

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEAL KENNETH HARDING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44609

FILED

OCT 07 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

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

Appellant was originally convicted, pursuant to a guilty plea, of one count of battery with the intent to commit sexual assault. The district court sentenced appellant to a prison term of 72 to 180 months, and further ordered a sentence of lifetime supervision pursuant to NRS 176.0931.

Appellant did not file a direct appeal, but filed a post-conviction petition for a writ of habeas corpus. The district court appointed counsel, who filed an amended petition. The State opposed the petition, and the district court denied the petition without conducting an evidentiary hearing.

Appellant contends that NRS 176.0931 is unconstitutional, and that counsel was ineffective for failing to litigate this issue. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that

counsel's errors prejudiced the defense.¹ The court need not consider both prongs of the ineffective-assistance test if the defendant makes an insufficient showing on either prong.²

Appellant first argues that the condition of lifetime supervision is unconstitutional because it is a sentencing enhancement that is not presented to a jury panel. However, NRS 176.0931 is not a sentencing enhancement that must be decided by a jury or fact-finder, rather it is an automatically-imposed mandatory sentence for commission of various sexual crimes.³

Appellant next argues that lifetime supervision is unconstitutional because it violates his right to travel. This court notes, however, that the same argument could be made for any penal statute that involves imprisonment or parole. In sum, we conclude that appellant has not identified any challenge to the constitutionality of NRS 179.0931 that might have been successful. Accordingly, appellant has not demonstrated that the district court erred by rejecting appellant's argument that counsel was ineffective for failing to challenge the statute.

Appellant also contends that counsel was ineffective for failing to argue that NRS 176.0931 violated his right to freedom of speech. In

¹See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

²Strickland, 466 U.S. at 697.

³See Palmer v. State, 118 Nev. 823, 827, 59 P.3d 1192, 1194-95 (2002); cf. Blakely v. Washington, 542 U.S. 296, ___, 124 S. Ct. 2531, 2535 (2004), (holding that a sentencing scheme allowing a judge to increase the defendant's sentence beyond the standard range upon finding of "substantial and compelling reasons" violates the Sixth Amendment right to a jury trial).

particular, appellant argues that mandatory conditions of parole might be arbitrarily imposed by a parole officer to restrict appellant's ability to access the internet and possess published materials.⁴ We conclude that counsel was not ineffective for failing to challenge conditions of parole that might be imposed at some point in the future, nor was counsel ineffective for failing to argue that lifetime supervision is unconstitutional because a parole officer might act arbitrarily in enforcing the conditions of parole. The district court did not, therefore, err by rejecting this claim.

Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Becker, C.J.
Becker

Maupin, J.
Maupin

Gibbons, J.
Gibbons

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

⁴See NRS 213.1245(n), (p).