IN THE SUPREME COURT OF THE STATE OF NEVADA

LAMAR ALEXANDER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41657

FILED

FEB 15 2005

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying Lamar Alexander's post-conviction habeas petition filed pursuant to Lozada v. State.[1] Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On March 14, 2001, the district court, pursuant to an Alford[2] plea, convicted Alexander of second degree murder. The district court sentenced Alexander to a prison term of life with the possibility of parole after serving 10 years. Alexander filed an untimely notice of appeal, which this court dismissed.[3] He then filed a proper person post-conviction petition for a writ of habeas corpus in the district court claiming that his counsel denied him a direct appeal. The district court conducted an evidentiary hearing, and the State conceded that Alexander was denied a direct appeal. The district court then appointed counsel to assist Alexander in filing a petition for a writ of habeas corpus raising any issues

[1]110 Nev. 349, 359, 871 P.2d 944, 950 (1994).

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

[3]Alexander v. State, Docket No. 39140 (Order Dismissing Appeal, March 25, 2002).

05-02938

that he could have raised on direct appeal pursuant to Lozada.[4] Alexander filed his Lozada petition on August 30, 2002. The district court denied his petition on May 29, 2003. This appeal followed.

All of Alexander's claims stem from the denial of his pre-sentence motion to withdraw his guilty plea. He claims that the district court erred in denying his motion because he believed that he was pleading guilty to aiding and abetting instead of second degree murder, he never adopted a factual basis for his Alford plea, and his plea canvass was inadequate. Alexander also claims that the district court erred in failing to recanvass him after it amended the first amended information and the presentence investigation report (PSI), and that his counsel was ineffective because he coerced him into pleading guilty.

NRS 176.165 permits a defendant to file a motion to withdraw a plea prior to sentencing. The district court has discretion to grant the motion for any substantial reason that is fair and just.[5] "To determine whether the defendant advanced a substantial, fair, and just reason to withdraw a plea, the district court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently."[6] It is, however, the defendant's burden to show that his plea was not entered knowingly, intelligently, and

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[4]See 110 Nev. at 359, 871 P.2d at 950.

[5]See State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969).

[6]Crawford v. State, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001).

voluntarily.[7] "On appeal from a district court's denial of a motion to withdraw a guilty plea, this court 'will presume that the lower court correctly assessed the validity of the plea, and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion.'"[8] We conclude that the district court did not abuse its discretion in denying Alexander's presentence motion to withdraw his guilty plea.

Alexander claims that the district court erred in denying his motion because he thought that he was pleading under an aiding and abetting theory instead of a second degree murder theory. The guilty plea canvass shows that Alexander knew that he was pleading to second degree murder under an aiding and abetting theory. Specifically, during the plea canvass the State conveyed that it would prove that "Mr. Alexander did enter into a conspiracy . . . to rob a Terry Dixon . . . and in the course of that robbery . . . Mr. Dixon was shot and killed, thereby making Mr. Alexander eligible of first degree murder under felony murder theory." The court then stated that Alexander was pleading to second degree murder and not first degree murder. The State agreed and explained that it was only conveying what it could prove if Alexander proceeded to trial. Alexander's attorney then stated that "Mr. Alexander was not intending to ever have been the shooter, never accused of, there was never going to be evidence put on about that fact. It was strictly felony murder." The State agreed and further stated its belief that the shooter was someone else.

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[7]See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

[8]Riker v. State, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995) (quoting Bryant, 102 Nev. at 272, 721 at 368).

Although the amended information, which was attached to the guilty plea agreement, stated that Alexander committed the crime of second degree murder by willfully and feloniously killing Terry Dixon "by shooting at and into the body" of Terry Dixon, we conclude that the district court did not abuse its discretion in denying his motion. It was clearly articulated at the plea canvass that Alexander was pleading to second degree murder and that he was not the shooter in the crime.

Next, Alexander claims that he never adopted a factual basis for his Alford plea and therefore his plea was invalid. "An Alford plea is a guilty plea accompanied by a denial of the facts constituting the offense."[9] Therefore, Alexander was not required to adopt a factual basis for his Alford plea to be constitutionally sound. However, in accepting an Alford plea, a district court must determine that there is a factual basis for the plea and must resolve the conflict between waiver of trial and the claim of innocence.[10] As stated, during the plea canvass the State offered what it could prove if Alexander chose to proceed to trial; thus, the district court had an adequate factual basis to accept Alexander's plea. In addition, Alexander stated that he read, understood, and signed the written plea agreement which set forth that he was pleading to second degree murder and that he was pleading pursuant to Alford to avoid the possibility of being convicted of more offenses or of a greater offense and receiving a greater penalty, resolving the conflict between waiver of trial and the

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[9]Tiger v. State, 98 Nev. 555, 558, 654 P.2d 1031, 1033 (1982).

