

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN INGEBRETSEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47114

FILED

JAN 09 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying appellant John Ingebretsen's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

The district court convicted Ingebretsen, pursuant to a guilty plea, of one count of attempting to use a minor in the production of pornography, one count of possession of a visual presentation depicting the sexual conduct of a person under 16 years of age, and one count of open or gross lewdness. The district court sentenced Ingebretsen to various concurrent terms of imprisonment, amounting to 36 to 120 months. We affirmed the judgment of conviction on direct appeal.¹

Ingebretsen filed a timely proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel, counsel supplemented Ingebretsen's habeas petition, and the State responded to both the petition and the supplement. Thereafter, the

¹Ingebretsen v. State, Docket No. 38391 (Order Dismissing Appeal, January 23, 2002).

district court heard arguments and denied Ingebretsen's petition. This appeal follows.

First, Ingebretsen contends that the district court erred by not dismissing his case when it learned that the State had lost or destroyed the photographic evidence of his crimes.

In order to establish a due process violation resulting from the state's loss or destruction of evidence, a defendant must demonstrate either (1) that the state lost or destroyed the evidence in bad faith, or (2) that the loss unduly prejudiced the defendant's case and the evidence possessed an exculpatory value that was apparent before the evidence was destroyed.²

Here, the district court found that the State had not acted in bad faith and that the photographs were not exculpatory in nature. Our review of the record reveals that the district court's findings are supported by substantial evidence and are not clearly wrong.

Second, Ingebretsen contends that the district court erred by denying his request for an evidentiary hearing. He specifically asserts that an evidentiary hearing was necessary to review the photographs seized by the State and determine whether they constituted evidence of the crimes for which he pled guilty. "A post-conviction habeas petitioner is entitled to an evidentiary hearing 'only if he supports his claims with specific factual allegations that if true would entitle him to relief.' However, if the record belies the petitioner's factual allegations, the

²State v. Hall, 105 Nev. 7, 9, 768 P.2d 349, 350 (1989).

petitioner is not entitled to an evidentiary hearing."³ Here, Ingebretsen's claim that the photographs do not constitute evidence of crimes is belied by statements that he made during the plea canvass and at the sentencing hearing.

Third, Ingebretsen contends that the district court erred by concluding that counsel was effective. Ingebretsen claims that counsel was ineffective for failing to inform him that the State's information did not contain all of the elements necessary to constitute the crimes of attempting to use a minor in the production of pornography and possession of child pornography. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient, and that the petitioner was prejudiced by counsel's performance.⁴ To show prejudice, a petitioner who has entered a guilty plea must demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."⁵ The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong.⁶ Here, the district court found that Ingebretsen received effective assistance of counsel. Our review of the record reveals that the

³Means v. State, 120 Nev. 1001, 1016, 103 P.3d 25, 35 (2004) (quoting Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004)).

⁴Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1987)).

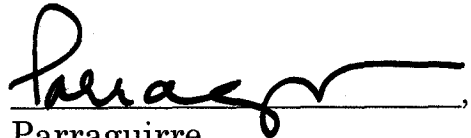
⁵Id. at 988, 923 P.2d at 1107 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

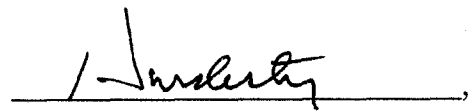
⁶See Strickland, 466 U.S. at 697.

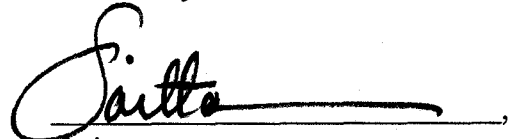
district court's finding is supported by substantial evidence and is not clearly wrong.

Having considered Ingebretsen's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

cc: Hon. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk