

IN THE SUPREME COURT OF THE STATE OF NEVADA

TODD A. TUNSTALL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42356

FILED

AUG 30 2004

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

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

This is a proper person appeal from an order of the district court denying appellant Todd A. Tunstall's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

On March 14, 2003, the district court convicted Tunstall, pursuant to a guilty plea, of two counts of attempted lewdness with a child under the age of 14. On November 14, 2002, Tunstall filed a motion to withdraw his guilty plea.¹ The district court held an evidentiary hearing on February 25, 2003, and on that date denied Tunstall's motion. The district court sentenced Tunstall to serve two consecutive terms of two to twenty years in the Nevada State Prison. An amended judgment of conviction was entered on July 16, 2003, to provide Tunstall with additional credits. No direct appeal was taken.

On August 5, 2003, Tunstall filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹Tunstall filed his November 14, 2002, motion to withdraw his guilty plea in proper person. On January 9, 2003, Tunstall's counsel filed a motion to withdraw a guilty plea on Tunstall's behalf.

State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Tunstall or to conduct an evidentiary hearing. On November 3, 2003, the district court denied his petition. This appeal followed.

In his petition, Tunstall advanced several claims upon which he sought relief. First, Tunstall raised several challenges to the voluntariness of his plea, claiming that he was unaware of the imposition of lifetime supervision. Specifically, Tunstall argued that his guilty plea was involuntary because the district court improperly canvassed him by failing to explain the consequences of lifetime supervision. Tunstall also complained that his guilty plea was involuntary because the district court, the State and the plea agreement violated State and federal contract law because the agreement did not advise him of the consequences of lifetime supervision. Additionally, Tunstall contended that his plea was involuntary and must be withdrawn pursuant to Palmer v. State,² because the record is silent as to whether he knew that his sentence included mandatory lifetime supervision and the conditions of such supervision.

A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.³ Moreover, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of

²118 Nev. 823, 59 P.3d 1192 (2002).

³Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

discretion.⁴ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.⁵

We conclude Tunstall's claims are without merit. The totality of the circumstances reveals that Tunstall was made aware of the consequences of his plea, including being subjected to lifetime supervision. Tunstall acknowledged in his signed plea agreement that he understood that the district court would include as part of his sentence "lifetime supervision commencing after any period of probation or any term of imprisonment and period of release upon parole; and said special sentence of lifetime supervision must begin upon release from incarceration." Furthermore, during an evidentiary hearing regarding Tunstall's pre-sentence motion to withdraw his guilty plea, his defense counsel testified that he discussed in "great detail, every element" of the plea agreement.

Moreover, Tunstall's reliance on Palmer is misplaced. Tunstall argued that his guilty plea was unknowing unless the totality of the circumstances indicated that he was advised about each particular condition of the lifetime supervision sentence. However, as we discussed in Palmer, all that is constitutionally required is that the totality of the circumstances demonstrate that a defendant was aware that he would be subject to the consequence of lifetime supervision before entry of the plea.⁶

⁴Id.

⁵State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. at 272, 721 P.2d 367-68.

⁶Palmer at 831, 59 P.3d at 1197. We note that in Palmer this court recognized that under Nevada's statutory scheme, a defendant is provided with written notice and an explanation of the specific conditions of lifetime

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Based on our review of the entire record, we conclude that Tunstall was properly advised regarding the imposition of lifetime supervision and that his plea was not involuntary in this regard.

Second, Tunstall asserted that his guilty plea was not voluntary because police officials posed as doctors and therapists in order to obtain a false confession. However, Tunstall pointed to nothing in the record to support his claim.⁷ In any event, when a defendant enters a guilty plea and admits in open court that he is guilty of the offense with which he is charged, he may not raise independent claims relating to the deprivation of constitutional rights occurring prior to the plea.⁸ Consequently, we conclude that Tunstall's claim is without merit.

Third, Tunstall contended that his defense counsel was ineffective because he failed to advise Tunstall of the direct consequences of lifetime supervision. To state a claim of ineffective assistance of counsel sufficient to invalidate a guilty plea, Tunstall must demonstrate that his counsel's performance fell below an objective standard of reasonableness.⁹ He must further show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going

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supervision that apply to him "[b]efore the expiration of a term of imprisonment, parole or probation." *Id.* at 827, 59 P.3d at 1194-95.

⁷Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

⁸See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975).

⁹See Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

to trial."¹⁰ Here, the record belies Tunstall's claim. His signed plea agreement states that his defense counsel thoroughly explained all the consequences of his plea. Furthermore, Tunstall's defense counsel testified that he thoroughly discussed the plea agreement with Tunstall. Based on our review of the record, Tunstall failed to demonstrate that his counsel acted unreasonably.

Lastly, Tunstall argued that his defense counsel was ineffective for failing to file a direct appeal when he requested his counsel do so. A petitioner is entitled to an evidentiary hearing if he raises claims, which, if true, would entitle him to relief and if his claims are not belied by the record.¹¹ This court has held that if a criminal defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on the defendant's behalf.¹² Prejudice is presumed where a defendant expresses a desire to appeal and counsel fails to file an appeal.¹³ On July 6, 2004, we ordered the State to show cause why Tunstall's case should not be remanded to the district court for an evidentiary hearing regarding Tunstall's claim that his counsel failed to file a direct appeal at Tunstall's request. The State answered the order, asserting that an evidentiary hearing was unnecessary because Tunstall's claims would have been

¹⁰Kirksey, 112 Nev. at 988, 923 P.2d at 1107 (quoting Hill, 747 U.S. at 59).

¹¹See Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

¹²See Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

¹³See Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003).

unsuccessful on appeal. However, as stated above, prejudice is presumed in this instance.

Here, the record does not belie Tunstall's claim that his counsel failed to perfect an appeal at his request. Thus, we conclude that the district court erred in failing to hold an evidentiary hearing on this issue.¹⁴

We reverse that portion of the district court's order concluding that Tunstall's counsel was not ineffective for failing to file a direct appeal at his request and remand this matter to the district court for the limited purpose of conducting an evidentiary hearing to determine whether his counsel's performance fell below an objective standard of reasonableness.¹⁵ We affirm the decision of the district court in all other respects.¹⁶

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that briefing and oral argument are unwarranted.¹⁷ Accordingly, we


¹⁴Tunstall also argued that an evidentiary hearing should be granted pursuant to Palmer. However, as we concluded above, Palmer is inapplicable to Tunstall's case and thus, an evidentiary hearing in this regard is not warranted.

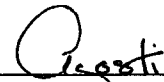
¹⁵See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).


¹⁶Tunstall challenged the district court's failure to withdraw his guilty plea prior to sentencing. However, such a claim is appropriate for review on direct appeal, and we decline to consider it at this time. After conducting an evidentiary hearing, the district court shall enter a written order resolving all claims not previously addressed.

¹⁷See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

ORDER the judgment of the district court AFFIRMED IN PART and REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹⁸


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Valorie Vega, District Judge
Todd A. Tunstall
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁸This order constitutes our final disposition of this appeal. Any subsequent appeal from an order of the district court regarding Tunstall's appeal deprivation claim shall be docketed as a new matter. We have considered all proper person documents filed or received in this matter. We conclude that Tunstall is only entitled to the relief described herein.