

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41965

FILED

MAY 28 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

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

On January 9, 2003, the district court convicted appellant, pursuant to a guilty plea, of one count of trafficking in a controlled substance. The district court sentenced appellant to serve a term of twenty-four to sixty months in the Nevada State Prison. No direct appeal was taken.

On May 8, 2003, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On November 17, 2003, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his guilty plea was not entered knowingly and voluntarily. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.¹ Further, this court will not reverse a district court's determination concerning the validity of a plea

¹Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

absent a clear abuse of discretion.² In determining the validity of a guilty plea, this court looks to the totality of the circumstances.³

First, appellant claimed that his guilty plea was not entered knowingly and voluntarily because a medical condition rendered him unaware of what he was doing at the time he entered his plea. We conclude that the district court did not err in denying this claim. Although appellant indicated that he was diagnosed with encephalopathy in 1999 and needed a liver transplant due to end-stage liver disease, appellant failed to demonstrate that his medical condition rendered him incompetent to enter a guilty plea in 2002.⁴ During the plea canvass, appellant affirmatively indicated that: (1) his guilty plea was entered freely and voluntarily; and (2) he had read and signed the plea agreement. The coherent nature of appellant's statements on the record belied his claim that he was incompetent to plead guilty. Therefore, appellant failed to carry his burden of demonstrating that his guilty plea was entered involuntarily or unknowingly.

Second, appellant claimed that his guilty plea was not entered knowingly because he was not informed of the maximum penalty. Appellant claimed that he was informed at the hearing in which he waived his preliminary hearing that he would receive a minimum penalty of two years, and he understood that to mean that he would receive only the

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

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

⁴See NRS 178.400(2) (providing that "'incompetent' means that the person is not of sufficient mentality to be able to understand the nature of the criminal charges against him, and because of that insufficiency, is not able to aid and assist his counsel in the defense interposed upon the trial or against the pronouncement of the judgment thereafter.").

minimum sentence of two years. We conclude that the district court did not err in denying this claim. The statement made in the justice's court was not inconsistent; rather it was incomplete. Appellant was correctly informed of the potential minimum and maximum penalty during the plea canvass and in the written guilty plea agreement. Therefore, appellant failed to carry his burden of demonstrating that his guilty plea was entered unknowingly or involuntarily.

Next, appellant raised several claims of ineffective assistance of counsel. 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 his counsel's performance fell below an objective standard of reasonableness. Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.⁵

First, appellant claimed that his trial counsel was ineffective for encouraging appellant to enter a guilty plea to trafficking when he was only a procuring agent. We conclude that the district court did not err in denying this claim. Appellant did not support this claim with any facts, and thus, he failed to demonstrate a reasonable probability that he would have insisted on going to trial absent trial counsel's advice. Thus, we conclude that appellant to demonstrate that his trial counsel was ineffective in this regard.

Second, appellant claimed that his trial counsel was ineffective for failing to object to imposition of a maximum sentence and encouraging appellant to sign a guilty plea agreement with a greater than two year sentence. We conclude that the district court did not err in

⁵See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

denying this claim. NRS 176.033(1)(b) provides that the district court shall sentence a defendant convicted of a felony offense requiring imprisonment "to a minimum term and a maximum term of imprisonment, unless a definite term of imprisonment is required by statute." The offense of mid-level trafficking requires "imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years."⁶ Thus, there was no basis for trial counsel to object to the imposition of a sentence containing both a minimum and maximum term. Therefore, we conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Third, appellant claimed that his trial counsel was ineffective for allowing appellant to enter a guilty plea given his medical condition. We conclude that the district court did not err in denying this claim. Appellant failed to demonstrate that his medical condition made him incompetent to enter a guilty plea. Thus, we conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Next, appellant claimed: (1) his sentence was cruel and unusual punishment because his incarceration caused him to be removed from a liver transplant list; (2) his sentence was in violation of his due process and equal protection rights because he was removed from a liver transplant list; (3) his sentence was cruel and unusual because the sentencing judge was under the impression that he could receive a medical furlough when in fact, he claimed, there was no possibility of a medical furlough. Appellant waived these claims by failing to raise them on direct appeal, and appellant failed to demonstrate good cause for this failure.⁷

⁶See NRS 453.3385(2).

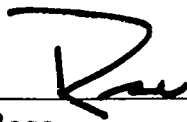
⁷Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

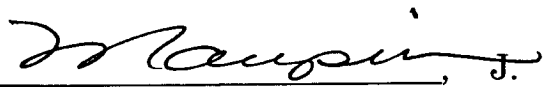
Therefore, we conclude that the district court did not err in denying these claims.


Finally, appellant claimed that he was improperly convicted of trafficking when he was merely a procuring agent. Appellant waived this claim by entry of the guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁹


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Kathy A. Hardcastle, District Judge
Mark Davis
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁹We have received appellant's notice and motions to appoint counsel and for voluntary dismissal of the appeal. We deny appellant's motions as moot.