

IN THE SUPREME COURT OF THE STATE OF NEVADA

KUPAA KEA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

No. 73016

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RESPONDENT'S ANSWERING BRIEF

VICTORIA T. OLDENBURG, ESQ.
P.O. Box 17422
Reno, Nevada 89511

ATTORNEY FOR APPELLANT

CHRISTOPHER J. HICKS
Washoe County District Attorney

TERRENCE P. McCARTHY
Chief Appellate Deputy
P.O. Box 11130
Reno, Nevada 89520

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

I.	STATEMENT OF THE CASE.....	1
II.	STATEMENT OF THE FACTS.....	2
III.	ARGUMENT	3
	1. The District Court Did Not Err in Failing to be Persuaded that Kea’s Guilty Plea Was the Product of Ineffective Assistance of Counsel.....	3
	2. The District Court Did Not Err in Failing to be Persuaded that the Other Claims Were True	4
IV.	CONCLUSION	8

TABLE OF AUTHORITIES

Pages

Cases

<i>Green v. State</i> , 96 Nev. 555, 612 P.2d 686 (1980)	6
<i>Means v. State</i> , 120 Nev. 1001, 103 P.3d 25 (2004)	7
<i>Mulder v. State</i> , 116 Nev. 1, 15, 992 P.2d 845, 853 (2000)	4
<i>Thomas v. State</i> , 122 Nev. 1361, 1367, 148 P.3d 727, 732 (2006)	5

Statutes

NRS 62b.330(3)(C)	6
NRS 62b.390	6

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

This is an appeal from an order denying a post-conviction petition for writ of habeas corpus. The Opening Brief suggests several times that claims were “dismissed.” They were not. They were denied on the merits.

Kea was 17 years old when he was charged with two counts of battery with a deadly weapon. He pleaded guilty in exchange for dismissal of some other counts. Senior Judge Norm Robison conducted the canvass. Subsequently, Judge Scott Freeman imposed sentence. Kea appealed but the judgment was affirmed. *Kea v. State*, Docket No. 61160, Order of Affirmance (February 13, 2013). One day shy of a year later, Kea filed his habeas corpus petition. The district court appointed counsel and allowed a

supplement. A motion to dismiss was denied and the cause was ultimately set for a hearing. At the close of the hearing, the district court made findings of fact and conclusions of law and denied the petition. Among the notable findings that are not mentioned in the Opening Brief is that Kea's testimony (upon which the arguments are based) was not credible. 1 AA 182-185. This appeal followed.

II. STATEMENT OF THE FACTS

The underlying facts are relatively simple. Kea and others were expecting members of another gang at Paradise Park for a fight. Kea drove the group to the park and arrived a bit before the designated time. Kea got out, got a rifle and assumed a shooting position behind a tree. When some Nortenos arrived and got out of their car, Kea started shooting. He is not exactly a marksman, as he hit two of the rivals in their legs.

When police responded to the park, they found Kea's car. Kea reported the car stolen. Police never found the gun that Kea used. See Presentence Investigation Report, ordered to be transmitted on October 6, 2017.

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III. ARGUMENT

1. The District Court Did Not Err in Failing to be Persuaded that Kea's Guilty Plea Was the Product of Ineffective Assistance of Counsel.

Kea contends that the court erred in “dismissing” Ground One of the petition. Actually the court conducted a hearing, received evidence, made factual findings and conclusions of law and denied the petition on the merits. The Opening Brief simply repeats the arguments that were made in the district court without identifying any alleged error of law or of fact by the district court. For that reason alone, for the failure to identify any alleged error, the judgment should be affirmed. That being said, the State will attempt to identify the various arguments as though they were asserting error, and to respond to each.

Ground One was denied on the merits. It had quite a few intermixed claims and should never have gone to a hearing. The Opening Brief at page 18 mentions what the claims were but makes no assertion of any error regarding most of them. One argument seems to be an assertion that the guilty plea was entered in ignorance of the relevant sentencing scheme. The argument is based on the testimony of Kea in the post-conviction hearing but the trier of fact found that testimony to be incredible. 1 AA 184. The trier of fact determined that Kea was aware, from both the court and

from his counsel, of the full range of the court's sentencing authority. The weight and credibility of testimony is reserved to the trier of fact. *Mulder v. State*, 116 Nev. 1, 15, 992 P.2d 845, 853 (2000) ("The trier of fact determines the weight and credibility to give conflicting testimony.").

