was reasonable for counsel not to file a motion to suppress. This court has stated that the "'ultimate authority to make certain fundamental decisions, . . . such as whether to plead guilty," rests with the defendant.[5] Here, counsel credibly testified at the evidentiary hearing that Arreola wanted to plead guilty. Counsel stated that she discussed possible defenses, the facts of the case, and whether or not to file any pretrial motions or writs. The following exchange took place at the hearing:

> Q. Did you file any motions on this particular case?
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> . . .
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> A. It was not his desire to go any further with it. It was a very unusual factual scenario, struck me a bit odd, because his only option, really, other than the motion to suppress was to do substantial [assistance], which he was not interested in either course of action.
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> Q. Now, would you agree that whether or not a motion to suppress is filed is an attorney's decision?
>
> A. Sure, it is, but I think it's also my decision to follow my client's wishes as well.
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> Q. And if you believed strongly that a motion to suppress would be granted and your client told you he didn't want you to do it, would you file it anyway?
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> A. It would depend on the nature of the case.

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[5]Johnson v. State, 117 Nev. 153, 161, 17 P.3d 1008, 1014 (quoting Raquepaw v. State, 108 Nev. 1020, 1022-23, 843 P.2d 364, 366 (1992), overruled on other grounds by DeRosa v. Dist. Ct., 115 Nev. 225, 985 P.2d 157 (1999)).

Therefore, based on all of the above, we conclude that the district court did not err in determining that counsel was not ineffective for failing to investigate further into Arreola's case or file a motion to suppress.

Second, Arreola contends that the district court erred when it dismissed his claim, without conducting an evidentiary hearing, that his guilty plea was not entered knowingly and voluntarily. Arreola argues that he agreed to plead guilty based on his mistaken belief, allegedly induced by counsel, that he would receive a 5-15 year sentence. In his proper person habeas petition, however, Arreola claimed that counsel promised that he would serve no more than 10 years. We disagree with Arreola's contention.

Our review of the record on appeal reveals that the district court did not err in dismissing Arreola's claim without conducting an evidentiary hearing. Arreola's claim that his guilty plea was not entered knowingly and voluntarily is belied by the record, and therefore, he was not entitled to an evidentiary hearing.[6] At his arraignment, Arreola informed the district court that he understood that, although the State was recommending a sentence of 10-25 years, the district court had the discretion to disregard the negotiations and sentence him to a term of life in prison with the possibility of parole after 10 years. Arreola also informed the district court that his counsel told him that he could receive a sentence of 10-25 years. The guilty plea memorandum, read and signed by Arreola, accurately informed him about the possible sentence. Additionally, Arreola indicated that no one had made any promises or

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[6]See Pangallo v. State, 112 Nev. 1533, 1536, 930 P.2d 100, 102 (1996), limited in part on other grounds by Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) (citing Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984)).

representations, or guaranteed any particular result if he pleaded guilty. And finally, this court has stated that "[a]n allegation that a guilty plea is entered because of the expectation of a lesser penalty is, of itself, insufficient to invalidate the plea."[7] Therefore, we conclude that Arreola has failed to demonstrate that his guilty plea was not knowingly or voluntarily entered.

Finally, Arreola contends that the district court erred when it dismissed his claim, without conducting an evidentiary hearing, that he was denied his right to a direct appeal without his consent. Arreola argues that counsel failed to inform him about his appellate rights, and that when he discovered he had appellate rights, it was too late. Arreola alleges that his sentence is disproportionate to the crime, and therefore, he has a meritorious appellate argument. We conclude that Arreola's contention is without merit.

Our review of the record on appeal reveals that the district court did not err in dismissing Arreola's appeal deprivation claim without conducting an evidentiary hearing. Arreola failed to support his claim with the required specific facts, which if true, would have entitled him to relief.[8] This court has stated that "there is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal."[9] Counsel is obligated to inform a defendant about his or her appellate rights if the defendant expressly inquires about an appeal, or if an appellate argument exists that seems

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[7]Lundy v. Warden, 89 Nev. 419, 422, 514 P.2d 212, 213 (1973).

[8]See Hargrove, 100 Nev. 498, 686 P.2d 222.

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

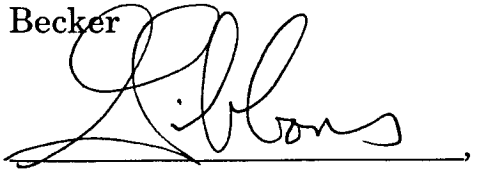
meritorious.[10] In this case, Arreola has not alleged that he asked counsel to file a direct appeal, and he has failed to demonstrate that a direct appeal had a reasonable likelihood of success. Therefore, we conclude that Arreola is not entitled to relief on this issue.

Accordingly, having considered Arreola's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Shearing

_____, J.
Becker



_____, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Karla K. Butko
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[10]See Thomas, 115 Nev. at 150, 979 P.2d at 223.