

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD WESLEY JANUARY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41641

FILED

FEB 25 2004

ORDER OF AFFIRMANCE

CLERK
J. Richards

This is an appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Appellant was originally convicted, pursuant to a plea of nolo contendere,¹ of one count of battery causing substantial bodily harm. The district court sentenced appellant to a prison term of 24 to 60 months.


In the petition, appellant presented claims of ineffective assistance of counsel and argued that his guilty plea was invalid. The district court found that appellant had failed to make specific factual allegations, and the district court therefore dismissed the petition without an evidentiary hearing.² Appellant has not demonstrated that the district court erred.

¹Appellant pleaded guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). Under Nevada law, "whenever a defendant maintains his or her innocence but pleads guilty pursuant to Alford, the plea constitutes one of nolo contendere." State v. Gomes, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996).

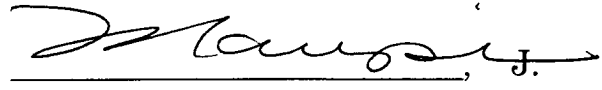
²See Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001) (holding that post-conviction claims must be supported by specific factual allegations).

Accordingly, for the reasons stated in the attached order of the district court, we

ORDER the judgment of the district court AFFIRMED.

 C.J.
Shearing

 J.
Rose

 J.
Maupin

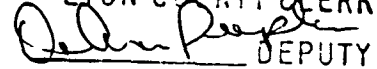
cc: Hon. Robert E. Estes, District Judge
Rick Lawton
Attorney General Brian Sandoval/Carson City
Lyon County District Attorney
Lyon County Clerk

1 Case No. CR 5830
2 Department No. III

FILE

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NIKKI A. BRYAN
LYON COUNTY CLERK

 DEPUTY

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6 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7
8 IN AND FOR THE COUNTY OF LYON

9 * * *

10 DONALD WESLEY JANUARY,

11 Petitioner,

12 vs.

**ORDER DISMISSING WRIT OF
HABEAS CORPUS (POST-CONVICTION)**

13
14 WARDEN, NORTHERN NEVADA
15 CORRECTIONAL CENTER, DON
HELLING, et al.,

16 Respondents.
17 _____/

18 Issue

19 Before the court is the Petitioner DONALD WESLEY
20 JANUARY's Application for Setting and Respondents DON HELLING,
21 Warden, Northern Nevada Correctional Center, et al., Request to
22 Submit Petition of Writ of Habeas Corpus (Post-Conviction) and
23 Answer for Decision.

24 The Petition for Writ of Habeas Corpus was filed by the
25 Petitioner on February 27, 2003. The Petitioner claims he is
26 being unjustly held because of denial of effective assistance of
27 counsel in violation of the Sixth and Fourteenth Amendments of the
28 U.S. Constitution, and because of a violation of due process

1 guaranteed by the Fifth, Sixth and Fourteenth Amendments of the
2 U.S. Constitution since his guilty plea was (a) not entered
3 knowingly, intelligently and voluntarily, (b) predicated on
4 ineffective assistance of counsel, and (c) based on a plea canvass
5 that was insufficient since the trial court did not canvass the
6 Petitioner regarding the meaning of an Alford Plea. An Answer to
7 the Petition was filed by the Respondent on May 1, 2003. Counsel
8 for the Petitioner then filed a Notice of Intent Not to File
9 Supplement to Writ and Application for Setting on May 12, 2003,
10 which requests a hearing be set on the Writ. The Respondent then
11 filed an Opposition to Application for Setting and a Request to
12 Submit Petition and Answer for Decision.

14 The question before the court is whether or not the Writ
15 should be granted and whether or not an evidentiary hearing is
16 necessary under NRS 34.770.

17 Rule

18 NRS 34.770 governs the process of determining the need
19 for an evidentiary hearing on a Writ of Habeas Corpus. The rule
20 states as follows:

21 1. The judge or justice, upon review
22 of the return, answer and all supporting
23 documents which are filed, shall determine
24 whether an evidentiary hearing is required.
25 A petitioner must not be discharged or com-
mitted to the custody of a person other than
the respondent unless an evidentiary hearing
is held.

26 2. If the judge or justice determines
27 that the petitioner is not entitled to re-
28 lief and an evidentiary hearing is not re-
quired, he shall dismiss the petition with-
out a hearing.

1 3. If the judge or justice determines
2 that an evidentiary hearing is required, he
3 shall grant the writ and shall set a date
4 for the hearing.

5 When seeking post-conviction relief, a petitioner
6 "cannot rely on conclusory claims for relief but must support
7 any claims with specific, factual allegations that if true would
8 entitle him or her to relief." *Evans v. State*, 117 Nev. ___,
9 (2001).