The Opening Brief also has an argument about failure to investigate, but again there is no identified error by the district court. The brief seems to contend that this Court should evaluate the evidence in the first instance and find that there was a duty to undertake a specific investigation, and that it never happened, and that the results of the investigation would have led Kea to insist on a trial on all the available charges and enhancements. The trier of fact, in contrast, determined that trial counsel did indeed investigate and learn that police had not recovered the rifle used by Kea, and therefore that the police had not compared bullets to the rifle, and that counsel discussed that with Kea and Kea was aware of that when he pleaded guilty. 1 AA 184. As the Opening Brief does not question those findings, but simply ignores them, the Court should simply affirm.

2. The District Court Did Not Err in Failing to be Persuaded that the Other Claims Were True.

Kea next argues that the court erred in disposing of Ground Two of the petition. That was a claim of ineffective assistance of counsel in failing to object to hearsay at sentencing. Hearsay is not inadmissible in a

sentencing hearing. *Thomas v. State*, 122 Nev. 1361, 1367, 148 P.3d 727, 732 (2006).

To the contention that some rule of law prohibited someone from using the term “ambush” to describe the crime of waiting behind a tree and then shooting at people as they came in to range, the State admits to being unfamiliar with that rule of law. If there were such a rule of law, then the next problem would be the lack of any prevailing professional norm that required counsel to invoke that rule. Finally, if there was a rule, and a duty, there was no prejudice to using that shorthand term instead of the more detailed description of the crime.

There is also a claim of ineffective assistance of counsel in failing to present additional mitigating witnesses at the sentencing hearing. No such witnesses testified in the habeas corpus hearing and thus the trier of fact had no reason to believe they had anything mitigating to add.¹

Kea mentions the assertion that he was improperly certified as an adult. There was no evidence presented on that subject and the only citation to the record is to the petition. The petition is an allegation, like an

¹ The Opening Brief recites that the report of Dr. Mahafey was not included in the presentence report. That much is true, but the implication that it was not made available to the court is false. The report was filed with the court on May 31, 2012. See 1 AA 27. Why that is not mentioned in the argument is unclear.

indictment. It is not evidence. The State would also mention that it appears that Kea was eligible for the direct file statute, NRS 62b.330(3)(C). He also could have been certified as an adult via NRS 62b.390. The record provided to this Court does not reveal whether Kea was certified as an adult, or if there was a direct file in the district court. If there was a direct file, it appears appropriate as the PSI reveals a prior adjudication for Robbery and robbery is a felony. Even if it actually was a burglary as alleged by Kea, there is zero evidence, not a single word, supporting the supposition that it might have been the type of burglary that can be a misdemeanor. The appellant bears the burden of providing the Court with an adequate record. *Green v. State*, 96 Nev. 555, 612 P.2d 686 (1980). This appellant has provided this Court with nothing, so the judgment should be affirmed.

Ground Five concerned the appeal. Kea had an appeal. To the extent that he asserts that appellate counsel had a duty to seek the advice of this young criminal concerning the issues to be raised, there was no evidence on the subject. There was no evidence concerning the customary practices of appellate lawyers, no evidence concerning the communications about the appeal, no evidence of what advice Kea might have offered and no evidence about any other aspect of the claim. If the current claim is that appellate

counsel should have raised the claim asserting error in how Kea came to be charged as an adult, as noted earlier, the record provided to this Court does not include any information on the subject. Therefore, this Court should find that the district court did not err in failing to be persuaded by the lack of evidence. *See Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004) (regarding the burden of proving the claims of ineffective assistance).

Ground Three of the petition was an assertion that counsel was ineffective in failing to arrange a competency evaluation. No such evaluation was presented in the habeas corpus hearing and so there is no reason to believe that a competency evaluation would have rebutted the presumption of competence. The State would mention again that the Opening Brief claims that Ground Three was “dismissed.” It was not. There was a hearing on every claim, but Kea presented no evidence supporting Ground Three and so it was denied on the merits.

Ground Six of the supplemental petition alleged that trial counsel was ineffective in failing to seek suppression of some potentially inculpatory statements made by Kea during questioning by a police officer. Trial counsel testified, and the trier of fact found, that counsel noted the issues and discussed them with Kea and that Kea insisted on a plea bargain. 1 AA

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183. That factual finding was supported by the testimony of Attorney Berning. Again, Kea identifies no error in those findings, but just ignores them. This Court ought to likewise ignore the argument in the Opening Brief.

IV. CONCLUSION

The petitioner got a hearing. At that hearing he bore the burden of persuasion. He failed in that burden. No law required the trier of fact to be persuaded. Accordingly, the judgment of the Second Judicial District Court should be affirmed.

DATED: November 20, 2017.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: TERRENCE P. McCARTHY
Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: November 20, 2017.

CHRISTOPHER J. HICKS
Washoe County District Attorney

BY: TERRENCE P. McCARTHY
Chief Appellate Deputy
Nevada State Bar No. 2745
P. O. Box 11130
Reno, Nevada 89520
(775) 328-3200

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on November 20, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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