

IN THE SUPREME COURT OF THE STATE OF NEVADA


JAYSON WARREN EPPS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45717

FILED

FEB 16 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY  CHIEF DEPUTY CLERK

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; Donald M. Mosley, Judge.

On November 26, 2003, the district court convicted appellant, pursuant to a guilty plea, of two counts of pandering of a child. The district court sentenced appellant to serve two consecutive terms of 30 to 120 months in the Nevada State Prison. The district court also sentenced appellant to pay restitution in the amount of \$36,405. Appellant did not file a direct appeal.

On October 12, 2004, 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, the district court declined to appoint counsel to represent appellant. Following an evidentiary hearing, the district court denied appellant's petition on July 7, 2005. This appeal followed.

In his petition, appellant contended that his counsel was ineffective.¹ 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.² 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.³ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁴ A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.⁵ Further, the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁶

¹To the extent that appellant raised any of the following 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).

²Strickland 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.

⁵Means v. State, 120 Nev. ___, ___, 103 P.3d 25, 33 (2004).

⁶Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant claimed that his counsel was ineffective for coercing him into pleading guilty, thereby making his plea involuntary. Appellant stated that counsel coerced him into pleading guilty by threatening him with life sentences. Appellant failed to demonstrate that his counsel's performance was deficient or that, had counsel's performance been different, he would have refused to plead guilty and would have proceeded with trial. Appellant was facing nine separate counts, including sexual assault on a minor under fourteen, first degree kidnapping, and robbery. Advising a defendant of the highest possible sentence he would face if he proceeded to trial is not deficient performance. Appellant's plea agreement stated that he was signing voluntarily, and he that was not acting under duress, coercion, or by virtue of any promises of leniency. During the plea canvass, appellant stated that he had read the plea agreement, understood it, and had no questions regarding the plea agreement. Appellant failed to demonstrate that counsel's performance was ineffective, and therefore, the district court did not err in denying this claim.


Second, appellant claimed that his counsel was ineffective for failing to object to malicious prosecution. Specifically, appellant claimed that counsel failed to object to the State over-charging him. Appellant failed to demonstrate that counsel's performance was deficient. All of the charges that appellant faced were supported by evidence presented at appellant's preliminary hearing. Thus, the district court did not err in denying this claim.

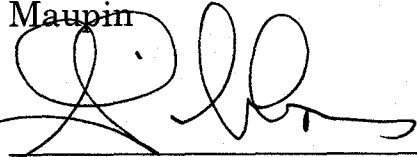
Third, appellant claimed that his counsel was ineffective for failing to object when the district court sentenced him to consecutive sentences. Appellant failed to demonstrate that counsel's performance was deficient. The plea agreement stated that the sentences would run consecutive. During the plea canvass, appellant agreed that he understood that the district court would determine the sentence. Counsel testified during the evidentiary hearing that he informed appellant of the district court's discretion during sentencing. The district court sentenced appellant to the terms recommended in the plea agreement, which were less than those recommended in the presentence investigation report. Thus, the district court did not err in denying this claim.

Last, appellant claimed that his counsel was ineffective for failing to move the district court to dismiss restitution. Appellant failed to demonstrate that counsel's performance was ineffective. The State agreed to drop a robbery charge against appellant pursuant to the plea agreement, but did not dismiss the restitution sought under that charge. The plea agreement stated that appellant agreed to pay full restitution toward the robbery case. When the district court sentenced appellant, he did not object verbally to the restitution. Counsel testified at the evidentiary hearing that the State would not dismiss the robbery charge unless the restitution was paid. Appellant failed to demonstrate that had his counsel moved to have the restitution dismissed, that he would have refused to plead guilty and would have proceeded to trial, and thus, the district court did not err in denying this claim.

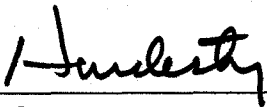
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.

Maupin
 _____, J.

Gibbons

 _____, J.
Hardesty

cc: Hon. Donald M. Mosley, District Judge
Jayson Epps
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁷See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).