10 Claims of ineffective assistance of counsel are
11 reviewed according to the "reasonably effective assistance"
12 standard as set out in *Strickland v. Washington*, 466 U.S. 668
13 (1984). In order to meet this standard, a petitioner must show
14 that (1) counsel's performance fell below and objective standard
15 of reasonableness, and (2) there is a reasonable probability
16 that but for counsel's unprofessional errors, the result of the
17 proceeding would have been different. *McNelton v. State*, 115
18 Nev. 396, 403 (1999). Since this conviction is the result of an
19 guilty plea, the petitioner "*must show a reasonable probability*
20 *that, but for counsel's errors, he would not have pleaded guilty*
21 *and would have insisted on going to trial.*" *Kirksey v. State*,
22 112 Nev. 980, 988 (1996), emphasis added by *Kirksey* court.
23 (Quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). See also
24 *State v. Langarica*, 107 Nev. 932, 933, (1991).

25 When challenging the validity of a guilty plea, the
26 plea is viewed as presumptively valid with a burden on the
27 defendant to demonstrate that the plea was not entered knowingly
28

1 and intelligently. Bryant v. State, 102 Nev. 268, 272 (1986).
2 See also State v. Freese, 116 Nev. 1097. A reviewing court
3 "should review the entire record, and look to the totality of
4 the facts and circumstances of a defendant's case, to determine
5 whether a defendant entered his plea with an actual understand-
6 ing of the nature of the charges against him." Bryant at 271
7 (citations omitted). The standard of review as to whether or
8 not a trial court committed reversible error in accepting such a
9 guilty plea is a "clear abuse of discretion" standard. Id. at
10 272.
11

12 Analysis

13 Ineffective Assistance of Counsel

14 Although the Petitioner alleges ineffective assistance
15 of counsel, the Petitioner has failed to provide sufficient
16 facts that would, if true, entitle him to relief under the
17 "reasonably effective assistance" requirement set out in Strick-
18 land.

19 He claims that counsel failed to interview witnesses,
20 but does not explain who these witnesses were or what informa-
21 tion they might have provided. Thus the court cannot conclude
22 that there is a reasonable probability that the outcome of the
23 proceeding would have been different but for the alleged im-
24 proper act.
25

26 The same problem exists in the Petitioner's claims
27 that counsel failed to inform him that a witness had given two
28 conflicting written statements, failed to explain the Alford

1 plea and did not present the court the mitigating circumstance
2 of self-defense. It is not sufficient to simply make broad
3 allegations concerning omissions on the part of counsel. For
4 example, the Petitioner is not entitled to have a Writ of Habeas
5 Corpus granted based on a claim that his attorney did not inform
6 him of two conflicting statements given by a witness; under
7 Kirksey, the Petitioner must provide facts that would be enough
8 to establish a reasonable probability that but for the lack of
9 information concerning the two statements he would have insisted
10 on going to trial. In this case the Petitioner has not even
11 informed the court as to what the two conflicting statements
12 were or who made them.

14 Under the two prongs of the Strickland test, the court
15 must be provided information that would allow it to conclude
16 that there is a reasonable probability that had counsel not
17 committed a specific unprofessional error, the Petitioner would
18 have insisted on going to trial. Kirksey v. State, 112 Nev.
19 980, 988 (1996). The allegations of ineffective assistance of
20 counsel made by the Petitioner are insufficient to allow the
21 court to reach this conclusion. Even if the allegations made by
22 the Petitioner are true, in and of themselves they do not
23 entitle the Petitioner to relief. Therefore, under NRS
24 34.770(2), no evidentiary hearing based on ineffective assis-
25 tance of counsel is warranted.

27 Due Process

28 Likewise, the Petitioner has failed to allege

1 sufficient facts to entitle him to relief as a result of
2 violation of due process of law.

3 The Petitioner's claim that his guilty plea was not
4 entered knowingly, intelligently and voluntarily is a conclusory
5 statement and provides no specific factual allegation which
6 would overcome the presumption of validity of the guilty plea
7 and entitle him to relief.

8 The Petitioner also claims violation of due process
9 based on ineffective assistance of counsel. The issue of
10 ineffective assistance of counsel has already been discussed,
11 but it should be noted that this claim of a violation of due
12 process is also a conclusory statement and does not provide any
13 facts regarding acts or omissions on which the Petitioner's
14 claim is based.

