IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK P. DECAROLIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40276

FILED

FEB 18 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 Patrick Decarolis' post-conviction petition for a writ of habeas corpus and motion to proceed in forma pauperis.

On February 22, 2001, the district court convicted Decarolis, pursuant to an Alford plea,[1] of one count of felony trafficking in a controlled substance in district court case C149540. The district court sentenced Decarolis to serve a term of 60 months in the Nevada State Prison with the possibility of parole in 24 months. The district court imposed his sentence to run concurrently with the sentence he received in district court case C149541. No direct appeal was taken.

On January 29, 2002, Decarolis filed a proper person post-conviction petition for a writ of habeas corpus and a motion to proceed in forma pauperis 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 Decarolis or to conduct an evidentiary hearing. On

[1]See North Carolina v. Alford, 400 U.S. 25 (1970).

July 12, 2002, the district court issued an order denying Decarolis' petition and motion.[2] This appeal followed.

In his petition, Decarolis raised several 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 plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness.[3] A petitioner must further demonstrate prejudice by showing a reasonable probability that, but for his counsel's errors, he would not have pleaded and would have insisted on going to trial.[4]

First, Decarolis contended that his trial counsel was ineffective because his counsel, and the State, promised him that, as a condition of his plea in this case—district court case C149540—his sentence was to be imposed to run concurrently with the sentences he received for his pending court cases. However, Decarolis' subjective belief about his sentence is an insufficient basis by itself to invalidate his plea.[5] There is nothing in the record suggesting that Decarolis was promised by his counsel or the State that he would receive concurrent sentences as a condition of his plea.

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[2]Decarolis also appeals from a district court order denying his motion to proceed in forma pauperis. Because Decarolis failed to attach a Certificate of Inmate's Institutional Account to his motion, we conclude that the district court properly denied his motion. See NRS 34.735(3).

[3]See Hill v. Lockhart, 474 U.S. 52, 57 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

[4]See id.

[5]See Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975).

Rather, the record reveals that the plea agreement informed Decarolis that if more than one sentence is imposed, "the sentencing judge has the discretion to order the sentences served concurrently or consecutively." During his plea canvass, the district court also informed Decarolis that it is up to the district court whether or not his sentences are imposed to run concurrently or consecutively. Thus, Decarolis' allegation was belied by the record.[6] Furthermore, we note that even if Decarolis' allegation was true, his sentence in this case—district court case C149540—was, in fact, imposed to run concurrently with the sentence he received in district court case C149541. Thus, Decarolis failed to show how any promise by his counsel or the State was breached. Therefore, we conclude that the district court properly denied Decarolis relief on this allegation.

Second, Decarolis contended that his trial counsel was ineffective for failing to inform him that he could file a pre-sentence motion to withdraw his plea. However, Decarolis has not alleged any specific facts showing that he ever requested that his counsel move to withdraw his plea, nor has he specified on what grounds such a motion could have been made.[7] Even assuming that Decarolis' counsel had a duty to inform him that he could move to withdraw his plea, Decarolis cannot show any prejudice by his counsel's conduct because he has failed to demonstrate a reasonable probability that such a motion would have been

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[6]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

[7]See id. at 502, 686 P.2d at 225.

successful.[8] Therefore, we conclude that the district court properly denied Decarolis relief on this allegation.

Third, Decarolis contended that his trial counsel was ineffective for promising him that he would receive a prison term of between 1 and 6 years as a result of his plea. Felony trafficking in a controlled substance carries a sentencing range of between 1 and 6 years in prison.[9] The district court sentenced Decarolis to a term of between 2 and 5 years in prison, which is well within the sentencing range for that offense. Decarolis has failed to show how his counsel's statement was incorrect. Therefore, we conclude that the district court properly denied Decarolis relief on this allegation.

Fourth, Decarolis contended that his counsel was ineffective because he failed to inform Decarolis that the district court was not bound by the terms of the plea agreement. However, by signing the plea agreement, Decarolis acknowledged that he had "not been promised or guaranteed any particular sentence by anyone." Decarolis also acknowledged that he understood that his sentence was to be imposed by the district court within the applicable statutory limits, and the district court was not obligated to accept any sentence recommendation by either his counsel or the State. During his plea canvass, the district court asked Decarolis, "[D]o you understand that the matter of sentencing is strictly up to me and no one else?" Decarolis replied, "Yes, sir." Thus, Decarolis'

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[8]See Hill, 474 U.S. at 57; Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

[9]See NRS 453.3385(1).

allegation was belied by the record.[10] Therefore, we conclude that the district court properly denied Decarolis relief on this allegation.

Fifth, Decarolis contended that his trial counsel was ineffective because he did not file a direct appeal from his judgment of conviction. This court has held that counsel has no duty to inform a defendant about the right to file a direct appeal, unless the defendant inquires about an appeal or the defendant's case presents claims that have a reasonable likelihood of success on appeal.[11] Decarolis 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. Therefore, we conclude that the district court properly denied Decarolis relief on this allegation.

Finally, Decarolis contended that his trial counsel was ineffective at his sentencing hearing for failing to correct an alleged error in his pre-sentence investigative report (PSI). Specifically, Decarolis contended that the statement in his PSI that he earned between $300.00 to 400.00 per day as a drug dealer to support his drug habit was misleading and warranted objection by his counsel. Decarolis, however, failed to specify how this information was misleading and on what basis his counsel could have objected to it being included in his PSI.[12]

Moreover, even if Decarolis' allegation was true, he failed to demonstrate how he was prejudiced by his counsel's failure to object to

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[10]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

[11]See Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); see also Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

[12]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

this information being included in his PSI.[13] In a handwritten statement included in his PSI, Decarolis admitted to being both an illegal drug user and seller, and also admitted that he became "used to" all of the money he made from selling illegal drugs. Although the district court imposed a fine of $5,000.00 for restitution, the transcript of Decarolis' sentencing hearing does not show that the district court relied upon, or even referred to, the amount of money described in the PSI that Decarolis allegedly made by selling illegal drugs.[14] Therefore, we conclude that the district court properly denied Decarolis relief on this allegation.

In his petition, Decarolis also raised claims that his plea was involuntary and unknowingly entered and that both his counsel and the State broke the "spirit" of his plea agreement. A plea is presumptively valid, and the burden is on the petitioner to show that it was not freely, knowingly, and voluntarily made under a totality of the circumstances from the record.[15]

Decarolis' allegations, however, are similar to those he raised alleging ineffective assistance of trial counsel. For the reasons discussed above, Decarolis failed to show that his plea was invalid. Rather, our

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[13]See Hill, 474 U.S. at 57; Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

[14]See Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) (stating that this court will refrain from interfering with a district court's sentence "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence"); see also Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[15]See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Freese v. State, 116 Nev. 1097, 1104, 13 P.3d 442, 447 (2000).

review of the record and a totality of the circumstances, including Decarolis' plea agreement and plea canvass, show that Decarolis' plea was freely, knowingly, and voluntarily entered.[16] Therefore, we conclude that the district court properly denied Decarolis relief on these allegations.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Decarolis 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. Jessie Elizabeth Walsh, District Judge
Patrick P. Decarolis
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[16]See id.

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

[18]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.