

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. MILLER A/K/A GLENN  
LEROY CASS A/K/A MICHAEL L.  
MILLER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44666

**FILED**

JUN 16 2005

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

ORDER OF AFFIRMANCE AND REMAND FOR ENTRY OF AN  
AMENDED JUDGMENT OF CONVICTION

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; Jackie Glass, Judge.

On September 16, 2003, the district court convicted appellant, pursuant to a guilty plea, of two counts of coercion (sexually motivated). The district court sentenced appellant to serve two consecutive terms of twenty-four to seventy-two months in the Nevada State Prison. The district court further imposed a special sentence of lifetime supervision. Appellant did not file a direct appeal. This court dismissed appellant's untimely notice of appeal for lack of jurisdiction.<sup>1</sup>

On August 25, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

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<sup>1</sup>See Miller v. State, Docket No. 42473 (Order Dismissing Appeal, January 28, 2004).

State opposed the petition. On December 17, 2004, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his trial counsel was ineffective and that this rendered his guilty plea involuntary. 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.<sup>2</sup> Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.<sup>3</sup>

First, appellant claimed that his counsel was ineffective for refusing to suppress an "illegal arrest." This claim is not supported by the record. The record reveals that the arresting officer knew of "facts and circumstances sufficient to lead a prudent person to believe that a felony was committed" by the appellant.<sup>4</sup> We conclude that appellant failed to demonstrate that his counsel erred in refusing to file a suppression

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

<sup>4</sup>Alward v. State, 112 Nev. 141, 156, 912 P.2d 243, 253 (1996), overruled on other grounds by Rosky v. State, 121 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (2005); NRS 171.123(1), (4).

motion, or that the motion would have had a probable chance of success.<sup>5</sup> Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to move the district court to dismiss his case because the criminal complaint was defective, and therefore, the district court lacked jurisdiction. This claim is not supported by the record. Appellant's criminal complaint, filed August 19, 2003, contained the required declaration, subject to perjury.<sup>6</sup> Thus, appellant failed to demonstrate that counsel's performance was deficient in failing to file for a dismissal based on a defective complaint. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for advising him to waive his right to a preliminary hearing. Appellant does not explain how proceeding with the preliminary hearing would have assisted in his defense. Even assuming that counsel had proceeded with a preliminary hearing, the two victims had made statements incriminating appellant. Appellant made a voluntary statement verifying certain aspects of the victims' statements. The State likely would have presented enough evidence to bind over appellant for trial. Appellant failed to demonstrate how counsel's performance was deficient in this regard. Therefore, the district court did not err in denying this claim.

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<sup>5</sup>Kirksey, 112 Nev. 980, 990, 923 P.2d 1102, 1109.

<sup>6</sup>See NRS 171.102(2).

Fourth, appellant claimed that trial counsel was ineffective for informing appellant that the victims had stated that they were raped, "contrary to discovery." This claim is not supported by the record. Appellant was charged with sexual assault, and sexual assault with a minor under the age of sixteen. The victims had given statements of events incriminating appellant of, at the very least, sexual assault. Appellant failed to demonstrate that counsel's performance was deficient in this regard. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel coerced him into pleading guilty by threatening him with harsh sentencing if he went to trial. This claim is not supported by the record. Appellant was charged with two counts of sexual assault and one count of sexual assault with a minor under sixteen, and was facing a possible term of three life sentences. Trial counsel's candid advice about the maximum sentences upon trial is not deficient. Appellant's plea agreement states that the agreement was voluntary, and that appellant was not acting under duress or coercion or by virtue of any promises of leniency. Appellant stated in his plea canvass that he was not being forced to sign and that he was signing freely and voluntarily. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his counsel was ineffective for failing to provide a hearing pursuant to NRS 207.193(3). A person may stipulate that his offense was sexually motivated before a hearing as part

of an agreement to plead guilty.<sup>7</sup> Appellant so stipulated within his plea agreement. Therefore, appellant failed to demonstrate that his counsel was ineffective in this regard or that with such a hearing he would not have pleaded guilty and would have proceeded to trial. Thus, the district court did not err in denying this claim.

Seventh, appellant claimed that his counsel was ineffective for failing to fully explain the rights that would be waived pursuant to his guilty plea. This claim is not supported by the record. Our review of the record on appeal reveals that appellant was canvassed at length regarding the voluntariness of his plea. Appellant stated that he had read and understood the plea agreement, and that he understood that as a result of his plea he would be waiving certain constitutional rights. The plea agreement specifically addressed and listed the rights that appellant would be waiving upon pleading guilty. Appellant failed to demonstrate that counsel's performance was deficient in this regard, and therefore, the district court did not err in denying this claim.

Last, appellant claimed that counsel was ineffective for advising appellant to waive his right to a psychosexual evaluation pursuant to NRS 176.139. A psychosexual evaluation is required when a defendant is convicted of a crime for which the granting of probation is permitted.<sup>8</sup> Coercion (sexually motivated) was an offense for which the district court could have granted probation. The record does not belie

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<sup>7</sup>NRS 207.193(4).

<sup>8</sup>NRS 176.139(1).

appellant's claim that he was not given a psychosexual evaluation. We conclude, however, that appellant failed to demonstrate that the results of his sentencing hearing would have been different if he had been given a psychosexual evaluation. Appellant stipulated to the sentences that he received and failed to provide any facts that would indicate the district court would have deviated from the negotiated sentences. Further, appellant insisted on being sentenced immediately after he entered his plea and he waived any defects as far as sentencing.<sup>9</sup> Thus, appellant did not establish that his trial counsel was ineffective on this issue, and the district court did not err in denying the claim.

Our review of the record on appeal reveals that appellant's convictions under NRS 207.190 did not subject him to a special sentence of lifetime supervision pursuant to NRS 176.0931(5)(b). Accordingly, we conclude that the district court erred in sentencing appellant to this special sentence. Therefore, we remand this appeal to the district court for the limited purpose of amending the judgment of conviction to remove the special requirement of lifetime supervision.

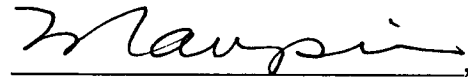
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to further relief and that briefing and oral argument are unwarranted.<sup>10</sup> Accordingly, we

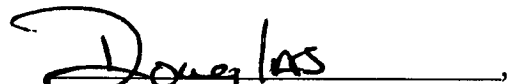
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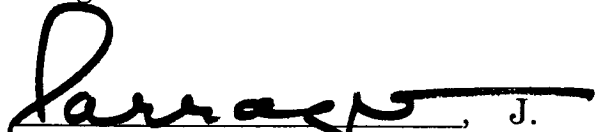
<sup>9</sup>Appellant wanted to proceed quickly so that he could return to prison to complete serving a prison term in another case.

<sup>10</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

ORDER the judgment of the district court AFFIRMED AND  
REMAND the matter for proceedings consistent with this order.

 J.  
Maupin

 J.  
Douglas

 J.  
Parraguirre

cc: Hon. Jackie Glass, District Judge  
Michael A. Miller  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk