IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY H. PHILSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41394

FILED

APR 14 2004

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

ORDER OF AFFIRMANCE

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

On March 6, 2002, the district court convicted Philson, pursuant to a guilty plea, of conspiracy to commit robbery, burglary while in possession of a firearm, robbery with the use of a deadly weapon, and attempted murder with the use of a deadly weapon. The district court sentenced Philson to serve multiple concurrent and consecutive terms in the Nevada State Prison. No direct appeal was taken.

On February 13, 2003, Philson filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Philson filed a reply. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent Philson. On April 23, 2003, the district court conducted an evidentiary hearing on Philson's petition, where it heard testimony from Philson, his trial

counsel, Gregory Denue, and Denue's legal assistant, Betty Engerberg.[1] On May 5, 2003, the district court issued an order denying Philson's petition. This appeal followed.

In his petition, Philson contended that his trial counsel was ineffective for advising him to enter his guilty plea. Specifically, Philson contended the following: he was factually innocent of attempted murder with the use of a deadly weapon, he received no consideration from the State in exchange for his plea, and his trial counsel succumbed to persuasive tactics by the State in convincing him to enter his plea. As such, Philson contended that his guilty plea was invalid.

To state a claim of ineffective assistance of trial counsel sufficient to invalidate a guilty plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness.[2] A petitioner must also show "'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'"[3] Moreover, a guilty plea is presumptively

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[1]A certified copy of the transcript of this evidentiary hearing indicates that it occurred on April 23, 2003. Other documents in the record indicate that this hearing occurred on April 24, 2003. We note that the discrepancy in these dates is immaterial for purposes of this appeal.

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

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

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.[4]

Our review of the record reveals that Philson entered a written plea agreement, where he admitted factual guilt to four criminal charges as they were set forth in an amended information attached as an exhibit to his plea agreement. These four charges included one of attempted murder with the use of a deadly weapon, which was supported by the factual statement that Philson fired a gunshot at a police officer in an attempt to kill the officer. In exchange for entering the plea, the State agreed not to oppose the dismissal of a charge of embezzlement, and an alternative charge of assault with the use of a deadly weapon, which were originally filed against Philson.

In the plea agreement, Philson acknowledged that he had discussed the elements of the charges filed against him with his trial counsel, and that he understood the nature of these charges. Philson also acknowledged that he had discussed all possible defenses and circumstances in his favor with his trial counsel, and that he believed that entering the guilty plea agreement was in his best interest. Philson further acknowledged that he was entering the agreement voluntarily, without any duress or coercion. The agreement was signed by both Philson and his trial counsel.

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[4]See Freese v. State, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000); Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

During the plea canvass, the district court asked Philson whether he had read, signed, and understood the plea agreement. Philson replied to these questions, "Yes, sir." When the district court asked Philson whether he signed the plea agreement freely and voluntarily, Philson again replied, "Yes, sir." The district court explained to Philson the possible sentencing ranges, fines, and fees that may be imposed for each of the charges to which he was pleading guilty.

Thereafter, Philson admitted to the district court that he and his wife had "planned to rob Jack in the Box at which she worked." Philson admitted that he entered the fast food restaurant armed with a semi automatic handgun, used the handgun in instructing an employee of the restaurant to open a safe and obtain money, and exited the establishment with the money. Philson also admitted that while he was exiting the fast food restaurant, he fired a single gunshot at a police officer. Philson stated that he fired the gunshot at the officer because the officer fired a gunshot at him first.

At that point, the State interjected and asked the district court not to accept Philson's plea. The State explained that it had evidence contrary to Philson's version of events, namely that it was Philson who first fired his weapon at the officer. The State rejected Philson's factual assertion on the basis that it may leave room for Philson to somehow later argue that he was acting in self-defense when he fired at the officer. Thus, the State indicated that it was prepared to proceed to trial.

After conferring with his trial counsel, Philson clarified his earlier statement as to whether it was he, or the pursuing officer, who first fired his weapon. The district court asked Philson, "You shot at him first?"

Philson replied, "Yes." Philson later admitted to the district court, "I fired the weapon because I didn't want to get arrested."

Given these considerations, our review of the totality of the circumstances surrounding Philson's plea reveal that it was freely, knowingly, and voluntarily entered. Philson's allegations were belied by the record,[5] and he failed to demonstrate that his trial counsel was ineffective for advising him to enter his plea or that his plea was invalid. Therefore, we conclude that the district court properly denied Philson relief on these allegations.

Philson also contended in his petition that his trial counsel was ineffective for failing to file either a motion to withdraw his guilty plea, or a direct appeal from his judgment of conviction, despite his repeated requests to do so. At the evidentiary hearing held on Philson's petition, Philson testified that he requested that his trial counsel, Gregory Denue, file a motion to withdraw his guilty plea both before and after he was sentenced. Philson also testified that he requested Denue to file a notice of direct appeal from his judgment of conviction. Yet, Philson acknowledged that he never spoke directly with Denue after his sentencing hearing.

Denue, however, testified that Philson never requested that he file either a motion to withdraw his guilty plea or a notice of direct appeal from his judgment of conviction. Rather, Denue testified that Philson was very upset with him after sentencing and Philson told Denue that he

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

desired no further contact with him. When questioned by the State at the evidentiary hearing as to whether Denue had a very clear recollection of this issue, Denue replied, "I absolutely do." Denue testified further that he actually went to the detention center in an attempt to visit Philson after the sentencing hearing, but Denue was informed by a corrections officer that Philson did not want to see him.

Denue's legal assistant, Betty Engerberg, testified at the evidentiary hearing that she received a telephone call from Philson sometime around the period of time in which Philson was sentenced. During this telephone conversation, Engerberg testified, "Mr. Philson stated to me do not have Mr. Denue file anything. Do not have Mr. Denue come to visit me. Please advise that to Mr. Denue."

The district court found that Denue did not improperly fail to file either a motion to withdraw a guilty plea,[6] or a notice of direct appeal on Philson's behalf.[7] Although the testimony of Denue and Engerberg contradicted that of Philson, the district court found Denue and Engerberg to be the more credible witnesses. The district court's findings were supported by the record and not clearly wrong.[8] Therefore, we conclude that the district court properly denied Philson relief on these allegations.

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[6]See NRS 176.165.

[7]See Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

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

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Philson is not entitled to the relief requested 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. John S. McGroarty, District Judge
Roy H. Philson
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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

[10]We have reviewed all documents that Philson 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 Philson has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.