

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC A. BURKHART,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45234

**FILED**

**FEB 16 2006**

ORDER OF REVERSAL AND REMAND

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

This is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On January 28, 2004, the district court convicted appellant, pursuant to a guilty plea, of failure to register as a sex offender. The district court sentenced appellant to serve a term of twelve to thirty months in the Nevada State Prison, suspended the sentence, and placed appellant on probation. Probation was revoked on February 20, 2004, and appellant was ordered to serve the original sentence imposed. Appellant did not file a direct appeal.

On December 7, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State moved to dismiss 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 5, 2005, the district court dismissed the petition. This appeal followed.

In his petition, appellant contended that his counsel was ineffective.<sup>1</sup> 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> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>4</sup>

Appellant contended that counsel was ineffective for advising him to plead guilty to failure to register as a sexual offender, when he was not legally required to register as such. Specifically, appellant claimed

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<sup>1</sup>To the extent that appellant raised any issues independently from his ineffective assistance of counsel claims, we conclude that they fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. NRS 34.810(1)(a).

<sup>2</sup>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>Strickland, 466 U.S. at 697.

that counsel did not fully investigate his case, and that if counsel had, he would have discovered that appellant's 1979 Oregon conviction for contributing to the sexual delinquency of a minor did not qualify as an offense requiring registration pursuant to NRS 179D.410(19). That statute defines a sexual offense requiring registration as

An offense of a sexual nature committed in another jurisdiction . . . if the person who committed the offense resides or has resided or is or has been a student or worker in any jurisdiction in which the person is or has been required by the laws of that jurisdiction to register as a sex offender because of the offense.

On September 26, 2005, this court ordered the State to show cause why the district court's dismissal of the petition should not be reversed. Specifically, we noted that it appeared that pursuant to Oregon law appellant was not required to retroactively register as a sexual offender in Oregon.<sup>5</sup> The State responded that pursuant to State v. MacNab<sup>6</sup> appellant would be required to register in Oregon as a sexual offender because the Oregon Supreme Court held in MacNab that requiring the defendant in that case to register retroactively did not

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<sup>5</sup>State v. Driver, 923 P.2d 1272 (Or. 1996) (holding that there was no obligation for the offender to register if discharged from supervised release prior to the enactment of former ORS 181.518).

<sup>6</sup>51 P.3d 1249 (Or. 2002).

violate the ex post facto clauses of the Oregon and U.S. Constitutions. We do not agree with the State's conclusion.

The defendant in MacNab was convicted of first-degree sexual abuse, whereas appellant was convicted of a misdemeanor offense of contributing to the sexual delinquency of a minor. Contributing to the sexual delinquency of a minor was not listed in Oregon as a conviction requiring registration until 1999. Moreover, the legislative history of ORS 181.595 reveals that when the registration requirements were approved in 1999, the crime of contributing to the sexual delinquency of a minor was expressly exempted from the general retroactive registration requirement of the Act.<sup>7</sup>

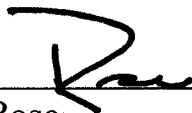
Therefore, appellant was never required, nor would he presently be required, to register as a sexual offender in Oregon for his 1979 offense. Our review of the record on appeal reveals no other factual basis supporting appellant's plea of guilty. Thus, we conclude that appellant's counsel was ineffective for failing to investigate whether appellant was required to register as a sexual offender in Oregon, which would have put him on notice and required him to register as a sexual offender in Nevada. Accordingly, we reverse the order of the district court denying appellant's petition, and remand with instructions for the district court to grant the petition and vacate the judgment of conviction.

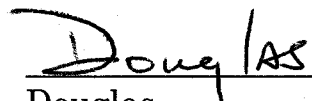
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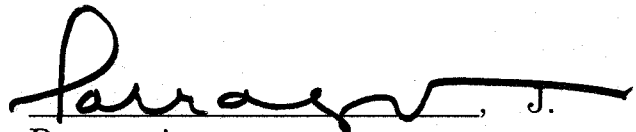
<sup>7</sup>Or. Laws 1999, ch. 626, § 23 (2)(a) (providing that the registration requirements apply only to persons convicted of contributing to the sexual delinquency of a minor on or after the effective date of the 1999 Act).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is only entitled to the relief granted herein, and that briefing and oral argument are unwarranted.<sup>8</sup> Accordingly, we

ORDER the judgment of the district court denying appellant's petition REVERSED, AND REMAND to the district court for proceedings consistent with this order.<sup>9</sup>

  
\_\_\_\_\_, C.J.  
Rose

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Parraguirre

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<sup>8</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>9</sup>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 appellant is entitled only to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Hon. Steven R. Kosach, District Judge  
Eric A. Burkhart  
Attorney General George Chanos/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk