IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 41254

FILED

FEB 11 2004

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

ORDER OF AFFIRMANCE

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

On April 22, 1998, the district court convicted Barlow, pursuant to an Alford plea,[1] of attempted murder. The district court sentenced Barlow to serve a term of 88 to 220 months in the Nevada State Prison. This court dismissed Barlow's appeal from his judgment of conviction and sentence.[2] The remittitur issued on September 15, 1998.

On August 19, 1999, Barlow filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On December 27, 1999, the district court denied Barlow's petition. On appeal, this court noted that several pages of Barlow's petition were missing from the record on appeal, and

[1]North Carolina v. Alford, 400 U.S. 25 (1970).

[2]Barlow v. State, Docket No. 32411 (Order Dismissing Appeal, August 27, 1998).

consequently reversed the district court's order and remanded the case to allow Barlow to re-file his petition in its entirety.[3]

On December 16, 2002, Barlow filed a proper person post-conviction petition for a writ of habeas corpus pursuant to this court's order.[4] The State opposed the petition. Barlow filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Barlow or to conduct an evidentiary hearing. On March 10, 2003, the district court denied Barlow's petition. This appeal followed.

In his petition, Barlow first contended that his sentence was illegal because he was sentenced for a category A felony, although his guilty plea agreement stipulated that he would be sentenced for a category B felony. This claim is outside the scope of a post-conviction petition for a writ of habeas corpus when the conviction is based on a guilty plea.[5] Moreover, as a separate and independent ground to deny relief, this claim is without merit.[6] The guilty plea agreement stated that Barlow would plead guilty to one count of attempted murder as a category B felony, pursuant to NRS 200.010, 200.030, and 193.330.[7] NRS 193.330(a)(1) provides that an attempt to commit a category A felony is itself a category

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[3]Barlow v. State, Docket No. 35461 (Order of Reversal and Remand, November 6, 2002).

[4]This was a proper supplement to the original August 19, 1999 petition.

[5]See NRS 34.810(1)(a).

[6]See Edwards v. State, 112 Nev. 704, 918 P.2d 321 (1996).

[7]These statutes define murder, define and provide the penalties for first and second-degree murder, and state the punishment for attempt, respectively.

B felony, punishable by imprisonment for a term of two to twenty years. Because murder is a category A felony,[8] Barlow's sentence was not in excess of the statutory maximum. Furthermore, the plea agreement stated that Barlow would be sentenced to a term of between two and twenty years. Therefore, Barlow's claim is also belied by the record.[9] Lastly, on direct appeal, this court stated, "the sentence imposed is within the parameters provided by the relevant statutes." The doctrine of the law of the case prevents further litigation of this issue and "cannot be avoided by a more detailed and precisely focused argument."[10] Accordingly, the district court did not err in denying this claim.

In his petition, Barlow also made numerous allegations of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.[11] Further, a petitioner 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."[12]

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[8]See NRS 200.030.

[9]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

[10]Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

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

[12]Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Kirksey v. State, 112 Nev 980, 988, 923 P.2d 1102, 1107 (1996).

First, Barlow contended that his trial counsel was ineffective for (1) failing to object to the imposition of his sentence because it was in excess of plea agreement, (2) failing to advise him of his ability to withdraw his guilty plea after the terms of the plea agreement were dishonored, (3) failing to ensure that the terms of the plea agreement were followed, and (4) failing to challenge the ambiguousness of the plea agreement because his sentence exceeded its terms. As discussed above, Barlow failed to establish that the terms of the plea agreement were breached. Therefore, he did not demonstrate that his counsel acted unreasonably in any of these areas, and we affirm the order of the district court on these issues.

Second, Barlow contended that his trial counsel was ineffective for failing to object to the addition of a second victim to the amended information filed by the State. He argued that this amounted to a breach of the plea agreement. A review of the record reveals that the district attorney filed an amended information immediately before Barlow entered his guilty plea. Prior to entering his plea, Barlow responded affirmatively when asked by the court whether he had a copy of the amended information. Thereafter, Barlow entered his plea of guilty. Because he entered his plea after the addition of the second victim to the amended information, Barlow did not establish that the State breached the plea agreement. Further, Barlow failed to demonstrate that he would not have pleaded guilty and would have insisted on going to trial if his trial counsel had objected to the amended information. Therefore, we affirm the order of the district court on this claim.

