

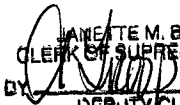
IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL LEONETTI,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 47485

**FILED**

**AUG 07 2007**

JANE M. BLOOM  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from orders of the district court denying appellant Michael Leonetti's motions to withdraw his guilty plea and post-conviction petitions writs of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On October 24, 2000, the district court convicted Leonetti, pursuant to a guilty plea, of one count of attempted sexual assault of a minor under the age of sixteen. The district court sentenced Leonetti to serve a term of eight to twenty years in the Nevada State Prison, and imposed a special sentence of lifetime supervision. This court dismissed Leonetti's direct appeal.<sup>1</sup> The remittitur issued on January 29, 2002.

On May 9, 2001, December 5, 2002, and July 14, 2003, Leonetti filed motions to withdraw his guilty plea. On January 6, 2004, Leonetti filed an addendum to the July 14, 2003, motion. On May 9, 2001, and December 5, 2002, Leonetti filed post-conviction petitions for writs of

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<sup>1</sup>Leonetti v. State, Docket No. 36980 (Order Dismissing Appeal, January 2, 2002).

habeas corpus. Leonetti filed supplemental petitions on February 19, 2002, and September 26, 2002. Leonetti filed a "good cause" petition on March 13, 2002. The State opposed the motions and petitions. The district court entered several orders denying Leonetti's motions and petitions. Leonetti filed multiple appeals from the denial of his motions and petitions. Because one of the district court orders improperly denied Leonetti's petitions for a writ of habeas corpus, and the other orders contained errors or did not address all of the claims raised in the motions and petitions, this court remanded one of Leonetti's appeals,<sup>2</sup> and dismissed the other appeals.<sup>3</sup> Because the district court had not yet entered orders resolving Leonetti's motions and petitions, on March 7, 2006, this court entered an order granting Leonetti's petition for a writ of mandamus and directing the district court to enter orders that identified and resolved all claims raised in the motions and petitions.<sup>4</sup>

On May 19, 2006, the district court entered orders denying Leonetti's motions, petitions, and supplements. This appeal followed. Although the May 19, 2006, orders did not precisely comply with this court's directives in the order granting Leonetti's petition for a writ of

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<sup>2</sup>Leonetti v. State, Docket No. 39531 (Order of Reversal and Remand, August 20, 2002).

<sup>3</sup>Leonetti v. State, Docket No. 44202 (Order Dismissing Appeal, December 6, 2004); Leonetti v. State, Docket No. 42674 (Order Dismissing Appeal, September 15, 2004).

<sup>4</sup>Leonetti v. Dist. Ct., Docket No. 46369 (Order Granting Petition, March 7, 2006).

mandamus, we conclude that these orders resolve all claims raised and are therefore sufficient to enable this court to review the district court's decisions.<sup>5</sup>

In his motions, petitions, and supplements, Leonetti claimed that his guilty plea was invalid and his counsel was ineffective. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.<sup>6</sup> Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.<sup>7</sup> In determining the validity of a guilty plea, this court looks to the totality of the circumstances.<sup>8</sup> 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

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<sup>5</sup>To the extent that Leonetti challenges the denial of his motion to disqualify Judge Glass, appellant failed to demonstrate Judge Glass was biased, and we conclude the district court did not err by denying the motion. See NRS 1.230; NRS 1.235.

<sup>6</sup>Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

<sup>7</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

<sup>8</sup>State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

on going to trial.<sup>9</sup> The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.<sup>10</sup> "[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."<sup>11</sup> Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal.<sup>12</sup>

First, Leonetti claimed that his plea was not knowingly, voluntarily or intelligently entered and his counsel, James Guesman, was ineffective because Guesman had a conflict of interest that Leonetti did not waive. Leonetti alleged that while representing him in the criminal proceeding, Guesman also represented Leonetti's wife, Diane, in the divorce proceeding and drafted Leonetti's proper person answer to the divorce complaint, in which Leonetti expressly consented to all requests made in the divorce complaint.

