

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIO TAPIA MARTINEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46778

FILED

JUL 05 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; Sally L. Loehrer, Judge.

On October 1, 2004, the district court convicted appellant, pursuant to a guilty plea, of sexual assault of a minor under the age of sixteen and lewdness with a child under the age of fourteen. The district court sentenced appellant to serve a term of five to twenty years in the Nevada State Prison for sexual assault with a minor and a consecutive term of life with parole eligibility after ten years has been served for lewdness with a minor under the age of fourteen. Appellant did not file a direct appeal.

On September 26, 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 or to

conduct an evidentiary hearing. On January 19, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that counsel was ineffective. 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.¹ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.²

First, appellant contended that his counsel was ineffective for failing to adequately investigate and prepare a possible defense. Specifically, appellant claimed that counsel failed to investigate the possibility that the victim consented to sexual assault, and that counsel erred in advising him to enter a guilty plea and instead should have pursued a defense of consent of the victim.

Appellant failed to demonstrate that his counsel's performance was unreasonable or that he was prejudiced. Appellant failed to establish that his mistaken belief that the victim consented to the sexual conduct

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

²Strickland v. Washington, 466 U.S. 668, 697 (1984).

was reasonable,³ such that his trial counsel was deficient in advising him to plead guilty. NRS 200.366 defines sexual assault as a sexual penetration against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is incapable of resisting or understanding the nature of the sexual conduct. When evaluating whether a sexual penetration is against the will of the victim several factors may be considered, including but not limited to, the relationship between the victim and the perpetrator and the victim's age and maturity level.⁴ The record reveals that thirty-eight-year-old appellant started sexually assaulting his step-daughter when she was nine- or ten-years-old. Thus, trial counsel's advice was not unreasonable. Appellant admitted to the sexual abuse of his step-daughter, both during initial questioning and his plea canvass. Further, appellant avoided going to trial and being convicted of an exorbitant number of sexually-based offenses. Appellant did not demonstrate that his trial counsel was ineffective on this issue, and the district court did not err in denying this claim.

Next, appellant claimed that due to his counsel's ineffective performance, his guilty plea was not knowingly and voluntarily entered. A guilty plea is presumptively valid, and appellant carries the burden of

³See Honeycutt v. State, 118 Nev. 660, 670, 56 P.3d 362, 368 (2002) (providing that Nevada law supports a defense of reasonable mistaken belief of consent in sexual assault cases") (emphasis added) overruled on other grounds by Carter v. State, 121 Nev. ___, 121 P.3d 592 (2005).

⁴Shannon v. State, 105 Nev. 782, 790, 783 P.2d 942, 947 (1989).

establishing that his plea was not entered knowingly and intelligently.⁵ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.⁶ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.⁷

Appellant claimed that his trial counsel was ineffective for misrepresenting the consequences of his plea, resulting in his plea being involuntarily and unknowingly entered. Specifically, appellant claimed that counsel represented that appellant would receive concurrent terms rather than the consecutive terms he received. We conclude that under the totality of the circumstances, appellant failed to demonstrate that his guilty plea was invalid. Appellant's sentence was a negotiated sentence, including the consequence of consecutive terms. The plea agreement stated that both parties stipulated to the sentences running consecutively. During appellant's plea canvass, appellant stated that he understood everything within the plea agreement, that he understood that he was stipulating to consecutive sentences, and that he would not be eligible for parole until fifteen years had been served. Appellant failed to demonstrate that his counsel's performance was deficient or that his plea

⁵See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

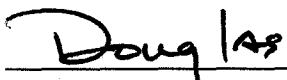
⁶State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.


⁷Hubbard, 110 Nev. at 675, 877 P.2d at 521.

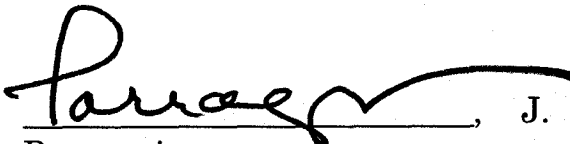
was not voluntary or knowing. Thus, the district court did not err in denying this claim.

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.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Becker


_____, J.
Parraguirre

cc: Hon. Sally L. Loehrer, District Judge
Mario Tapia Martinez
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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