

IN THE SUPREME COURT OF THE STATE OF NEVADA

SABIN G. BARENDT,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43665

FILED

APR 04 2005

ORDER OF AFFIRMANCE

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

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

Barendt was convicted, pursuant to a guilty plea, of two counts of sexual assault on a minor under 14 years of age. He was sentenced to two concurrent terms of 20 years to life in the Nevada State Prison. This court affirmed Barendt's conviction and sentence on appeal.<sup>1</sup>

Barendt filed a timely petition for a writ of habeas corpus. After conducting an evidentiary hearing, the district court denied Barendt's petition. This appeal followed.

Barendt raises two allegations of error on appeal. First, he claims that his guilty plea was involuntary because a condition precedent to his plea agreement was not met. Specifically, Barendt contends that prior to entering his plea, his counsel advised him that if he pleaded guilty to two counts of sexual assault on a minor and received a favorable psychological evaluation, his counsel would file a motion to withdraw his

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<sup>1</sup>Barendt v. State, Docket No. 38912 (Order of Affirmance, August 19, 2003).

guilty plea and the prosecutor would renegotiate his plea deal to probational offenses. Although the condition was not included in the written plea agreement, Barendt argues that his guilty plea is involuntary because this condition was not met.

At the evidentiary hearing, the prosecutor and trial counsel testified that no promise was extended to Barendt that his plea deal would be renegotiated upon receiving a favorable evaluation from his therapist. The prosecutor further testified that it was never her understanding that the purpose of her meeting with Barendt's therapist was to persuade her to renegotiate Barendt's plea deal, but rather she agreed to the meeting as an accommodation to the defense. She did, however, agree to recommend that Barendt's sentences run concurrently rather than consecutively based on her discussion with his therapist.

A guilty plea is presumptively valid, and Barendt carries the burden of establishing that the plea was not entered knowingly and intelligently.<sup>2</sup> Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.<sup>3</sup> In determining the validity of a guilty plea, this court looks to the totality of the circumstances.<sup>4</sup> Additionally, "[t]he district court's factual finding, adjudging the credibility of the witnesses and the evidence, is entitled to deference on appeal and will not be overturned by

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<sup>2</sup>See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

<sup>3</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

<sup>4</sup>State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

this court if supported by substantial evidence."<sup>5</sup> In denying Barendt's petition, the district court found that the credibility of the prosecutor and trial counsel "far outweigh[ed] that of the defendant's." The district court further found that there was no evidence supporting Barendt's claim that "a probationable offer was extended."

Based on the record presented, we conclude that the district court's factual findings are supported by substantial evidence. Accordingly, we conclude that the district court did not abuse its discretion in denying this claim.

Second, Barendt claims that his counsel was ineffective for failing to file a motion to withdraw his guilty plea and for not attempting to renegotiate his plea deal. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, Barendt must demonstrate that his counsel's performance fell below an objective standard of reasonableness.<sup>6</sup> Further, Barendt must demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.<sup>7</sup>

Trial counsel testified that she did not file a motion to withdraw Barendt's plea because there was no basis for it, as Barendt was never promised a renegotiation of his plea deal. However, even assuming trial counsel should have filed a motion to withdraw the guilty plea or

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<sup>5</sup>See Little v. Warden, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001) (citing Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994)).

<sup>6</sup>See Strickland v. Washington, 466 U.S. 668 (1984).

<sup>7</sup>See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

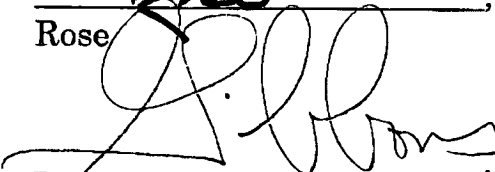
sought renegotiation, Barendt must demonstrate prejudice. We conclude he has not done so. Accepting as true Barendt's claim that there existed a promise of renegotiation to a probational offense, his expectation in this regard was speculative. By Barendt's own admission, the alleged promise was contingent upon a positive report from his therapist. Other than Barendt's bare assertion to the contrary, the record does not demonstrate that a favorable report was forthcoming.

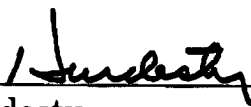
Moreover, by pleading guilty to two counts of sexual assault on a minor under 14 years of age, Barendt avoided facing 30 charges related to sexual conduct with a minor. Additionally, counsel secured a promise from the prosecutor that she would propose concurrent rather than consecutive sentences. For the foregoing reasons, we conclude that the district court did not err in denying Barendt's ineffective assistance of counsel claim.

Based on the record presented, we conclude that the district court did not err in denying Barendt's petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Valorie Vega, District Judge  
Kirk T. Kennedy  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk