IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLIN OLIVAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41939

FILED

MAY 28 2004

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 appellant Marlin Olivas' post-conviction petition for a writ of habeas corpus.

On April 2, 2002, Olivas was convicted, pursuant to an Alford plea,[1] of one count each of battery with the use of a deadly weapon on a police officer causing substantial bodily harm (count I), assault on a police officer with the use of a deadly weapon (count II), and mistreatment of a police animal (count III). The district court sentenced Olivas to serve consecutive prison terms of 72-180 months for count I, 24-72 months for count II, and 12-36 months for count III; and, Olivas was ordered to pay $14,122.97 in restitution and $195.00 in extradition costs. Olivas did not pursue a direct appeal from the judgment of conviction and sentence.

On March 4, 2003, Olivas, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. After conducting an evidentiary hearing, the district court denied Olivas' petition. This timely appeal followed.

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

Olivas contends that the district court erred in denying his post-conviction petition for a writ of habeas corpus because "the record was clear prior to sentencing that Olivas intended to withdraw his Alford plea." After the entry of his Alford plea and before sentencing, Olivas attempted to file a proper person motion to withdraw his guilty plea in the district court. Because Olivas was represented by counsel, the motion was not filed and instead was forwarded to the public defender's office.[2] Only two days later, Olivas' sentencing hearing took place, and no mention was made about Olivas' previous desire to withdraw his plea. Olivas argues on appeal that: (1) the district court erred in accepting his plea because it was not entered knowingly and intelligently; and (2) counsel was ineffective for not informing him about his right to appeal, not informing the district court about his desire to withdraw his plea, and allowing him therefore to enter an invalid plea. We disagree with Olivas' contentions.

A plea entered pursuant to Alford is a guilty plea, coupled with the defendant's claim of innocence.[3] An Alford 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

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[2]See EDCR 3.70 ("[A]ll motions . . . delivered to the clerk of the court by a defendant who has counsel of record will not be filed but must be marked with the date received and a copy forwarded to that attorney for such consideration as counsel deems appropriate.").

[3]See Tiger v. State, 98 Nev. 555, 558, 654 P.2d 1031, 1033 (1982); see also State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996).

[4]Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

plea, this court looks to the totality of the circumstances[5] and will not reverse a district court's determination absent a clear abuse of discretion.[6]

Additionally, to state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial.[7] A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.[8]

We conclude that the district court did not err in denying Olivas' petition. At the evidentiary hearing, his former counsel, Jeff Banks, testified that he spoke nearly a dozen times with Olivas prior to the entry of his plea, and approximately four more times after the entry of his plea and prior to sentencing. Banks stated that although Olivas seemed to understand and communicate reasonably well in English, Banks exercised an "overabundance of caution" and used an interpreter on several occasions to make sure that Olivas understood all of the plea negotiations, ramifications, and strategy. Banks discussed Olivas' proper person motion to withdraw his plea with him, and informed him that he

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

[6]Hubbard, 110 Nev. at 675, 877 P.2d at 521.

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

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

did not believe there was a successful legal basis for the claim. After much discussion about the consequences of withdrawing his plea, Olivas agreed instead to proceed with his plea and argue for probation. Banks testified that he told Olivas several times that he could not promise that he would receive probation. Banks also testified that if Olivas had insisted on moving to withdraw his plea, he would have notified the district court, but that it was Olivas' decision to proceed with sentencing. Olivas and his family actively participated in preparing for the sentencing.

Olivas testified at the evidentiary hearing and admitted that he spoke with Banks numerous times prior to the entry of his plea, and several times with an interpreter, but that Banks coerced him into entering an Alford plea. Olivas also admitted that he never informed the district court at the sentencing hearing that he was confused or that he wanted to withdraw his plea. And at no point in the proceedings has Olivas challenged the thoroughness of the district court's plea canvass. Based on all of the above, we conclude that the district court did not err in finding, based on the totality of the circumstances, that Olivas' plea was entered knowingly and voluntarily, and that there was substantial evidence that Olivas did not receive ineffective assistance of counsel.

Finally, Olivas' contention that he was denied a direct appeal without his consent is without merit. Olivas argues that Banks was ineffective for failing to inform him about his appellate rights, and claims that the attempted filing of his proper person motion to withdraw his plea "is clear proof of [his] desire to appeal." We disagree.

Initially, we note that Olivas has failed to support his claim with the required specific facts, which if true, would have entitled him to

relief.[9] Olivas never even raised the issue, let alone presented evidence, during the lengthy evidentiary hearing on his petition. Moreover, this court has stated that "there is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal."[10] Counsel is obligated to inform a defendant about his or her appellate rights if the defendant expressly inquires about an appeal, or if an appellate argument exists that seems meritorious.[11] In this case, Olivas has not alleged or demonstrated with any degree of factual specificity that he asked counsel to file a direct appeal, and he has failed to demonstrate that a direct appeal had a reasonable likelihood of success. Therefore, we conclude that Olivas is not entitled to relief on this issue.

Having considered Olivas' contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Douglas

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

[10]Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470 (2000).

[11]See Thomas, 115 Nev. at 150, 979 P.2d at 223.

cc: Hon. John S. McGroarty, District Judge
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