[10]See State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996).

claim of innocence.[11] Therefore, we conclude that the district court did not abuse its discretion in denying Alexander's motion.

Alexander next claims that his guilty plea canvass was inadequate because the district court failed to ask if he understood the rights that he was waiving by pleading guilty, if he had an understanding of an Alford plea, and if he had been coached. He also claims that the district court failed to advise him that he was waiving his right to a direct appeal and to appeal his motion to suppress. We conclude that under the totality of the circumstances, the plea canvass was adequate.[12] As stated, Alexander acknowledged during his plea canvass that he read, understood, and signed the written plea agreement freely and voluntarily.[13] In that agreement, all the rights that he was waiving were clearly set forth as was an explanation of his Alford plea. In addition, Alexander also stated that signing the agreement was in his best interest. He acknowledged that his plea was by way of Alford and that he understood that he stipulated to a sentence of 10 to life. Moreover, Alexander never waived his right to a direct appeal. The plea agreement stated that he was waiving the "right to appeal the conviction, with the assistance of an attorney, either appointed or retained, unless the appeal

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[11]Alexander was originally charged with conspiracy to commit robbery and/or murder, burglary while in possession of a firearm, murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and failure to stop on signal of a police officer.

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

[13]Alexander now claims that he did not actually read the guilty plea agreement and that he answered affirmatively to questions regarding the plea agreement because his counsel instructed him to do so.

is based upon reasonable constitutional jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035." This clause did not prohibit him from filing a direct appeal. Lastly, the district court had no obligation to advise him that he was waiving his right to appeal his motion to suppress. It is the defendant's obligation to preserve that right.[14]

Next, Alexander claims that once the district court amended the information and the PSI to reflect that he was not the shooter and that he was pleading to second degree murder under the aiding and abetting theory, it should have recanvassed him. He also claims that the district court's decision to amend these documents was an improper remedy. This court cannot positively conclude from the record whether or not the information and PSI were amended to reflect that Alexander was not the shooter and that he was pleading under an aiding and abetting theory because counsel did not provide these documents in the record on appeal.[15] However, if these documents were amended as expressed by the district court at the evidentiary hearing on Alexander's presentence motion to withdraw his guilty plea, we can conclude that no basis existed to recanvass Alexander. These amendments did not materially alter the factual basis for the crime as set forth in the plea canvass and did not prejudice Alexander.[16] Moreover, Alexander agreed to the amendments as they were to his benefit.

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[14]See NRS 174.035(3).

[15]See NRAP 30.

[16]See NRS 173.095(1); see also Grant v. State, 117 Nev. 427, 433, 24 P.3d 761, 765 (2001).

Next, Alexander claims that he received ineffective assistance of counsel, making his judgment of conviction invalid. Alexander raises this claim in the instant Lozada petition in which only direct appeal claims are to be raised.[17] Claims of ineffective assistance of counsel cannot be raised on direct appeal unless there has been an evidentiary hearing on the matter below.[18] Because Alexander raises this claim in the context of an appeal from the district court's denial of his presentence motion to withdraw his guilty plea, which it conducted an evidentiary hearing on, we will consider this claim. Specifically, Alexander claims that his counsel coerced him into pleading guilty primarily because he brought the deputy district attorney on the case to the jail where Alexander was housed to discuss the negotiations. We conclude that the district court did not err in denying this claim. It was clear from the testimony at the evidentiary hearing that counsel did not coerce Alexander into taking the plea negotiations. Counsel strongly advised Alexander to plead to second degree murder since he was originally charged with much greater offenses and apparently confessed to them. In addition, the DA was only brought to Alexander's jail cell to assist his attorney in explaining the plea negotiations to him.

Alexander also claims that his counsel was ineffective because he failed to preserve his right to appeal his pretrial motion to suppress pursuant to NRS 174.035(3). Although counsel failed to preserve Alexander's right to appeal this motion, Alexander has failed to

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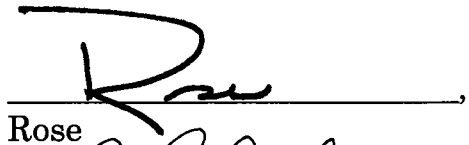
[17]See Lozada, 110 Nev. at 359, 871 P.2d at 950.

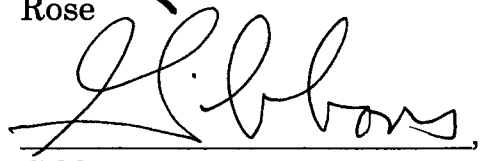
[18]See Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

demonstrate that this motion had a reasonable probability of success on appeal and thus has failed to show how he was prejudiced by counsel's actions.[19] We conclude that the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. John S. McGroarty, District Judge
William J. Taylor
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[19]See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).