IN THE SUPREME COURT OF THE STATE OF NEVADA

HOWARD V. BROWN, SR. A/K/A HOWARD V. BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42784

FILED

AUG 19 2004

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

ORDER OF AFFIRMANCE

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. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

On June 13, 2002, the district court convicted appellant, pursuant to a guilty plea, of second-degree murder. The district court sentenced appellant to serve a life term in the Nevada State Prison with the possibility of parole after ten years. This court affirmed appellant's conviction and sentence.[1] The remittitur issued on August 5, 2003.

On November 19, 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 January 27, 2004, the district court denied appellant's petition. This appeal followed.

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[1]Brown v. State, Docket No. 39795 (Order of Affirmance, July 9, 2003).

Appellant challenged the validity of his guilty plea on three grounds. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[2] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[3] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[4]

First, appellant asserted that the district court erred in accepting his guilty plea because he had not admitted to killing his victim with malice aforethought. During the plea canvass, appellant acknowledged that he willfully, unlawfully and feloniously killed his victim by beating and kicking her. When questioned whether he had committed the killing with malice aforethought, appellant responded, "No, I didn't think I would kill her. I was just being upset." After conferring with his counsel, appellant acknowledged that he could have stopped beating and kicking the victim, but continued to do so. Malice aforethought is implied when no considerable provocation appears, or when the circumstances of the killing demonstrate an abandoned or malignant heart.[5] Thus, we conclude that district appellant failed to demonstrate his plea was entered unknowingly or involuntarily.

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

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

[4]State v. Freese, 116 Nev. 1097, 1104, 13 P.3d 442, 447 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

[5]See Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 272 (1988); NRS 200.010; NRS 200.020.

Second, appellant asserted that he was incompetent to enter a guilty plea. Appellant contended that he was taking medication for schizophrenia and that the medication rendered him incapable of entering a voluntary guilty plea. During sentencing, appellant's counsel stated that appellant suffered from schizophrenia and needed to stay on his medication. However, the record belies appellant's claim that he was incompetent to enter a guilty plea. In his signed plea agreement, appellant acknowledged that he understood the agreement and was not under the influence of any drug that impaired his ability to comprehend the agreement or the proceedings surrounding his plea. Furthermore, during the plea canvass, appellant indicated that he understood the plea agreement and the consequences of his plea. Thus, we conclude that appellant has not demonstrated that his plea was involuntary in this regard.[6]

Next, appellant raised numerous claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial 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.[7] Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors,

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[6]Lizotte v. State, 102 Nev. 238, 240-41, 720 P.2d 1212, 1214 (1986) (holding that when the record fails to reveal that a defendant's appreciation of the events of trial are diminished because of medication, the result below will not be disturbed).

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

petitioner would not have pleaded guilty and would have insisted on going to trial.[8]

Appellant argued that his trial counsel failed to investigate his mental competency, did not explain the nature of the charges, coerced him into pleading guilty, and failed to object when appellant did not admit to committing the killing with malice aforethought. The record does not support appellant's contentions. In his plea agreement, appellant acknowledged that his counsel had thoroughly explained the nature of the offenses, possible defenses and the consequences of his plea. Moreover, appellant affirmed in his plea agreement that he was not acting under duress, coercion or the influence of drugs. During the plea canvass, appellant admitted that he understood the plea agreement and was not acting under duress. The judge inquired whether appellant had any questions concerning the plea agreement, to which appellant responded, "[n]o ma'am." We conclude appellant has not demonstrated that his counsel's performance fell below an objective standard of reasonableness.

Appellant also claimed his trial counsel was ineffective because his counsel made a racist remark against him. During the preliminary hearing, appellant's counsel strongly denied making such a comment. Appellant informed the judge that a court transport officer overheard counsel's alleged remark. The judge then agreed to allow the transport officer to testify. However, the officer was not immediately available. At the conclusion of the hearing, the judge asked appellant if he desired the court to continue its investigation. Appellant replied, "No, let's

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

drop it." Under these circumstances, we conclude appellant failed to demonstrate that his counsel was ineffective.[9]

Appellant also claimed that his trial counsel provided ineffective assistance regarding appellant's motion to withdraw his guilty plea.[10] He contended that his counsel was ineffective for failing to raise the following issues in his motion: (1) ineffective assistance of trial counsel; (2) appellant's incompetence to render a guilty plea; and (3) appellant's failure to admit to the element of malice aforethought. In light of our discussion of these issues above, we conclude appellant failed to establish that his counsel was ineffective.[11]

Appellant next argued that his appellate counsel was ineffective for a variety of reasons. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."[12] Appellate counsel is not required to raise every non-frivolous issue on

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[9]Regarding his preliminary hearing, to the extent appellant asserted claims independent from his allegation of ineffective assistance of counsel, he waived these claims. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

[10]Appellant was appointed other counsel to represent him concerning his motion to withdraw his guilty plea.

[11]Regarding his motion to withdraw his guilty plea, to the extent appellant asserted claims independent from his allegation of ineffective assistance of counsel, he has waived these claims. See Franklin 110 Nev. at 752, 877 P.2d at 1059 .

[12]Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

appeal.[13] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[14] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[15]

First, appellant asserted appellate counsel was ineffective for failing to raise the ineffective assistance of trial counsel claims discussed above on direct appeal. However, such claims may not be raised on direct appeal unless an evidentiary hearing has been conducted.[16] Consequently, appellate counsel's performance was not deficient in this regard.

Second, appellant argued that appellate counsel failed to pursue the issue of his mental competency on appeal. However, as previously discussed, there is no evidence to support appellant's assertion that he lacked the mental capacity to enter into a guilty plea. Thus, this claim is without merit.

Lastly, appellant asserted that appellate counsel was ineffective for not challenging the district court's denial of his motion to withdraw his guilty plea. Specifically, appellant argued that appellate counsel should have pursued his claim that his guilty plea was invalid because he did not admit to the element of malice aforethought. However, as discussed above, appellant's admissions during the plea canvass

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[13]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[14]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

[15]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[16]Feazell v. State, 111 Nev. 1446, 906 P.2d 727 (1995).

satisfied the malice aforethought element of the offense. Consequently, appellant's claim is without merit.

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.[17] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[18]

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Kathy A. Hardcastle, District Judge
Howard V. Brown Sr.
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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

[18] We have reviewed all documents that appellant 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 appellant 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.