In the context of an ineffective assistance of counsel claim based on an alleged conflict of interest, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his

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<sup>9</sup>Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

<sup>10</sup>Strickland v. Washington, 466 U.S. 668, 697 (1984).

<sup>11</sup>Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

<sup>12</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

lawyer's performance."<sup>13</sup> The existence of an actual conflict of interest must be established on the specific facts of each case, but "[i]n general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties."<sup>14</sup>

We conclude that Leonetti demonstrated that an actual conflict of interest existed with regard to Guesman's representation of Diane. The record reveals that Guesman simultaneously represented Leonetti in the criminal matter and Diane in her divorce proceeding against Leonetti. Although Guesman had Leonetti sign a waiver of the conflict, the waiver was not presented to Leonetti or signed by him until after Leonetti was sentenced in his criminal matter. The waiver was therefore invalid for waiving the conflict in the criminal matter. Accordingly, we conclude that the district court erred by determining that Leonetti waived any potential conflict that arose as a result of the simultaneous representation of Leonetti and Diane.

We further conclude, however, that Leonetti failed to demonstrate that the conflict of interest adversely affected Guesman's performance or rendered his plea invalid. Leonetti faced one count of open

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<sup>13</sup>Strickland, 466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 350, 348 (1980)); see Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992); but see Cuyler, 446 U.S. at 348 (holding that prejudice is presumed if the district court fails to provide a defendant the opportunity to show that a potential conflict of interest, that the defendant has timely objected to, impermissibly imperils his right to a fair trial).

<sup>14</sup>Clark, 108 Nev. at 326, 831 P.2d at 1376 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

or gross lewdness, two counts of sexual assault of a minor under the age of sixteen and twenty-two counts of statutory sexual seduction. Guesman negotiated a plea in which Leonetti pleaded guilty to one count of attempted sexual assault of a minor under the age of sixteen and all other counts were dismissed. By pleading guilty, Leonetti received a substantial benefit. Had Leonetti been convicted of the charges against him, Leonetti faced a mandatory term of life for each count of sexual assault, a term of one to five years for each count of statutory sexual seduction and a term of one to four years for the count of open or gross lewdness.<sup>15</sup> Leonetti was informed of the consequences of pleading guilty and acknowledged that he understood that by pleading guilty he was facing a single term of two to twenty years and a special sentence of lifetime supervision. The plea negotiated by Guesman substantially benefited Leonetti, and Leonetti did not demonstrate that the conflict of interest adversely affected Guesman's performance or rendered Leonetti's plea invalid. Accordingly, we conclude the district court did not err by denying these claims.

Second, Leonetti claimed that his plea was not knowingly, voluntarily or intelligently entered and Guesman was ineffective because Guesman had a second conflict of interest that Leonetti did not waive. Leonetti alleged that prior to representing him in the criminal proceeding, Guesman had either been a business partner along with Leonetti's father-in-law, Donald Rux, and the victim's mother, Rebecca Conway, in a "big

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<sup>15</sup>See NRS 200.366(3); 1995 Nev. Stat., ch. 443, § 59, 1187 (NRS 200.368); NRS 201.210; NRS 193.130(2)(c), (d).

money deal" or had represented Rux and Conway in the "big money deal." Leonetti implied that Guesman's representation of or business involvement with Rux and Conway continued during the criminal proceeding.

Leonetti failed to demonstrate that Rux's, Conway's and Guesman's interests, if any, in the "big money deal" were in competition with Leonetti's interests in the criminal proceeding and that Guesman made a choice between possible alternative courses of action that impermissibly favored Rux's, Conway's or Guesman's interests.<sup>16</sup> Therefore, Leonetti failed to demonstrate that Guesman's prior relationship with Rux and Conway constituted an actual conflict of interest, rather than just a potential conflict of interest. Further, even assuming that an actual conflict of interest did exist with regard to these relationships, for the reasons stated above, Leonetti failed to demonstrate that the conflict of interest adversely affected Guesman's performance or rendered Leonetti's plea invalid. Accordingly, we conclude the district court did not err by denying these claims.

Third, Leonetti claimed that his guilty plea was invalid and Guesman was ineffective because the State Bar had to take action against Guesman. Guesman pleaded guilty on May 15, 2001, to multiple charges brought against him by the State Bar. As part of the State Bar action,

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<sup>16</sup>See Washington v. Lampert, 422 F.3d 864, 872 (9th Cir. 2005); Clark, 108 Nev. at 326, 831 P.2d at 1376.

Guesman pleaded guilty to violating former<sup>17</sup> SCR 79 (Address of member) and SCR 173(3) (Knowingly disobeying an obligation under the rules of a tribunal) for his failure to respond to orders of this court while representing Leonetti in his direct appeal from his conviction and sentence.<sup>18</sup>

"[A] lawyer can be disciplined for a variety of reasons—merely because he is subject to disciplinary proceedings while representing a client does not mean that he is presumptively incapable of providing effective assistance."<sup>19</sup> Although it is clear from the record that Guesman violated some rules of professional conduct while he represented Leonetti in this case, Guesman's actions did not prejudice Leonetti or render his guilty plea invalid. As noted above, Leonetti received a substantial benefit by pleading guilty and the record demonstrates that he was aware of the

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<sup>17</sup>The former version of the Supreme Court Rules governing professional misconduct are cited in this order since Guesman's actions occurred before they were renumbered and amended in 2006. See Nevada Pay TV v. District Court, 102 Nev. 203, 205 n.2, 719 P.2d 797, 798 n.2 (1986), superseded by rule as acknowledged in State, Dep't Mtr. Veh. v. Dist. Ct., 113 Nev. 1338, 948 P.2d 261 (1997).

<sup>18</sup>Leonetti's appeal was a fast track appeal and, therefore, Guesman was responsible for the appeal. See NRAP 3C. Leonetti filed his notice of appeal in proper person, and because Guesman did not maintain an accurate address, it appears that Guesman never received any of this court's orders directing him to comply with the requirements of NRAP 3C. Eventually, alternate counsel was appointed to represent Leonetti on direct appeal.

<sup>19</sup>Young v. Runnels, 435 F.3d 1038, 1043 (9th Cir. 2006).



consequences of his plea. Guesman's later actions while representing him on direct appeal did not render Guesman's earlier assistance ineffective or render the guilty plea invalid. Accordingly, we conclude that the district court did not err by denying these claims.

Fourth, Leonetti claimed that his guilty plea was invalid and Guesman was ineffective because he believed, and Guesman promised him, that he would be sentenced to a term of two to five years.

A defendant's mere subjective belief "as to potential sentence, or hope of leniency, unsupported by any promise from the State or indication by the court, is insufficient to invalidate a guilty plea as involuntary or unknowing."<sup>20</sup> There is nothing in the record to indicate that Leonetti was promised a term of two to five years by the State, the court or Guesman. Leonetti was informed in the written plea agreement and at the plea canvass, and Leonetti acknowledged that he understood, that he was subject to a term of two to twenty years and the imposition of sentence was within the discretion of the court. Leonetti did not indicate that he had been promised a sentence of two to five years. At the evidentiary hearing, Guesman testified that although he informed Leonetti that he was hopeful of getting a sentence of two to five years, because the victim was not supposed to testify at the sentencing hearing, he never promised Leonetti that he would receive this sentence.<sup>21</sup> The

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<sup>20</sup>Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975).

<sup>21</sup>The record reveals that the victim changed her mind and decided to testify at the sentencing hearing on the date of sentencing.

district court's determination that Leonetti failed to demonstrate that his guilty plea was invalid or that Guesman was ineffective was not clearly wrong and was supported by substantial evidence. Accordingly, we conclude that the district court did not err by denying these claims.

Fifth, Leonetti claimed that his guilty plea was invalid and Guesman was ineffective because he was never informed that he would have to pass a "psych panel" before being released on parole. This claim is belied by the record.<sup>22</sup> Leonetti was informed of this requirement at the plea canvass and in the plea agreement. Accordingly, we conclude that the district court did not err by denying these claims.

Sixth, Leonetti claimed that his guilty plea was invalid and Guesman was ineffective because Leonetti was suffering severe depression when he entered the guilty plea. Leonetti also claimed that Guesman was ineffective for failing to request a competency hearing. In his addendum to the motions to withdraw his guilty plea, Leonetti attached medical records from when he was in county custody to support his claim of depression and attempted suicide while he was in the county jail.

A defendant is competent to stand trial, and enter a guilty plea, if he has sufficient ability to consult with his lawyer with a reasonable degree of understanding, and can comprehend the proceedings against him.<sup>23</sup> Leonetti did not provide any facts to support a claim that

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<sup>22</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

<sup>23</sup>See NRS 178.400(2); Riker v. State, 111 Nev. 1316, 1324, 905 P.2d 706, 711 (1995) (holding that there is no higher standard of competency  
*continued on next page . . .*

he was unable to consult with Guesman or that he did not understand the proceedings against him. Further, the documents in the addendum did not support this claim. At the evidentiary hearing, Guesman testified that it was his opinion that Leonetti's psychiatric problems were an act and he believed Leonetti was fully competent to enter a guilty plea. Leonetti acted rationally during the plea canvass, and, in the plea agreement, Leonetti acknowledged that he was not under the influence of intoxicating liquor, controlled substance or other drug which would impair his ability to comprehend or understand the plea agreement. The district court's determination that Leonetti failed to demonstrate that his guilty plea was invalid or that Guesman was ineffective was not clearly wrong and was supported by substantial evidence. Accordingly, we conclude that the district court did not err by denying these claims.

Seventh, Leonetti claimed that his guilty plea was invalid because he was never informed of the elements of the offense. Leonetti failed to demonstrate that his plea was invalid. The elements of the offense were included in the written plea agreement, which Leonetti acknowledged he read, understood, and signed. Further, when asked by the court what he did that caused him to plead guilty to attempted sexual assault of a minor under the age of sixteen, Leonetti stated that he had

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*... continued*

required to plead guilty than to stand trial); Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983).

sexual intercourse with a female under the age of sixteen. Accordingly, we conclude that the district court did not err by denying this claim.

Leonetti also claimed that his appellate counsel was ineffective for failing to raise his conflict of interest claims on direct appeal. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.<sup>24</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>25</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>26</sup>

Leonetti's claim that his appellate counsel was ineffective for failing to raise his conflict of interest claims on appeal is belied by the record.<sup>27</sup> Contrary to Leonetti's assertion, his appellate counsel raised a conflict of interest claim on direct appeal and this court dismissed the claim because it was improperly raised.<sup>28</sup> Accordingly, we conclude that the district court did not err by denying this claim.

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<sup>24</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>25</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

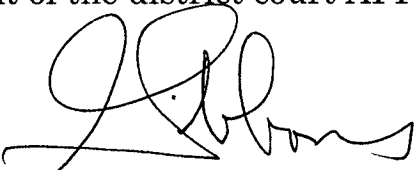
<sup>26</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

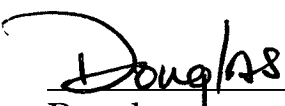
<sup>27</sup>See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

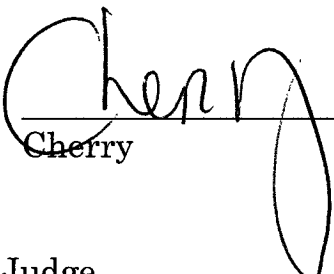
<sup>28</sup>Leonetti v. State, Docket No. 36980 (Order Dismissing Appeal, January 2, 2002).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Leonetti is not entitled to relief and that briefing and oral argument are unwarranted.<sup>29</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>30</sup>

  
\_\_\_\_\_, J.  
Gibbons

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

  
\_\_\_\_\_, J.  
Cherry

cc: Hon. Jackie Glass, District Judge  
Michael Leonetti  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>29</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>30</sup>We have reviewed all documents that Leonetti 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 Leonetti 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.