IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ALLEN LANOUE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46031

FILED

MAR 24 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

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; Michelle Leavitt, Judge.

On June 28, 2004, the district court convicted appellant, pursuant to a guilty plea, of one count each of attempted sexual assault of a minor under the age of fourteen years and attempted lewdness with a minor under the age of fourteen years. The district court sentenced appellant to serve two consecutive terms of three and a half to twenty years in the Nevada State Prison.[1] Appellant did not file a direct appeal.

On March 18, 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, the district court declined to appoint counsel to represent appellant. On August 31, 2005,

[1]On March 14, 2005, the district court entered an amended judgment of conviction that awarded appellant 114 days' credit for time served.

after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised six claims of ineffective assistance of counsel.[2] 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.[3] A petitioner must further establish a reasonable probability that the results of the proceedings would have been different,[4] or that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[5] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[6] A petitioner must demonstrate "the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."[7] The

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[2]To the extent that appellant raised any of these claims outside of the context of a claim for ineffective assistance of counsel, these claims fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a conviction based on a guilty plea. See NRS 34.810(1)(a).

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

[4]See Strickland, 466 U.S. at 694.

[5]Hill v. Lockhart, 474 U.S. 52 (1985); see also Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

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

[7]Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[8]

First, appellant claimed that his counsel was ineffective for failing to file an appeal after being asked to do so. The district court held an evidentiary hearing on this issue. At the evidentiary hearing, appellant's counsel testified that appellant did not ask her to file an appeal on his behalf. Although appellant did not testify at the hearing, he argued that he asked his counsel to file an appeal several times. The district court determined that appellant's counsel was a credible witness and denied the petition. We conclude that the district court's factual determination was supported by substantial evidence and was not clearly wrong.[9] Accordingly, the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to ensure that a psychosexual evaluation was prepared prior to sentencing and included in his pre-sentence investigation report (PSI).[10] Appellant argued that because a psychosexual evaluation was not included in the PSI, he was unable to seek probation or a concurrent sentence for the attempted lewdness charge.

Although the record on appeal reveals that the written guilty plea agreement informed appellant that a psychosexual evaluation would be conducted prior to sentencing and included in the PSI, appellant failed to demonstrate that he was prejudiced by the failure to include a psychosexual evaluation in his PSI.

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

[9]See id.

[10]See NRS 176.139.

Appellant initially faced charges for three counts of sexual assault of a minor under the age of fourteen years and five counts of lewdness with a minor under the age of fourteen years. In exchange for pleading guilty to one count each of attempted sexual assault of a minor under the age of fourteen years and attempted lewdness with a minor under the age of fourteen years, both appellant and the State agreed to recommend two consecutive sentences of three and a half to twenty years. Although the plea agreement informed appellant that the district court retained discretion to sentence him within statutory limits, at the sentencing hearing, the district court informed appellant that it was inclined to impose the agreed upon sentence but would not impose a lesser sentence. Further, appellant failed to demonstrate that if a psychosexual evaluation had been conducted the results would have been positive.[11] Appellant received the sentence he bargained for, and cannot demonstrate that he was prejudiced by the failure to conduct a psychosexual evaluation prior to sentencing. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for failing to object to the district court's denial of his request to have a closed sentencing hearing. Appellant argued that a closed hearing was necessary because of the potential negative impact on him in prison if other inmates learned the nature of his offenses. Appellant asserted that the presence of

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[11]See id.; NRS 176A.110(1)(a) (providing that a district court may not grant probation to individuals convicted of specific sexual offenses unless the person conducting the psychosexual evaluation certifies that "the person convicted of the offense does not represent a high risk to reoffend").

other inmates in the courtroom during his sentencing hearing curbed his ability to offer argument in favor of concurrent sentences and probation, and made him fear for his safety and life. Appellant failed to demonstrate that his counsel was deficient in this regard.

If a reasonable alternative to closing a public trial proceeding can be implemented, the district court should not close the proceeding.[12] The record reveals that at the beginning of his sentencing hearing appellant requested to have the hearing closed. In response, the district court held a bench conference at which time it denied appellant's request, but stated that, in light of appellant's concerns, it would refrain from reading or referring to the charges against appellant at the hearing. No mention of appellant's charges was made at the hearing, and appellant failed to demonstrate that he could not adequately express his remorse or argue for a more lenient sentence without referring to his charges. Because the district court implemented a reasonable alternative to closing the sentencing hearing, appellant failed to demonstrate that an objection to the denial of the request to close the hearing would have been successful. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for failing to produce witnesses to speak on his behalf at the sentencing hearing. Appellant failed to demonstrate that his counsel was deficient in this regard. A defendant does not have a right to call witnesses to testify on his behalf at a sentencing hearing unless convicted of first-degree

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[12]See Feazell v. State, 111 Nev. 1446, 1448, 906 P.2d 727, 729 (1995).

murder.[13] Accordingly, we conclude the district court did not err in denying this claim.

Fifth, appellant claimed that his counsel was ineffective for failing to present any mitigating evidence to the court at his sentencing hearing. Appellant failed to identify what evidence his counsel should have presented on his behalf.[14] Accordingly, we conclude the district court did not err in denying this claim.

Sixth, appellant claimed that his counsel was ineffective for failing to object to, or take steps to cure, actual bias by the sentencing court. Specifically, appellant argued that the district court demonstrated that it was biased against him because it stated "You're lucky this is not left in my hands." Appellant failed to demonstrate that his counsel was deficient in this regard.

The record on appeal reveals that the district court never made the statement alleged by appellant. At the sentencing hearing, the district court stated: "Here's the deal, I'm inclined to go along with what the attorneys have negotiated. You probably don't want to put it in my hands." There is no indication that the district court was biased against appellant. The district court accepted the parties' recommendation and

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[13]See NRS 176.015(2) (providing that only the defendant and defendant's counsel may address the court on behalf of the defendant at the sentencing hearing); compare NRS 175.552(3) (allowing for the presentation of mitigating evidence at the sentencing hearing for an individual convicted of first-degree murder).

[14]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that no relief is warranted for claims unsupported by specific factual allegations).

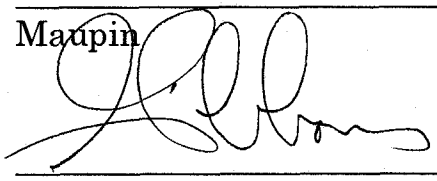
imposed the sentence appellant bargained for. Accordingly, we conclude the district court did not err in denying this claim.

Appellant also contended that the cumulative effect of his counsel's errors rendered his sentencing unfair. However, because appellant did not demonstrate that his counsel erred, he necessarily failed to establish a claim of cumulative error.

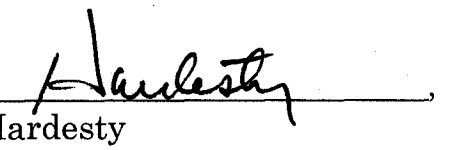
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[15] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Maupin



_____, J.
Gibbons



_____, J.
Hardesty

cc: Hon. Michelle Leavitt, District Judge
John Allen Lanoue
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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