IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD J. MCGUIRE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44803

FILED

JUN 16 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 Edward McGuire's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

On January 29, 2001, the district court convicted McGuire, pursuant to a guilty plea, of sexual assault of a minor under the age of sixteen (count I), lewdness with a minor under the age of fourteen (count II), and use of a minor in the production of pornography (count III). The district court sentenced McGuire to serve a term of 60 to 240 months in the Nevada State Prison for count I; a term of life with the possibility of parole after 120 months for count II; and a term of 60 to 180 months for count III. All terms were imposed to run concurrently. This court affirmed McGuire's judgment of conviction and sentence on appeal.[1] The remittitur issued on May 16, 2003.

On August 28, 2003, McGuire filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

[1]McGuire v. State, Docket No. 37461 (Order of Affirmance, April 21, 2003).

district court appointed counsel to represent McGuire, and counsel filed a supplement. The State filed an opposition. Pursuant to NRS 34.770, the district court declined to conduct an evidentiary hearing. On March 21, 2005, the district court denied McGuire's petition. This appeal followed.

In his petition, McGuire contended that his trial counsel was ineffective. 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.[2] 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."[3] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[4]

First, McGuire claimed that his trial counsel was ineffective for failing to adequately inform him of the consequence of lifetime supervision. We conclude that this claim is without merit.

A review of the record on appeal reveals that McGuire was informed in his written guilty plea agreement that he would be subject to a special sentence of lifetime supervision commencing after any term of imprisonment and period of release upon parole. McGuire acknowledged during the oral plea canvass that he read and understood the plea agreement, and did not have any questions with respect to its terms.

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

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

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

Therefore, McGuire failed to demonstrate that he was prejudiced by the alleged failure of his trial counsel to inform him of the consequence of lifetime supervision.

Moreover, we note that McGuire was advised both in the written guilty plea agreement and during the plea canvass that he was subject to a life sentence for the lewdness conviction.[5] Lifetime supervision is no greater than the prison term of which McGuire was informed he could receive, and it did not extend the maximum range of his sentence at the time he pleaded guilty.[6] McGuire therefore failed to establish that he would not have pleaded guilty and would have insisted on going to trial if his counsel had informed him of the consequence of lifetime supervision. Accordingly, we affirm the district court's denial of this claim.

Next, McGuire alleged that his trial counsel was ineffective for failing to argue that NRS 200.710,[7] which prohibits the use of a minor in

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[5]See 1997 Nev. Stat., ch. 455, § 5, at 1722.

[6]See Palmer v. State, 118 Nev. 823, 829 n.17, 59 P.3d 1192, 1195 n.17 (2002).

[7]NRS 200.710 provides that:

> 1. A person who knowingly uses, encourages, entices or permits a minor to simulate or engage in or assist others to simulate or engage in sexual conduct to produce a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750.
>
> 2. A person who knowingly uses, encourages, entices, coerces or permits a minor to be the subject of a sexual portrayal in a performance is guilty of a category A felony and shall be punished

continued on next page . . .

the production of pornography, is unconstitutionally overbroad and vague.[8] We conclude that McGuire did not establish that he was prejudiced by his counsel's actions.

McGuire first argued that his trial counsel's performance was deficient for failing to challenge NRS 200.710 as unconstitutionally vague because the word "produce" is not defined. This court has held that a vagueness challenge is appropriate "if the penal statute is so imprecise, and vagueness so permeates its text, that persons of ordinary intelligence cannot understand what conduct is prohibited, and the enactment authorizes or encourages arbitrary and discriminatory enforcement."[9] Due process, however, does not require "impossible standards of specificity" in statutory language, especially when, if viewed in the context of the entire statutory provision, there are well-settled and ordinary meanings for the words used.[10]

. . . *continued*

> as provided in NRS 200.750, regardless of whether the minor is aware that the sexual portrayal is part of a performance.

[8]McGuire additionally argued that his guilty plea was unknowingly entered on this basis. Consistent with the reasoning discussed below, we conclude that McGuire did not establish that his guilty plea was invalid. See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

[9]City of Las Vegas v. District Court, 118 Nev. 859, 863, 59 P.3d 477, 480 (2002).

[10]Woofter v. O'Donnell, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975) (citing United States v. Brown, 333 U.S. 18, 25-26 (1948)).

Although the word "produce" is not defined in the statute, it has a commonly understood meaning. Specifically, it is "[t]o bring forth [or] yield."[11] The plain meaning of the word "produce" clearly encompasses McGuire's actions of photographing the naked minor victim fondling his own penis. We therefore conclude that McGuire did not establish that his trial counsel acted objectively unreasonable in failing to challenge NRS 200.710 as unconstitutionally vague.[12]

McGuire also argued that his counsel was ineffective for failing to argue that NRS 200.710 is unconstitutionally overbroad on its face because it does not contain any exception for material that has serious literary, scientific, or educational value. McGuire did not establish, however, that this material would be constitutionally protected.[13] The fact that a work contains serious literary, artistic, or other value does not excuse the harm it caused to its child participants.[14] As such, McGuire failed to demonstrate that his counsel was ineffective for neglecting to raise an overbreadth challenge to NRS 200.710.

Lastly, McGuire argued that he was denied the right to an indictment by a grand jury. However, this claim is outside the scope of a post-conviction petition for a writ of habeas corpus when the conviction is

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[11]American Heritage Concise Dictionary 660 (3rd ed. 1994).

[12]We similarly reject McGuire's contention that his counsel was ineffective for failing to argue that NRS 200.710 is unconstitutionally vague because it lacks an intent element. By its own language, NRS 200.710 is limited to conduct that is knowing.

[13]See New York v. Ferber, 458 U.S. 747, 761 (1982).

[14]Ashcroft v. Free Speech Coalition, 535 U.S. 234, 249 (2002).

the result of a guilty plea.[15] Therefore, the district court did not err in denying McGuire relief on this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that McGuire is not entitled to relief and that briefing and oral argument are unwarranted.[16] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, C.J.
Becker

Rose, J.
Rose

Hardesty, J.
Hardesty

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

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[15]See NRS 34.810(1)(a).

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