

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ROBERT PEEK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47602

FILED

SEP 26 2006

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On January 14, 2005, the district court convicted appellant, pursuant to a guilty plea, of two counts of attempted lewdness with a child under the age of fourteen years. The district court sentenced appellant to serve two consecutive terms of sixty to one hundred and fifty months in the Nevada State Prison. The district court further imposed the special sentence of lifetime supervision. This court affirmed the judgment of conviction and sentence on appeal.¹ The remittitur issued on June 28, 2005.

On April 14, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a response. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to

¹Peek v. State, Docket No. 44698 (Order of Affirmance, June 2, 2005).

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

In his petition, appellant contended that he received ineffective assistance of trial counsel. 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.² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³

First, appellant claimed that his trial counsel was ineffective for advising him to waive his preliminary hearing and accept plea negotiations because the victim was not present for the preliminary hearing and would not have testified against appellant. Appellant claimed that the victim's absence would have exonerated him. We conclude that appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The record reveals that the preliminary hearing was unconditionally waived as part of the plea negotiations. Even assuming that the victim was not able to be present at the time of the scheduled preliminary hearing, there is no support in the

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

³Strickland v. Washington, 466 U.S. 668, 697 (1984).

record for appellant's assertion that he would have been exonerated or that the victim would not have testified at a later date or in later proceedings.⁴ Appellant received a substantial benefit by entry of his guilty plea because he avoided the imposition of life sentences—the maximum sentences available if he had gone to trial on the original charges.⁵ Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to file a motion to suppress the statements made during a polygraph examination. Appellant claimed that he was not given any Miranda⁶ warnings. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant waived any alleged constitutional violations by entry of his guilty plea.⁷ Because appellant was engaged in plea negotiations in the justice court, a motion to suppress would reasonably not have been pursued by trial counsel in the instant case. Appellant failed to demonstrate that he would not have entered a guilty plea absent counsel's alleged deficient

⁴Likewise, there is nothing in the record indicating whether the preliminary hearing would have been rescheduled, whether the State would have decided to proceed by indictment, or whether other witnesses were available to establish probable cause sufficient for a bind over to the district court. Appellant's acceptance of the plea negotiations necessarily rendered the record on appeal bereft of such details.

⁵See NRS 201.230 (lewdness with a child under the age of 14).

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

⁷See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975).

performance. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Third, appellant claimed that his trial counsel failed to advise him about the precise conditions of lifetime supervision. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. In Palmer v. State,⁸ this court concluded that lifetime supervision is a direct consequence of a guilty plea. Consequently, the totality of the circumstances must demonstrate that a defendant was aware of the consequence of lifetime supervision prior to the entry of a guilty plea.⁹ The particular conditions of lifetime supervision are tailored to each individual case and, notably, are not determined until after a hearing is conducted just prior to the expiration of the sex offender's completion of a term of parole or probation, or release from custody.¹⁰ Thus, all that is constitutionally required is that the totality of the circumstances demonstrates that a petitioner was aware that he would be subject to the consequence of lifetime supervision before entry of the plea and not the precise conditions of lifetime supervision.¹¹ Here, appellant

⁸118 Nev. 823, 59 P.3d 1192 (2002).

⁹Id. at 831, 59 P.3d at 1197.

¹⁰See NRS 213.1243(1); NAC 213.290.

¹¹Palmer, 118 Nev. at 831, 59 P.3d at 1197. We note that in Palmer this court recognized that under Nevada's statutory scheme, a defendant is provided with written notice and an explanation of the specific conditions of lifetime supervision that apply to him "[b]efore the expiration of a term of imprisonment, parole or probation." Id. at 827, 59 P.3d at 1194-95 (emphasis added).

was informed in the written guilty plea agreement and during the plea canvass that he was subject to the special sentence of lifetime supervision. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to interview key witnesses, investigate case facts, advise appellant about a defense strategy, prepare for trial, or act as an advocate for appellant. Appellant offered no specific facts in support of these claims, and thus, we conclude that the district court did not err in denying these claims.¹²

Next, appellant claimed that his guilty plea was not entered knowingly and voluntarily. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.¹³ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.¹⁴ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.¹⁵

Appellant claimed that his guilty plea was not entered knowingly and voluntarily because his trial counsel advised him to enter a

¹²See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

¹³Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

¹⁴Hubbard, 110 Nev. at 675, 877 P.2d at 521.

¹⁵State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

guilty plea when the victim was not present at the preliminary hearing, his trial counsel failed to file a motion to suppress statements made during a polygraph examination, and the district court failed to canvass appellant about the specific provisions of lifetime supervision. As discussed earlier, appellant failed to demonstrate that his trial counsel was ineffective in this regard and the precise conditions of lifetime supervision are not known at the time of entry of the plea. The district court conducted a sufficient personal canvass. Appellant was canvassed about his educational background and his ability to read, write and understand English. Appellant acknowledged that he had read the information and the plea agreement. Appellant further acknowledged that he was not being forced into entering a guilty plea. Appellant acknowledged that he understood the waiver of constitutional rights and that sentencing was left in the discretion of the district court. The district court expressly informed appellant about the potential sentences he faced by entry of his plea. A factual basis was set forth to support the guilty plea. The guilty plea agreement expressly informed appellant of the consequences of his guilty plea agreement. Therefore, appellant failed to carry his burden of demonstrating that his guilty plea was not entered into knowingly and voluntarily.

Finally, appellant claimed that some of the potential conditions of the special sentence of lifetime supervision violated various constitutional rights. This claim 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.¹⁶

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.¹⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁸

Becker, J.
Becker

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

¹⁶See NRS 34.810(1)(a).

¹⁷See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁸We 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: Honorable Jackie Glass, District Judge
David Robert Peek
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk