IN THE SUPREME COURT OF THE STATE OF NEVADA

JONNIE DIXSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42816

FILED

NOV 04 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 Jonnie Dixson's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

On February 20, 2003, Dixson was convicted, pursuant to an Alford plea,[1] of two counts of attempted battery with a deadly weapon causing substantial bodily harm.[2] The district court sentenced Dixson to serve two consecutive prison terms of 48-120 months and ordered him to pay $7,150.15 in restitution. Dixson did not pursue a direct appeal from the judgment of conviction and sentence.

On July 28, 2003, with the assistance of counsel, Dixson filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court conducted an evidentiary hearing, and on January 28, 2004, entered an order denying Dixson's petition. This timely appeal followed.

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[1]North Carolina v. Alford, 400 U.S. 25 (1970); State v. Gomes, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996).

[2]An amended judgment of conviction was filed on August 29, 2003.

Dixson contends that the district court erred in finding that his guilty plea was entered voluntarily and intelligently. Specifically, Dixson argues that he is a "severely mentally ill man," and: (1) at the time he entered his plea, "he was drugged . . . and unable to properly evaluate and participate in the plea proceedings"; and (2) "the D.A., with the cooperation of the court, . . . allowed a quick (in court) substitution of the guilty plea agreement for another with an amended information charging [him] with two counts when the original agreement . . . was that he be charged with one count." Dixson also contends that his trial counsel was ineffective for allowing the "bait and switch" to occur. Dixson claims that he should be allowed to withdraw his guilty plea and proceed to trial. We disagree with Dixson's 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] A defendant is competent to enter a plea if he has: (1) "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding'"; and (2) "'a rational as well as factual understanding of the proceedings against him.'"[5] In determining the validity of a plea, this court looks to the totality

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

[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).

[5]Godinez v. Moran, 509 U.S. 389, 396 (1993) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)).

of the circumstances[6] and will not reverse a district court's determination absent a clear abuse of discretion.[7]

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.[8] 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.[9]

We conclude that the district court did not abuse its discretion in denying Dixson's habeas petition. Initially, we note that the matter of Dixson's competency at the time he entered his Alford plea was not addressed during the evidentiary hearing on his petition in the district court. Therefore, the issue was waived.[10] Notwithstanding Dixson's failure to preserve the issue, our review of record on appeal reveals that Dixson failed to demonstrate that his plea was not entered voluntarily and intelligently. Counsel informed the district court during the sentencing

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

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

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

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

[10]See Lizotte v. State, 102 Nev. 238, 239-40, 720 P.2d 1212, 1213-14 (1986).

hearing that, because of Dixson's history of mental illness, Dixson underwent two psychological evaluations prior to the entry of his plea and each time was found to be competent.

At the evidentiary hearing, the same counsel testified that he discussed the terms of the plea negotiations with Dixson, and that throughout the proceedings the agreement included pleading guilty by way of Alford to the two counts. Counsel stated that Dixson never relied upon the incorrect information in agreeing to plead because the deal always included pleading to the two counts. At a status hearing conducted prior to the plea hearing, defense counsel accurately informed the district court about the negotiations and the two counts. At the entry of plea hearing and after the district court's canvass, however, the State discovered that the criminal information was in error; it contained only one count. As a result, the State left the courtroom to correct the typographical error and returned within minutes with an amended information listing the two counts. During the interlude, the following exchange took place:

> THE COURT: Okay. Mr. Dixson, [the prosecutor's] going to go up and get an amended information. If the amended information charges you with two counts of attempt[ed] battery with a deadly weapon with substantial bodily harm, is this negotiation still one that you want to enter into?
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> DIXSON: Yes, sir.
>
> THE COURT: Okay. So you understand that I could give you up to 20 years and fine you up to $20,000?
>
> DIXSON: Yes, sir.
>
> THE COURT: The Court's going to accept the plea. I just need the document.

> DEFENSE COUNSEL: Judge, just for the record, any defect or any double jeopardy argument that we might have we would waive in regards to the two separate counts.
>
> THE COURT: It's still an excellent negotiation as far as this defendant is concerned. There's no doubt that you've saved him some serious prison time here.

Based on all of the above, we conclude that Dixson's claim that the State used a "bait and switch" tactic, which effectively tricked him into pleading to two counts rather than just one, is belied by the record.

Finally, because we conclude that Dixson's Alford plea was valid, we further conclude that Dixson failed to demonstrate that he received ineffective assistance of counsel. Dixson cannot demonstrate that counsel was ineffective for allowing the substitution of the amended information listing the two counts because the terms of the negotiated plea always included the two counts. Moreover, although Dixson raised the matter of counsel's ineffectiveness in his petition and again on appeal, the issue was waived by counsel during the evidentiary hearing:

> MR. BUCHANAN: I'm not alleging he's ineffective. I'm just saying – I'm not saying Mr. Coffee's ineffective at all.
>
> What I'm saying is that the accused here just doesn't understand what's happening, never did. It was a switch there. He had a plea memo that only had one count, and they came down – and I doubt if most defendants would understand whether they're really competent or not. I don't think Mr. Coffee's ineffective.
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> THE COURT: All right. I'm going to sustain the objection only because I think that you are now waiving any allegation of ineffective assistance of counsel. So we really don't need to get into that.
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> MR. BUCHANAN: Yes.

Therefore, we conclude that the district court did not err in rejecting this claim.

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

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Michael A. Cherry, District Judge
James L. Buchanan II
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk