

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN C. SHAW,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 46382

**FILED**

**MAR 13 2006**

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. [Signature]*  
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; Jackie Glass, Judge.

On February 3, 2004, the district court convicted appellant, pursuant to a guilty plea, of two counts of sexual assault and two counts of sexual assault of a minor under sixteen years of age. The district court sentenced appellant to serve two concurrent terms of life with the possibility of parole after ten years, to be followed by two consecutive sentences of 60 to 240 months, in the Nevada State Prison. No direct appeal was taken.

On January 31, 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, but conducted an evidentiary hearing. On July 26, 2005, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of counsel, his guilty plea was involuntary, he was actually innocent of the charges, the district court erred in denying his motion to withdraw his guilty plea, and the district court was biased at sentencing.

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.<sup>1</sup> The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.<sup>2</sup> A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.<sup>3</sup> The district court's factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>4</sup>

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<sup>1</sup>Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

<sup>2</sup>Strickland v. Washington, 466 U.S. 668, 697 (1984).

<sup>3</sup>Means v. State, 120 Nev. \_\_, \_\_ 103 P.3d 25, 33 (2004).

<sup>4</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Appellant claimed his counsel was ineffective for failing to file a direct appeal after appellant requested she do so. At the evidentiary hearing, counsel testified that appellant specifically told her not to file an appeal, and counsel produced a letter she had received from appellant to that effect. We therefore conclude counsel was not ineffective in this regard, and the district court did not err in denying this claim.

Appellant next claimed counsel was ineffective for failing to investigate. Appellant claimed an investigation would have turned up one of the victim's motives for fabricating the allegations and revealed that both victims had previously fabricated sexual abuse allegations against him. At the evidentiary hearing, counsel testified she read all the discovery, interviewed the victims and their mother, and spoke with appellant numerous times. Counsel also testified she did not specifically ask the victims whether they were lying, but she did talk to appellant about that. Thus, it is clear from the record that counsel was aware the allegations were possibly fabricated and that previous allegations had been made; counsel was therefore not deficient for failing to discover those facts. Further, appellant failed to demonstrate he would not have pleaded guilty had counsel investigated this further. We therefore conclude counsel was not ineffective in this regard, and the district court did not err in denying this claim.

Appellant also claimed counsel was ineffective for failing to communicate with him. At the evidentiary hearing, counsel testified she spoke with appellant numerous times. Further, at the plea entry hearing,

appellant advised the district court he had discussed the case and the plea agreement with counsel before signing it, and that counsel had "answered all my questions." The guilty plea agreement also indicated appellant had discussed the charges and any possible defenses with counsel. We therefore conclude counsel was not ineffective in this regard, and the district court did not err in denying this claim.

Next, appellant claimed his counsel's ineffective performance led him to plead guilty involuntarily. However, as discussed above, counsel was not ineffective, and the district court therefore did not err in denying this claim.

Appellant also claimed he was actually innocent of the charges. "'[A]ctual innocence' means factual innocence, not mere legal insufficiency."<sup>5</sup> When the conviction is based on a guilty plea, the defendant must prove he was actually innocent of all the charges foregone by the State as part of the plea negotiation.<sup>6</sup> Appellant was originally charged with three counts each of sexual assault of a minor under fourteen, lewdness with a child under fourteen, and open or gross lewdness, as well as six counts of sexual assault of a minor under sixteen and five counts of sexual assault.

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<sup>5</sup>Bousley v. United States, 523 U.S. 614, 623-624 (1998) (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)); Mazzan v. Warden, 112 Nev. 838, 921 P.2d 920 (1996).

<sup>6</sup>Bousley, 523 U.S. at 624.



In support of his actual innocence claim, appellant submitted to the district court an affidavit from one of the victims, stating she had not been "completely truthful" when interviewed by investigators and had felt "coerced" by the investigators. The victim's affidavit did not demonstrate appellant was actually innocent of the charges. The affidavit does not contain an explicit recantation of the allegations, nor does it even address the allegations relating to the second victim. The second victim showed physical signs of sexual abuse. Appellant admitted his guilt at the plea entry and again at the sentencing, at which he also expressed remorse to the victims and to his wife. Accordingly, the district court did not err in denying this claim.

Appellant further claimed the district court erred in denying his motion to withdraw his guilty plea and in doing so without holding an evidentiary hearing. This claim is outside the scope of claims properly brought in a post-conviction petition for a writ of habeas corpus where the conviction is based upon a guilty plea.<sup>7</sup> As a separate and independent basis for denying this claim, the claim lacked merit. Our review of the record on appeal reveals that appellant never actually filed a motion to withdraw his guilty plea. Accordingly, the district court did not err in denying this claim.

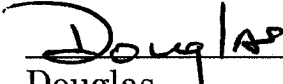
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<sup>7</sup>NRS 34.810(1)(a).

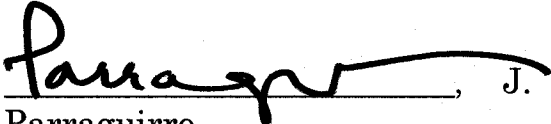
Finally, appellant claimed the district court sentenced him out of bias and personal vindictiveness. This claim is belied by the record.<sup>8</sup> The district court told appellant that he had "preyed upon" the victims and his actions would probably impact them for the rest of their lives, but this did not rise to the level of personal bias. In addition, the district court followed the State's recommendation and set two of the sentences to run concurrently, although the probation department had recommended all the sentences be consecutive. Accordingly, 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.<sup>9</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

 \_\_\_\_\_, J.  
Becker

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

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<sup>8</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

<sup>9</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Honorable Jackie Glass, District Judge  
Norman C. Shaw  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk