

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD LEE GRUBER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46265

FILED

MAR 24 2006

JENNIFER 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; Jennifer Togliatti, Judge.

On March 8, 2005, the district court convicted appellant, pursuant to a guilty plea, of sexual assault of a minor under the age of sixteen, lewdness with a child under the age of fourteen, and attempted sexual assault of a minor under the age of sixteen. The district court sentenced appellant to serve two consecutive terms of 60 to 240 months in the Nevada State Prison, and a consecutive term of life with parole eligibility after ten years has been served. Appellant's untimely direct appeal was dismissed for lack of jurisdiction.¹

On August 2, 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

¹Gruber v. State, Docket No. 45550 (Order Dismissing Appeal, July 29, 2005).

district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On November 2, 2005, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that counsel was ineffective.² 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 was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is 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 address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁴

First, appellant claimed that counsel was ineffective for failing to either file for a competency hearing based on appellant's mental health issues or file a motion requesting his medical file. Further, appellant claimed that counsel was ineffective for failing to protect him from pleading guilty when he could not understand the proceedings, and therefore, his guilty plea was involuntary. Appellant failed to

²To 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).

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

⁴Strickland v. Washington, 466 U.S. 668, 697 (1984).

demonstrate that counsel's performance was ineffective, or that, appellant was not able to consult with his attorney or understand the proceedings. The test applied in determining competency is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and if he has a rational and factual understanding of the proceedings.⁵ The district court conducted an extensive plea canvass, and appellant responded appropriately to all of the court's questions. Appellant stated at the canvass that he had received medicine every day for his psychological illness since being incarcerated. The plea agreement stated that appellant was not under the influence of any controlled substances or drugs which impaired his ability to comprehend or understand the plea agreement and proceedings surrounding his plea, and appellant stated during his canvass that he had read, understood, and signed the plea agreement. The record supports the district court's conclusion that appellant understood the proceedings and was able to consult with his counsel. Thus, the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for failing to move the court to suppress his statement to detectives because there was never a reading of his Miranda⁶ rights on the record and the detectives withheld medication from him. Appellant failed to demonstrate that counsel's performance was ineffective, or that, but for counsel's

⁵Means v. State, 120 Nev. 1001, 1016-17, 103 P.3d 25, 35 (2004) (citations omitted).

⁶Miranda v. Arizona, 384 U.S. 436 (1966).



performance, appellant would have refused to plead guilty and would have proceeded to trial. Per appellant's arrest report, appellant was read his Miranda rights, stated that he understood them, and wished to talk to detectives about the alleged sexual abuse. There was no evidence on the record that appellant was deprived of medication during interrogation. Furthermore, appellant had negotiated his plea bargain prior to waiving his preliminary hearing, so counsel did not have the opportunity to file a motion to suppress. Appellant benefited from pleading guilty because he avoided additional charges and a potential greater maximum sentence. The first amended complaint listed eight counts of sexual assault of a minor under the age of sixteen, twelve counts of lewdness with a child under the age of fourteen, and four counts of open and gross lewdness. Thus, the district court did not err in denying this claim.

Last, appellant claimed that counsel was ineffective for failing to object to him pleading guilty to the attempted sexual assault, because the State had negotiated the plea agreement to only contain the sexual assault and the lewdness counts. This claim is not supported by the record. At the waiver of the preliminary hearing, the State read into the record the plea as negotiated, including a count of attempted sexual assault. The plea agreement specified what counts appellant was pleading guilty to, including a count of attempted sexual assault. At the plea canvass, appellant stated that he had read and understood the plea agreement, that he understood the charges against him, and that he was pleading voluntarily. Appellant specifically admitted during his plea canvass that he committed the attempted sexual assault. Appellant failed

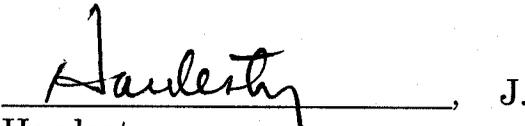
to demonstrate that counsel was ineffective. Thus, the district court did not err in denying this claim.

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.⁸


_____, J.
Maupin


_____, J.
Gibbons


_____, J.
Hardesty

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

⁸We 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.

cc: Hon. Jennifer Togliatti, District Judge
Richard Lee Gruber
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk