IN THE SUPREME COURT OF THE STATE OF NEVADA

LAVAR G. VARNADO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44378

FILED

MAR 2 9 2005

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's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

On November 24, 2003, the district court convicted appellant, pursuant to a guilty plea, of two counts of robbery with the use of a deadly weapon and one count of attempted sexual assault. The district court sentenced appellant to serve multiple terms totaling 60 to 120 months in the Nevada State Prison. Appellant did not file a direct appeal.

On July 30, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus 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 appellant or to conduct an evidentiary hearing. On December 9, 2004, the district court denied appellant's petition. This appeal followed.

05-06054

In his petition, appellant argued that his guilty plea was not entered knowingly, voluntarily or intelligently. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[1] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[2] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[3]

Appellant argued that his guilty plea was invalid because the district court failed to inform him of the mandatory special sentence of lifetime supervision. The record belies this claim.[4] The written plea agreement, which appellant acknowledged having read and understood, expressly informed appellant that his sentence would include lifetime supervision. Further, appellant informed the court that his counsel had informed him about the requirement of lifetime supervision. We conclude that the totality of the circumstances indicates that appellant was aware

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[1]Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

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

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

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

of the direct consequence of lifetime supervision.[5] Accordingly, appellant failed to demonstrate that his plea was invalid in this regard.

In his petition, appellant also raised several claims of ineffective assistance of counsel. 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 his counsel's performance fell below an objective standard of reasonableness.[6] Further, a petitioner 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."[7] The court may dispose of a claim if the petitioner makes an insufficient showing on either prong.[8]

First, appellant claimed that his counsel was ineffective for recommending that he plead guilty, even though DNA evidence contradicted the State's evidence. Assuming contradictory DNA evidence did exist, appellant would have been aware of the DNA evidence prior to entering his guilty plea. Appellant failed to establish that the presence of contradictory DNA evidence would have altered his decision to plead

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[5]See Palmer v. State, 118 Nev. 823, 831, 59 P.3d 1192, 1197 (2002).

[6]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[7]Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

[8]Strickland, 466 U.S. at 697.

guilty. Therefore, appellant did not demonstrate that his counsel was ineffective on this issue.

Second, appellant claimed that his counsel was ineffective for failing to adequately prepare for trial by failing to conduct any investigation. Appellant failed to articulate what investigation his counsel should have conducted, such that he would not have pleaded guilty and would have insisted on going to trial.[9] As such, we affirm the order of the district court with respect to this claim.

Third, appellant claimed that his counsel was ineffective for failing to file an appeal on his behalf. Counsel is required to file an appeal when a defendant inquires about an appeal.[10] Appellant did not allege that he asked his counsel to file an appeal and his counsel failed to do so. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for failing to object to the denial of his pre-trial petition for a writ of habeas corpus. Appellant alleged that his counsel should have objected to the district court's determination that the victim's preliminary hearing testimony regarding appellant's penetration of her was adequate to support the charges of sexual assault. At the preliminary hearing, the

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

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

victim testified that, without her consent, appellant digitally penetrated her on two occasions and placed a gun barrel to her vaginal lips. This testimony was sufficient to sustain the charges for sexual assault.[11] Appellant failed to demonstrate that his counsel's performance was deficient. As such, we affirm the order of the district court with respect to this claim.

Fifth, appellant claimed that his counsel was ineffective for recommending he plead guilty to attempted sexual assault despite the fact that the State's evidence was insufficient to prove sexual assault. As noted above, the victim's preliminary hearing testimony was sufficient to sustain the charges of sexual assault. Appellant failed to demonstrate that his counsel's performance was deficient. Accordingly, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that his counsel was ineffective for failing to object to the district court's imposition of lifetime supervision. Appellant failed to demonstrate that his counsel acted unreasonably by failing to object to the imposition of lifetime supervision. The imposition of lifetime supervision was mandatory,[12] and appellant was specifically informed in the plea agreement and at sentencing that his sentence would include lifetime supervision. Accordingly, we conclude that the district court did not err in denying this claim.

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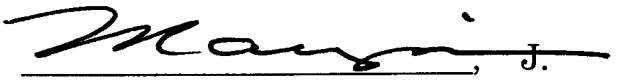
[11]See NRS 200.364; NRS 200.366(1).

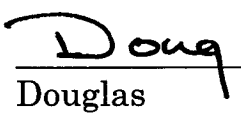
[12]NRS 176.0931

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.[13] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[14]



_____, J.
Maupin



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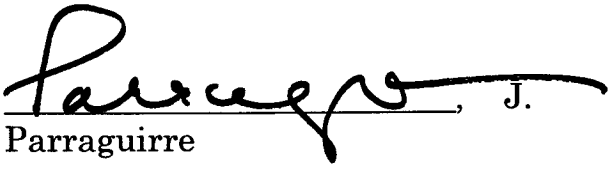

_____, J.
Parraguirre

cc: Hon. Nancy M. Saitta, District Judge
Lavar G. Varnado
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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

[14]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.