

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT EARL WHEELER,  
Appellant,  
vs.  
WARDEN, LOVELOCK  
CORRECTIONAL CENTER, CRAIG  
FARWELL,  
Respondent.

No. 44210

FILED

MAR 04 2005

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

On April 17, 2003, the district court convicted appellant, pursuant to a guilty plea, of one count each of sexual assault of a child and lewdness with a child under the age of fourteen years. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after twenty years for the sexual assault conviction, and a concurrent term of life with the possibility of parole after ten years for the lewdness conviction. Appellant did not file a direct appeal.

On March 23, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent appellant. The State moved to dismiss the petition. Appellant's counsel filed a non-opposition to the motion to dismiss. Pursuant to NRS 34.770, the district court declined to

conduct an evidentiary hearing. On October 7, 2004, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant raised several claims of ineffective assistance of trial counsel.<sup>1</sup> To state a claim of ineffective assistance of trial counsel sufficient to invalidate a guilty plea, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.<sup>2</sup> A petitioner must further establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."<sup>3</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>4</sup>

First, Wheeler claimed that his counsel was ineffective because his counsel signed a "Waiver of Preliminary Examination" on his behalf without his authorization. Our review of the record on appeal reveals that although Wheeler's counsel signed the "Waiver of Preliminary Examination," in the plea agreement and at the plea canvass, Wheeler acknowledged that by entering his plea he was giving up his right to cross-examine witnesses, to subpoena witnesses, to testify on his own behalf and

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<sup>1</sup>To the extent that appellant raised any of his claims independently from his ineffective assistance of trial counsel claims, appellant waived these issues. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

<sup>2</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>3</sup>Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

<sup>4</sup>See Strickland, 466 U.S. at 697.

to challenge the State's case against him. He also acknowledged that he was "waiving any right [he] may have to remand this matter to Justice Court should [he] later withdraw [his] plea." Finally, in the plea agreement, Wheeler acknowledged that he understood that "any substantive or procedural pretrial issue or issues which could have been raised at trial are waived by [his] plea." Wheeler failed to demonstrate that he was prejudiced by counsel's performance. Accordingly, we conclude that the district court did not err in dismissing this claim.

Second, Wheeler claimed that his counsel was ineffective because his counsel failed to investigate and demonstrate that there was insufficient evidence to support a charge of sexual assault. Wheeler has failed to demonstrate that his counsel was ineffective in this regard. In his plea agreement and at the plea canvass, Wheeler admitted that he "kissed and licked the victim's vagina," which was sufficient to support the charge of sexual assault.<sup>5</sup> Accordingly, we conclude that the district court did not err in dismissing this claim.

Third, Wheeler claimed that his counsel was ineffective for failing to notify the district court that the statute of limitations had run for his actions. Wheeler failed to demonstrate that his counsel was ineffective in this regard. Our review of the record on appeal indicates that the victim was sixteen years old at the time the complaint was filed against Wheeler. Therefore, the statute of limitations had not run when

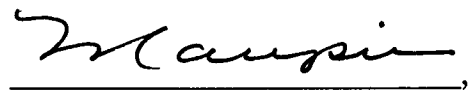
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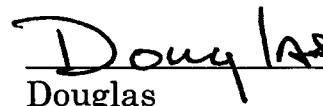
<sup>5</sup>See NRS 200.364(2) (defining "sexual penetration" to include cunnilingus); NRS 200.366(1) ("A person who subjects another person to sexual penetration . . . against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault").

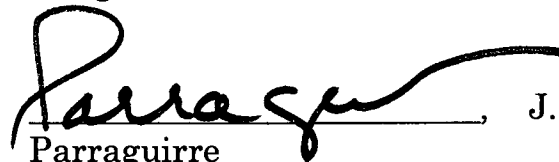
the complaint was filed.<sup>6</sup> Accordingly, we conclude that the district court did not err in dismissing this claim.

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.<sup>7</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>8</sup>

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Parraguirre

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<sup>6</sup>See NRS 171.095(1)(b)(1) ("An indictment must be found, . . . or a complaint filed, for any offense constituting sexual abuse of a child, as defined in NRS 432B.100, before the victim of the sexual abuse is: (1) Twenty-one years old if he discovers or reasonably should have discovered that he was a victim of the sexual abuse by the date on which he reaches that age").

<sup>7</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>8</sup>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.

cc: Second Judicial District Court Dept. 9, District Judge  
Robert Earl Wheeler  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk