

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN FOX,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42179

FILED

SEP 01 2004

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant Kevin Fox's motion to withdraw his guilty plea. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On December 11, 2002, the district court convicted Fox, pursuant to a guilty plea, of aggravated stalking and burglary. The district court sentenced Fox to serve a term of 180 months in the Nevada State Prison with a minimum parole eligibility of 72 months for the stalking conviction and a concurrent term of 72 months with a minimum parole eligibility of 16 months for the burglary conviction. Fox did not file a direct appeal.

On September 15, 2003, Fox filed a proper person motion to withdraw his guilty plea. The State opposed the motion. On October 3, 2003, the district court denied Fox's motion. This appeal followed.

In his motion, Fox 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

defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness.¹ Further, a defendant must demonstrate "a reasonable probability that, but for counsel's errors, [defendant] would not have pleaded guilty and would have insisted on going to trial."²

First, Fox contended that his counsel mischaracterized the consequences of his plea by advising him that he would receive probation. The record belies Fox's claim. Fox's signed plea agreement reveals he was advised that he could receive two to fifteen years in prison for the stalking charge and one to ten years for the burglary charge. Fox was further advised that, although he was eligible for probation, it was a matter left to the district court's discretion. Moreover, during the plea canvass, the district court advised Fox that sentencing remained within the district court's discretion. Based on the record before us, we conclude Fox's claim is without merit.

Second, Fox argued his counsel was ineffective in allowing him to plead guilty to burglary when there was no factual basis for the charge. Specifically, Fox contended that he was charged with burglary with the intent to commit a battery, yet never admitted to facts supporting the

¹Hill v. Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

²Kirksey, 112 Nev. at 988, 923 P.2d at 1107 (quoting Hill, 474 U.S. at 59).

battery portion of the offense. During the plea canvass, Fox admitted to entering his common law wife's home for the purpose of taking a television set. Although there appears to be a discrepancy between the information and Fox's admissions during the plea canvass, Fox failed to explain how his counsel's failure to challenge this discrepancy affected his decision to plead guilty. Consequently, we conclude Fox did not demonstrate that his counsel was ineffective on this issue.

Third, Fox contended that his counsel failed to inform him that he was pleading guilty to acts for which he had already been punished. The record reveals that on April 26, 2001, Fox's wife secured a temporary protective order (TPO) prohibiting him from contacting her. Fox was served with the TPO on May 21, 2001. The TPO was to remain in effect until April 26, 2002. It also appears from the record that Fox was arrested multiple times for violating the TPO. The record reveals that Fox contacted his wife on April 25, 2001, and September 23, 2001, for which he was arrested and charged with violating the TPO. These violations occurred during the charged time period for the instant convictions. However, pursuant to Fox's plea agreement, these two charges were dismissed along with one count of burglary. On December 24, 2001, Fox pleaded guilty to a misdemeanor violation of the TPO, which occurred in November 2001. Fox also pleaded guilty on December 31, 2001, to a misdemeanor violation of the TPO, which also occurred in November 2001. Pursuant to Fox's plea agreement, he received credit for time served for these two misdemeanor convictions. Based on our review of the record, we

conclude Fox did not plead guilty to acts for which had already been punished. Consequently, we conclude Fox's counsel was not ineffective in this regard.³

Fourth, Fox argued that counsel did not allow him sufficient time to review the plea agreement prior to entering his plea. Fox's claim is belied by the record. In his signed plea agreement Fox acknowledged he had consulted with his attorney prior to signing the agreement, and that his counsel had answered all his questions concerning the plea and its consequences. Fox also acknowledged that he was satisfied with the services his counsel provided. Moreover, during the plea canvass, the district court asked Fox if he understood the plea negotiations and whether he had any questions for his counsel. Fox responded that he did not. The district court also asked Fox if he read and understood the plea agreement. Fox responded affirmatively. The district court then asked Fox if he had any questions about the plea agreement. Fox stated that he did not. We conclude that Fox did not demonstrate that his counsel was ineffective.⁴

³Fox also asserted that his plea was involuntary because he unknowingly pleaded guilty to acts for which he had already been punished. However, as discussed above, Fox's claim is without merit. Consequently, we conclude that his plea was not involuntary in this regard.