15 Finally, Petitioner also alleges that the plea canvass
16 was insufficient since the Petitioner was not "canvassed regard-
17 ing the meaning of the Alford Plea." Although it is not en-
18 tirely clear from the Petitioner's statement, the court can only
19 assume one of two things; either the Petitioner claims that due
20 process of law was not given him since the Petitioner was not
21 canvassed as to what he meant to accomplish by entering the
22 Alford Plea, or the Petitioner simply alleges that the canvass-
23 ing was incomplete since it did not include a questions about
24 his understanding of the term "Alford Plea." In either case, no
25 facts are presented and no evidence exists in the record to
26 support this allegation and thereby require an evidentiary
27
28

1 hearing.

2 A trial court's responsibilities in regard to
3 accepting an Alford Plea are explained in Tiger v. State, 98
4 Nev. 555, 558 (1982). Tiger holds that an Alford Plea "is
5 constitutionally sound if it is knowingly entered for a valid
6 reason, for instance, to avoid the possibility of a harsher
7 penalty. However, the district judge, in accepting the plea,
8 must determine that there is a factual basis for the plea, and
9 he must further inquire into and seek to resolve the conflict
10 between the waiver of trial and the claim of innocence. Alford,
11 supra, 400 U.S. at 38 n. 10." As noted above, when reviewing a
12 guilty plea to determine whether a defendant entered it know-
13 ingly and intelligently, the totality of the circumstances are
14 examined. Bryant v. State, 102 Nev. 268, 271 (1986).

16 In reviewing the record in this case, we find that the
17 Petitioner plead guilty to the offense of Battery Causing
18 Substantial Bodily Harm at arraignment on October 7, 2002.
19 Transcript of Proceedings - Arraignment ("AT"), p.5. When asked
20 what the Petitioner did to cause this charge to be brought, the
21 Petitioner's attorney spoke:

22
23 "MR. MILLS: Your Honor, we'd ask you to
24 accept this plea in the form of an Alford v.
25 North Carolina plea.

26 Mr. January is doing this to avoid or
27 limit his criminal liability in this matter.

28 The State would have evidence in this
matter that on the 31st day of August Mr.
January did hit Mr. Feldman, causing him to
lose sight in one eye. And that it was done
under circumstances in which Mr. January
would not have any self-defense to that

1 charge, Your Honor." AT, p.7-8.

2 The prosecutor then added:

3 ". . . There were also more serious
4 charges that Mr. January could have faced in
5 this matter, if he had not agreed to this
6 negotiation." AT, p.8.

6 The Court then addressed the Petitioner personally:

7 "THE COURT: All right. Mr. January,
8 did you understand what was represented to
9 this Court by your attorney and by the Dis-
10 trict Attorney?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And you adopt those state-
11 ments as your own?

11 THE DEFENDANT: Yes sir.

12 THE COURT: All right. The Court will
13 accept the plea pursuant to Alford v. North
14 Carolina." AT, p.8.

14 The defendant was never directly asked if he knew what
15 the definition of an Alford plea was or how it functions, but
16 the Supreme Court of Nevada "has never required the 'articula-
17 tion of talismanic phrases' at plea hearings," Bryant v. State,
18 102 Nev. 268, 271 (1986). The record clearly indicates on its
19 face that the defendant intended to plead guilty, and that he
20 understood a valid reason for entering into an Alford plea,
21 namely to minimize his criminal liability. The record supports
22 the presumption that the guilty plea was entered knowingly and
23 intelligently. The requirements of Tiger are met by these
24 facts, and the Petitioner has presented no facts that would
25 contradict them.

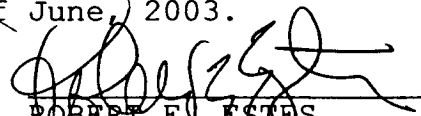
26 None of the Petitioner's contentions under the Due
27 Process section of his petition allege facts that would necessi-
28

1 tate an evidentiary hearing under NRS 34.770.

2 Conclusion

3 Respondent's motion to dismiss the Petitioner's
4 request for Writ of Habeas Corpus without an evidentiary hearing
5 is **GRANTED**.

6 DATED: This 12th day of June, 2003.

7 
8 ROBERT E. ESTES
9 DISTRICT JUDGE

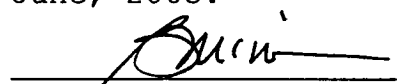
10 Certificate of Mailing

11 I hereby certify that I, Beatrice McMinn, am an employee
12 of the Honorable Archie E. Blake, District Judge, and that on this
13 date pursuant to NRCP 5(b), I deposited for mailing at Yerington,
14 Nevada, a true copy of the foregoing document addressed to:

15 Eileen Barnett
16 Deputy District Attorney
17 31 South Main Street
Yerington, Nevada 89447

18 Rick Lawton
19 Attorney At Law
20 P.O. Box 1740
Fallon, Nevada 89407

21 DATED: This 12th day of June, 2003.

22 
23 Beatrice McMinn