Third, Barlow asserted that his trial counsel was ineffective for failing to challenge the admission of the amended information as a

violation of his double jeopardy rights. Barlow claimed that amending the information to include a second victim caused him to be punished twice for the same crime. The record does not support this claim. Therefore, Barlow did not establish that trial counsel was ineffective and we affirm the order of the district court on this issue.

Fourth, Barlow alleged that his trial counsel was ineffective for failing to raise the defense of diminished capacity. Specifically, Barlow contended that he was being treated for a chemical imbalance. Barlow provided no specific facts, however, concerning his alleged diminished capacity at the time he committed the offense.[13] Additionally, Barlow failed to establish that his trial counsel was aware of his alleged diminished capacity at the time he committed the offense. Therefore, Barlow did not demonstrate that his trial counsel acted unreasonably in this regard.

Fifth, Barlow asserted that his trial counsel was ineffective for failing to object to the fact that the statute under which he was sentenced, NRS 193.330, was vague and ambiguous. He contended that NRS 193.130 and 193.330 prohibit the same conduct, yet provide different penalties. We conclude that Barlow's claim is without merit. NRS 193.130 describes the categories and punishments of felonies in general. NRS 193.330 provides the definition and punishments of attempt crimes specifically. Therefore, Barlow failed to demonstrate that his trial counsel acted unreasonably in failing to raise an objection on this issue.

Barlow next alleged that his appellate counsel was ineffective. "A claim of ineffective assistance of appellate counsel is reviewed under

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[13]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

the 'reasonably effective assistance' test set forth in Strickland v. Washington."[14] Appellate counsel is not required to raise every non-frivolous issue on appeal.[15] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[16]

Barlow contended that his appellate counsel was ineffective for failing to appeal his sentence on the ground that his plea agreement was breached when he was sentenced for a category A felony instead of a category B felony. As discussed previously, Barlow's sentence was not in violation of the plea agreement. Therefore, Barlow failed to establish that his appellate counsel was ineffective in this regard.

In his petition, Barlow also alleged that his guilty plea was not knowing or voluntary because he did not sign the guilty plea agreement. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[17] Further, this court will not reverse a district court's determination concerning the validity of the guilty plea absent a clear abuse of discretion.[18] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[19]

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[14]Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

[15]Jones v. Barnes, 463 U.S. 745 (1983).

[16]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

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

[18]Id. at 675, 877 P.2d at 521.

[19]See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000).

The record on appeal contains only an unsigned guilty plea agreement. During his plea canvass, however, Barlow answered affirmatively when asked by the district court whether he signed the agreement freely and voluntarily. Moreover, the totality of the circumstances reveals that Barlow was aware of the consequences of his plea. The district court canvassed Barlow extensively concerning the voluntariness of his plea, his understanding of the consequences of the plea, and his waiver of rights. Even assuming there was no signed written guilty plea agreement in violation of NRS 174.035(6), it was harmless error in this instance.[20] Accordingly, we affirm the order of the district court on this issue.

Lastly, Barlow alleged that (1) the district court abused its discretion in sentencing him for a category A felony, (2) the district court erred in failing to hold a hearing when the district attorney amended the information to include a second victim, and (3) the district attorney failed to honor the terms of the plea agreement. These claims are outside the scope of a post-conviction petition for a writ of habeas corpus when the conviction is based on a guilty plea.[21] Therefore, the district court did not err in denying these claims.

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[20]See Ochoa-Lopez v. Warden, 116 Nev. 448, 451, 997 P.2d 136, 138, (2000) (finding that under the totality of the circumstances, the failure to execute a signed guilty plea memorandum was harmless error).

[21]See NRS 34.810(1)(a).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Barlow is not entitled to relief and that briefing and oral argument are unwarranted.[22] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Jackie Glass, District Judge
Keith Barlow
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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