⁴Fox also asserted that his plea was involuntary because he was not afforded ample time in which to review the plea agreement. However, as
continued on next page . . .

Finally, Fox asserted that his counsel failed to inform him of his right to appeal. Preliminarily, we note that this claim does not challenge the validity of the plea, and this is a sufficient reason to deny this claim. Moreover, this claim lacks merit. We have held that "there is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to a direct appeal."⁵ Here, Fox did not allege that he ever requested his counsel to file a direct appeal, nor did he indicate what issues would have had a reasonable likelihood of success if an appeal were filed.⁶ Therefore, we conclude Fox's counsel was not ineffective in this regard.

In his motion, Fox also challenged the voluntariness of his plea. A guilty plea is presumptively valid, and the defendant carries the burden of establishing that the plea was not entered knowingly and intelligently.⁷ After imposition of a sentence, the district court may allow the withdrawal of a guilty plea only to correct a manifest injustice.⁸ This

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discussed above, Fox's claim is without merit and does not demonstrate that his plea was involuntary.

⁵Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

⁶See Id.

⁷Bryant 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).

⁸See NRS 176.165.

court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.⁹ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.¹⁰

First, Fox asserted that he was misinformed about one of the elements of the burglary charge. Specifically, Fox argued that although he admitted to unlawfully removing a television set from his wife's home, he did not admit to committing the burglary with the intent to commit a battery. The information alleged that Fox committed a burglary with the intent to commit a battery. In his signed plea agreement, he acknowledged that he admitted to all the facts supporting all the elements of the offenses set forth in the information. During the plea canvass, the district court asked Fox if he entered his wife's home "with the purpose of committing a crime therein." Fox responded, "I entered the home with the purpose of taking the tv [sic], yes." The district court then asked, "You entered the home with the purpose of taking the television; is that right?" Fox answered, "Yes."

We "will not invalidate a plea as long as the totality of the circumstances, as shown by the record, demonstrates that the plea was knowingly and voluntarily made and that the defendant understood the

⁹Hubbard, 110 Nev. at 675, 877 P.2d at 521.

¹⁰State v. Freese, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 272, 721 P.2d at 368.

nature of the offense and the consequences of the plea."¹¹ Here, when asked if he entered his wife's home with the intent to commit a crime, Fox volunteered that he entered the home to remove a television set. He cannot now be heard to complain that his plea was unknowing. Although there does appear to be a discrepancy between the information and Fox's statements during the plea canvass, we conclude that under the totality of the circumstances Fox's plea was voluntary and knowing.

Second, Fox claimed that his plea agreement was breached because he was not advised that the aggravated stalking charge carried a term of two to fifteen years and that the pre-sentence report recommended a term of one to four years. The district court is vested with wide discretion in sentencing matters.¹² Furthermore, a recommendation from the Department of Parole and Probation has no binding effect on the courts.¹³ As discussed above, the plea agreement informed Fox of the

¹¹Freese, 116 Nev. at 1105, 13 P.3d at 448; see also Bryant, 102 Nev. at 273, 721 P.2d at 368 (noting that in reviewing the validity of a guilty plea this court is concerned with determining whether the defendant understood the nature of the charge against him and that such an understanding does not always require the defendant to express an understanding of or admit to every specific element of the crime charged).


¹²See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).

¹³See Collins v. State, 88 Nev. 168, 171, 494 P.2d 956, 957 (1972) (concluding that a trial court does not abuse its discretion by imposing a sentence in excess of that recommended by the Department of Parole and Probation).

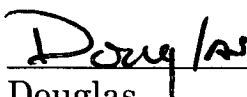
possible sentence for the aggravated stalking charge and that the district court would determine his sentence within the prescribed statutory limits. Additionally, during the plea canvass, the district court specifically advised Fox that "the matter of sentencing is entirely up to me." Consequently, relief is not warranted on this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Fox is not entitled to relief and that briefing and oral argument are unwarranted.¹⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁵


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

¹⁴See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁵We have reviewed all documents that Fox has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Fox has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Donald M. Mosley, District Judge
Kevin Fox
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk