IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMY CICCONE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47784

FILED

APR 06 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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; Joseph T. Bonaventure, Judge.

On March 25, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted lewdness with a child under the age of fourteen.[1] The district court sentenced appellant to serve a term of 60 to 180 months in the Nevada State Prison. Appellant did not file a direct appeal.

On February 27, 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 evidence in support of his petition and a "Motion to Vacate Illegal Sentence NRS 178.400 in Conjunction with Habeas Corpus Proceeding and Expansion of Evidentiary Hearing for all Grounds and Renewed Motion for Appointed Counsel with Absolute Medical Evidence that Petitioner has Ahlzeimers

[1]A duplicate judgment of conviction was filed on April 6, 2005.

[sic]."[2] The State filed an opposition to appellant's motion. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. The district court denied appellant's petition on August 3, 2006, after conducting a limited evidentiary hearing. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of 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.[3] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[4] "[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."[5] Factual findings of the district court that are supported by

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[2]We conclude that because appellant's motion only responded to the State's opposition to appellant's petition, the motion constituted a reply to the State's opposition.

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

[4]Strickland v. Washington, 466 U.S. 668, 697 (1984).

[5]Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal.[6]

First, appellant claimed that his counsel was ineffective for failing to file an appeal after being requested to do so. The district court held an evidentiary hearing limited to this issue. At the evidentiary hearing, appellant's counsel testified that she did not recall appellant requesting an appeal. Counsel further testified that when a client requests an appeal she immediately puts a note in the client's file and forwards the file to the appeals clerk for the filing of an appeal. Counsel reviewed appellant's file and found no note regarding the request for an appeal. Appellant testified at the evidentiary hearing that he requested counsel to file an appeal on the date of sentencing and sent a letter requesting counsel to file an appeal. On cross-examination, appellant testified that he did not have a copy of the letter he sent to his counsel, but that he wrote the letter in April after he went to prison—approximately three months after being sentenced.[7] The district court determined that appellant's counsel's testimony was more credible and appellant failed to

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[6]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[7]We note that appellant's testimony conflicted with the documents submitted by appellant in support of his petition. Specifically, appellant provided a copy of the letter he allegedly sent to counsel as an exhibit to the petition. That letter was dated January 14, 2005, and indicated appellant sent the letter from the Clark County Detention Center rather than from the prison. Another copy of this letter was submitted on May 18, 2006, as evidence in support of the petition. This copy included a testament by Wendell Coyle that he "was present and watched Mr. Ciccone mail the above letter on the date thereon." The testament indicates that Coyle is housed at the Lovelock Correctional Center.

demonstrate that he was denied an appeal by a preponderance of the evidence. We conclude that the district court's determination was supported by substantial evidence and was not clearly wrong, and we affirm the denial of this claim.

Second, appellant claimed that his counsel was ineffective for failing to investigate appellant's mental health, obtain records of appellant's past mental history, or initiate full competency hearings under NRS 178.415.[8]

Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced by his counsel's actions. The record reveals that appellant's counsel effectively challenged his competency prior to the preliminary hearing. The district court determined that appellant was incompetent to stand trial and entered an order of commitment to have appellant detained and treated pursuant to NRS 178.425(1). Six months after appellant was committed for treatment, the district court entered an order finding appellant competent to stand trial pursuant to NRS 178.460. Because appellant was initially found incompetent under NRS 178.425(1), appellant failed to demonstrate that he was prejudiced by his counsel's failure to request a full hearing under NRS 178.415. Further, appellant failed to identify what additional investigation his counsel should have conducted, and failed to demonstrate how additional investigation into appellant's mental health or review of appellant's records of past mental

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[8]To the extent that appellant raised this claim outside the context of a claim of ineffective assistance of counsel, the 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 on a guilty plea. See NRS 34.810(1)(a).

history would have altered the district court's determination of competency after appellant had undergone treatment for six months. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for failing to investigate facts, interview key witnesses, prepare for trial, and advise appellant regarding a possible defense. Appellant failed to identify what facts his counsel should have investigated, which witnesses his counsel should have interviewed and what additional preparation his counsel should have undergone such that appellant would not have pleaded guilty and would have insisted on proceeding to trial.[9] Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for allowing him to enter his guilty plea while he was suffering from Alzheimer's and while he was incompetent. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Even assuming appellant currently suffers from Alzheimer's to the extent that he would be incompetent to stand trial, appellant failed to demonstrate that he was suffering from Alzheimer's at the time he

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[9]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that a petitioner is not entitled to an evidentiary hearing on bare and naked claims for relief that are unsupported by specific factual allegations).

entered his plea.[10] Further, appellant failed to demonstrate that his counsel could have prevented him from entering the guilty plea on the basis of competency because the district court specifically determined that appellant was competent. Accordingly, we conclude the district court did not err in denying this claim.

Appellant also claimed that his guilty plea was involuntary and unknowingly entered. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[11] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[12] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[13]

Appellant claimed that his plea was involuntary because he was not informed of the specific conditions of lifetime supervision.[14] Appellant failed to demonstrate that his plea was not entered knowingly

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[10]See Ford v. State, 102 Nev. 126, 135, 717 P.2d 27, 33 (1986) (finding that later incompetence by a defendant did not indicate that the defendant was incompetent during trial).

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

[12]Hubbard, 110 Nev. at 675, 877 P.2d at 521.

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

[14]To the extent that appellant attempted to challenge the actual conditions of lifetime supervision, we note that the conditions for lifetime supervision have not yet been established for appellant and therefore such a challenge is premature.

and intelligently. The particular conditions of lifetime supervision are tailored to each individual case and 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.[15] Thus, all that is constitutionally required is that the totality of the circumstances demonstrate that a defendant 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.[16] Here, the guilty plea agreement, which appellant acknowledged having read, signed and understood, informed appellant that he was subject to the special sentence of lifetime supervision. Accordingly, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed that he was denied due process because a presentence investigation report (PSI) was not submitted to the district court and his sentencing was conducted without a PSI. 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 on a guilty plea.[17] Further, as an independent and separate ground for denying

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[15]See NRS 213.1243(1); NAC 213.290.

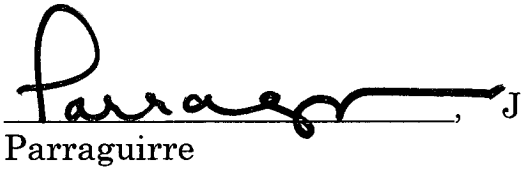
[16]Palmer v. State, 118 Nev. 823, 831, 59 P.3d 1192, 1197 (2002). We note that in Palmer this court recognized that under Nevada's statutory scheme, a defendant is provided with written notice and an explanation of the specific conditions of lifetime supervision that apply to him "[b]efore the expiration of a term of imprisonment, parole or probation." Id. at 827, 59 P.3d at 1194-95 (emphasis added).

[17]See NRS 34.810(1)(a).

this claim, it is belied by the record.[18] The record reveals that a PSI was prepared on November 9, 2004, and the district court had a copy of the PSI at the sentencing hearing. Accordingly, we conclude 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.[19] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[20]



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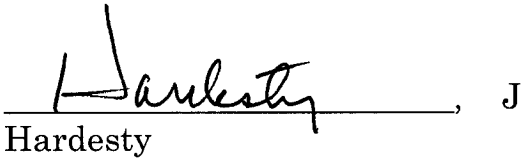
Parraguirre



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Hardesty

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[18]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

[19]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[20]We 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. We deny appellant's motion to voluntarily withdraw his appeal.

cc: Hon. Joseph T. Bonaventure, District Judge
Jimmy Ciccone
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk