

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID AUGUST KILLE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45216

FILED

OCT 11 2005

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On September 19, 2003, the district court convicted appellant, pursuant to a guilty plea, of one count of sexual assault on a minor under the age of sixteen years and one count of attempted sexual assault on a minor under the age of sixteen years. The district court sentenced appellant to serve two consecutive terms of five to twenty years in the Nevada State Prison. This court affirmed appellant's judgment of conviction on appeal.¹ The remittitur issued on March 30, 2004.

On January 19, 2005, 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 April 26, 2005, the district court denied appellant's petition. This appeal followed.

¹Kille v. State, Docket No. 42254 (Order of Affirmance, March 5, 2004).

In his petition, appellant contended that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability of a different outcome absent the alleged errors.² When a conviction is based upon a guilty plea, 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.³ The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.⁴

Appellant claimed that his trial counsel was ineffective for failing to adequately research the house arrest program requirements. Appellant asserted that because he was unable to find suitable housing that he was unable to receive one of the benefits of his plea agreement—house arrest for two weeks after entry of the plea in order to get his affairs in order. Appellant claimed that his trial counsel should have known that house arrest was illusory because the State had opposed house arrest prior to the preliminary hearing and because appellant believed that the State knew that appellant could not be on house arrest in his fiancé's home which was federally-subsidized housing.

The district court concluded that appellant's trial counsel erred in not better researching the house arrest requirements, but that appellant failed to demonstrate that his counsel was ineffective in this

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

³See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁴Strickland, 466 U.S. at 697.

regard. Based upon our review of the record on appeal, we conclude that the district court did not err. Even assuming that appellant's trial counsel should have been aware that appellant could not stay at appellant's fiancé's home on house arrest because of her type of housing, appellant failed to demonstrate that he was prejudiced by counsel's performance. By entry of his guilty plea, appellant avoided the possibility of being convicted of four counts of sexual assault on a minor under the age of fourteen. The crime of sexual assault on a minor under the age of fourteen requires the imposition of a life sentence with the possibility of twenty years.⁵ Thus, appellant faced a far greater penalty if he had not accepted the guilty plea. Appellant failed to demonstrate that the term of two weeks of house arrest was more significant to his decision to enter a guilty plea than to avoid the possibility of the maximum penalty of four life sentences with the possibility of parole after eighty years had been served and that he would not have entered a guilty plea absent the house arrest term. Further, the record demonstrates that the district court provided appellant with an opportunity to find other housing, and any failure for not finding suitable housing can be attributed to appellant. To the extent that appellant was claiming that the State breached the plea agreement, we conclude that appellant failed to demonstrate that he was prejudiced by counsel's performance because this court has already previously considered and rejected appellant's claim on direct appeal that the State breached the plea agreement. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Next, appellant claimed that his guilty plea was invalid. A guilty plea is presumptively valid, and a petitioner carries the burden of

⁵See NRS 200.366(3)(c).

establishing that the plea was not entered knowingly and intelligently.⁶ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.⁷ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.⁸

Appellant claimed that his guilty plea was involuntary because the district attorney threatened appellant that he would file more charges if appellant did not sign the guilty plea agreement. Appellant failed to carry his burden of demonstrating that his guilty plea was involuntary. In signing the written guilty plea agreement and during the plea canvass, appellant acknowledged that his plea was voluntary and not the product of any threats or coercion. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Finally, appellant claimed: (1) the district attorney's office knew that appellant was not eligible for house arrest; (2) the district attorney illegally opened a voided and sealed case; (3) the district attorney's office violated a discovery order; (4) the district attorney's office hid evidence that appellant was found not guilty in a prior sexual assault case; and (5) collateral estoppel prevented the district attorney's office from using as a prior bad act a 1995 criminal case that allegedly resulted in a not guilty verdict. These claims fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus

⁶Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

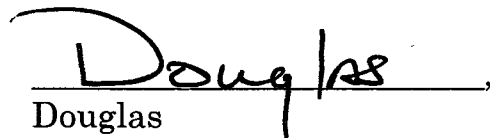
⁷Hubbard, 110 Nev. at 675, 877 P.2d at 521.

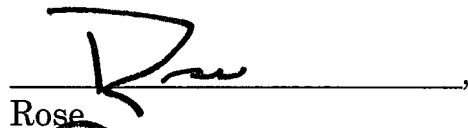
⁸State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

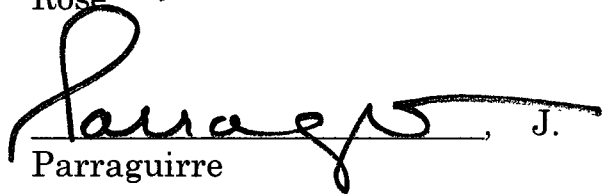
challenging a judgment of conviction based upon a guilty plea.⁹ Therefore, we conclude that the district court did not err in denying these claims.

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.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹¹

 J.
Douglas

 J.
Rose

 J.
Parraguirre

cc: Hon. Joseph T. Bonaventure, District Judge
David August Kille
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁹See NRS 34.810(1)(a).

¹⁰See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹¹We 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.