

IN THE SUPREME COURT OF THE STATE OF NEVADA

DUANE A. HARPER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41632

FILED

SEP 07 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying appellant Duane A. Harper's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

On February 24, 2000, Harper was convicted, pursuant to a guilty plea, of one count each of burglary while in the possession of a deadly weapon (count I) and robbery with the use of a deadly weapon (count II). In exchange for his guilty plea, the State agreed not to pursue habitual criminal adjudication. The district court sentenced Harper to serve a prison term of 35-156 months for count I and a concurrent prison term of 35-156 months for count II, plus an equal and consecutive prison term for the use of a deadly weapon. Harper did not pursue a direct appeal from the judgment of conviction and sentence.

On January 10, 2001, Harper filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, and Harper filed a proper person reply to the State's opposition. Harper's petition alleged that his guilty plea was not entered knowingly and intelligently because he was never informed that pleading guilty to count II would result in a mandatory and additional

equal and consecutive prison term as a sentencing enhancement for the use of a deadly weapon. The district court did not appoint counsel to represent Harper. Without Harper being present, the district court conducted an evidentiary hearing, and received evidence and testimony regarding the merits of Harper's claim prior to denying his petition.

Harper appealed from the district court's ruling. This court, pursuant to Gebers v. State¹ and Mann v. State,² concluded that the district court violated Harper's statutory rights when it conducted the ex parte evidentiary hearing and when it improperly expanded the record by requesting that Harper's former counsel, Craig Jorgenson, submit a written response to the petition for consideration. Accordingly, this court reversed and remanded the matter to a different district court judge for an evidentiary hearing on the merits of Harper's petition.³

On remand, the district court appointed post-conviction counsel to represent Harper, and on March 31, 2003, conducted an evidentiary hearing. Both Harper and his former trial counsel, Craig Jorgenson, testified. On July 24, 2003, the district court entered an order denying Harper's petition. This timely appeal followed.

Harper contends that the district court erred in finding that his guilty plea was entered knowingly and intelligently. Harper once again argues that "had [he] known that his sentence was effectively going to be doubled by the deadly weapon enhancement, he would not have

¹118 Nev. 500, 50 P.3d 1092 (2002).

²118 Nev. 351, 46 P.3d 1228 (2002).

³Harper v. State, Docket No. 37918 (Order of Reversal and Remand, October 8, 2002).

entered a guilty plea.” Harper claims that he should be allowed to withdraw his guilty plea. We disagree with Harper’s contention.

A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.⁴ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.⁵ Additionally, this court has stated that “the failure to utter talismanic phrases will not invalidate a plea where a totality of the circumstances demonstrates that the plea was freely, knowingly and voluntarily made.”⁶ This court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.⁷

We conclude that the district court did not abuse its discretion in denying Harper’s habeas petition. Although the plea canvass did not include a discussion of the potential sentence range, the district court concluded that, based on the totality of the circumstances, Harper was adequately advised about the consequences of pleading guilty to robbery with the use of a deadly weapon. Our review of the plea canvass reveals that Harper stated that he read and signed the written plea agreement, and when questioned by the district court admitted to using a deadly

⁴Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

⁵State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

⁶Freese, 116 Nev. at 1104, 13 P.3d at 447 (citing Bryant, 102 Nev. at 271, 721 P.2d at 367).

⁷Hubbard, 110 Nev. at 675, 877 P. 2d at 521.

weapon, a knife, during the commission of the robbery. We further note that the guilty plea agreement, signed by Harper, correctly noted that the deadly weapon enhancement would be applied at sentencing.

At the evidentiary hearing on Harper's petition, his former counsel testified that he discussed the plea agreement and its sentencing consequences with Harper:

Q Mr. Jorgenson, you testified that Mr. Harper did not want to plead guilty to robbery with use of a deadly weapon; is that correct?

A Right.

Q Do you recall why it was he didn't want to plead guilty to robbery with use of a deadly weapon?

A Because he – because that would double his sentence.

Q Did you specifically discuss that aspect of the case with him?

A Yes.

Finally, Harper's testimony at the evidentiary hearing belies his claim that he was not aware of the repercussions of pleading guilty to "use" and its sentencing enhancement. The following exchanged occurred while being cross-examined by the State:

Q And why didn't you want to plead guilty to robbery with use of a deadly weapon?

A Well, the – the reason I didn't want to plead to the use of a deadly weapon was when I took the agreement I was admitting responsibility for the crime, but I was also asking for leniency in sentencing because I have two children and I wanted to get out at a fairly reasonable age and be some sort of a provider for them.

.....


Q [W]ere you aware that if you pled guilty to a robbery with a deadly weapon that would cause you to get a double sentence, one for robbery and a consecutive one for the deadly weapon?


A Yes, I was aware.

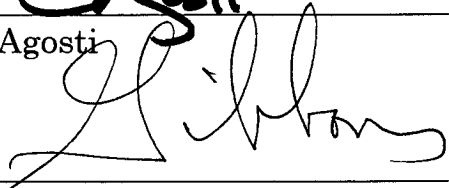
Therefore, based on all of the above, we conclude that Harper has failed to demonstrate that his guilty plea was not entered knowingly and intelligently.

Having considered Harper's contention and concluded that it is without merit, we

ORDER the judgment of the district court AFFIRMED.⁸


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Nancy M. Saitta, District Judge
Longabaugh Law Offices
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁸Because Harper is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, the clerk of this court shall return to Harper unfiled all proper person documents he has submitted to this court in this matter.