

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEMETRIUS EDWARD JOSEPH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41367

FILED

MAY 05 2004

ORDER OF AFFIRMANCE

JANE T. 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 Demetrius Joseph's post-conviction petition for a writ of habeas corpus.

On June 21, 2002, the district court convicted Joseph, pursuant to a guilty plea, of attempted robbery and attempted first-degree kidnapping. The district court sentenced Joseph to serve a term of 16 to 72 months in the Nevada State Prison for the robbery conviction, and a concurrent term of 84 to 210 months for the kidnapping conviction. On appeal, this court affirmed the judgment of conviction and sentence.¹ The remittitur issued on January 3, 2003.

On February 26, 2003, Joseph filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Joseph filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Joseph or to conduct an evidentiary hearing. On May 14, 2003, the district court denied Joseph's petition. This appeal followed.

¹Joseph v. State, Docket No. 39968 (Order of Affirmance, December 9, 2002).

In his petition, Joseph first made an allegation of ineffective assistance of trial 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.² 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."³ The court need not consider both prongs of the test if the petitioner makes an insufficient showing on either one.⁴

Joseph contended that his trial counsel was ineffective for permitting him to plead guilty to attempted first-degree kidnapping. Joseph claimed that there was insufficient evidence adduced at the preliminary hearing to support the charge of first-degree kidnapping because the movement of the victim was incidental to the robbery.⁵

A person is guilty of first-degree kidnapping when that person "willfully seizes, [or] confines . . . a person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person for . . . the

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

³Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

⁴Strickland, 466 U.S. at 697.

⁵To the extent that Joseph raised this issue independently from the ineffective assistance of counsel claim, we conclude that it is waived. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

purpose of committing . . . robbery upon or from the person."⁶ A literal application of the kidnapping statute would make it "difficult to conceive how any robbery could be accomplished without committing the crime of kidnap."⁷ This court has concluded that the legislature did not intend kidnapping as a separate punishment when the "movement of the victim is incidental to the robbery and does not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself."⁸ Kidnapping is an additional offense, however, if the victim is restrained, and the restraint increases the risk of harm to the victim or has an independent purpose.⁹

In the instant case, the record reveals that Joseph knocked the victim unconscious, transported him to an adjacent room in the apartment, and wrapped tape around his hands, mouth, and eyes. The movement and physical restraint of the unconscious victim was not necessary to effectuate the robbery. Further, covering the unconscious victim's mouth with tape increased the risk of harm. Accordingly, Joseph failed to demonstrate that there was insufficient evidence to support his first-degree kidnapping charge, such that his trial counsel acted unreasonably in permitting him to plead guilty to attempted kidnapping. Thus, Joseph did not establish that his trial counsel was ineffective on this issue.

⁶NRS 200.310(1).

⁷Wright v. State, 94 Nev. 415, 417, 581 P.2d 442, 443 (1978).

⁸Id. at 417, 581 P.2d at 443-44.

⁹Hutchins v. State, 110 Nev. 103, 108, 867 P.2d 1136, 1140 (1994).

Joseph next contended that his guilty plea was not knowingly and voluntarily entered. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.¹⁰ Further, this court will not reverse a district court's determination concerning the validity of a guilty plea absent a clear abuse of discretion.¹¹ This court looks to the totality of the circumstances in determining whether a guilty plea was valid.¹²

Joseph claimed that his guilty plea was not knowingly entered because he did not admit to any facts constituting attempted first-degree kidnapping. Further, neither the district court nor the prosecutor stated the elements of attempted first-degree kidnapping. A review of the record on appeal reveals that during the plea canvass, the district court read the amended information, which provided a factual basis for Joseph's attempted kidnapping plea. Joseph responded affirmatively when asked by the district court if the allegation was true. Therefore, Joseph's claim is belied by the record.¹³ Further, Joseph acknowledged having read and understood the guilty plea agreement. A copy of the amended information, which contained specific facts concerning the charge, was attached to the guilty plea agreement. Thus, under the totality of the circumstances, Joseph failed to demonstrate that his guilty plea was not entered knowingly and voluntarily.

¹⁰Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).


¹¹Hubbard, 110 Nev. at 675, 877 P.2d at 521.


¹²State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000).

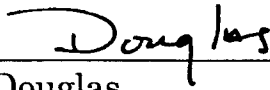
¹³See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Joseph is not entitled to relief and that briefing and oral argument are unwarranted.¹⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁵


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Valorie Vega, District Judge
Demetrius Edward Joseph
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁴See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁵We have reviewed all documents that Joseph has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Joseph has attempted to present claims or facts in those submissions that were not previously presented in the proceedings below, we have declined to consider them in the first instance.