IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL LEE TOWE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47791

FILED

MAR 08 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 July 5, 2005, the district court convicted appellant, pursuant to a guilty plea, of attempted lewdness with a child under the age of fourteen. The district court sentenced appellant to serve a term of 24 to 60 months in the Nevada State Prison.[1] The district court also imposed a special sentence of lifetime supervision. Appellant did not file a direct appeal.

On March 23, 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 supplemental petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant; however, it conducted a limited evidentiary hearing on the issues of whether appellant was aware of lifetime supervision and

[1]The district court entered an amended judgment of conviction on January 19, 2006, to reflect jail time credits of 46 days.

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whether counsel failed to file a direct appeal after appellant asked him in a timely manner to do so. On August 15, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his guilty plea was not entered voluntarily or knowingly. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that his plea was not knowingly and intelligently entered.[2] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[3] This court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[4]

First, appellant claimed that his plea was involuntary because it was induced by the promise of probation. As part of appellant's negotiated plea, the State had agreed that it would not oppose probation if appellant received a favorable psycho-sexual evaluation. The record on appeal reveals that appellant was given two psycho-sexual evaluations: one which indicated he was moderate-to-low risk to reoffend, and one that indicated he was moderate-to-high risk to reoffend. Appellant's plea agreement, which he acknowledged reading, understanding and signing, stated that the granting of probation was in the discretion of the sentencing judge. The plea agreement also stated that appellant was not promised any particular sentence, and appellant verbally agreed to this

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

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

[4]Hubbard, 110 Nev. 671, 877 P.2d 519.

during his plea canvass. Although the district court considered granting appellant probation, it exercised its discretion and opted not to grant probation. Thus, it is apparent from the totality of the circumstances that appellant was not coerced to plead guilty with the promise of probation. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing.[5] Thus, the district court did not abuse its discretion in rejecting this claim.

Appellant additionally claimed that his plea was not entered voluntarily or knowingly because he was not aware of the imposition of lifetime supervision prior to entering his guilty plea. In Palmer v. State, this court determined that lifetime supervision is a direct consequence of a guilty plea.[6] 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; otherwise, the petitioner must be allowed to withdraw the plea. Trial counsel testified at the evidentiary hearing that he had discussed lifetime supervision with appellant and appellant had stated prior to entering his plea that he did not want to be sentenced to lifetime supervision. Appellant admitted at the evidentiary hearing that he was aware that he could be sentenced to lifetime supervision. Because appellant was aware of lifetime supervision, the district court properly rejected this claim.

Next, appellant claimed that his trial counsel was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate

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[5]See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

[6]118 Nev. 823, 59 P.3d 1192 (2002).

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.[7] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[8] A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.[9] Further, the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[10]

First, appellant claimed that his counsel was ineffective for failing to investigate facts, to interview key witnesses, to advise him of the defense strategy, or to prepare for trial. These claims are bare and naked allegations unsupported by specific facts.[11] Accordingly, we conclude that the district court did not err in denying these claims.

Second, appellant claimed that counsel was ineffective for failing to inform him of the consequences of lifetime supervision. Appellant failed to demonstrate that his counsel was ineffective. The

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

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

[9]Means v. State, 120 Nev. 1001, 1013, 103 P.3d 25, 33 (2004).

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

[11]Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

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.[12] As discussed above, the totality of the circumstances demonstrated that appellant was aware of the possibility of being sentenced to lifetime supervision, which is all that is constitutionally required.[13] Thus, the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for advising him to enter a guilty plea when he was actually innocent. "'[A]ctual innocence' means factual innocence, not mere legal insufficiency."[14] To establish actual innocence, the petitioner must show that "'it is more likely than not that no reasonable juror would have convicted him.'"[15] In support of his claim, appellant presented the court with documents that discussed the victim's recantation of her statement accusing appellant of lewd acts. Appellant did not demonstrate that these documents were not available at an earlier date. Furthermore, the documents presented demonstrate that the victim's recantation was suspect. Our review of the record reveals that the district court did not err in denying this claim as appellant failed to demonstrate that his claim of actual innocence was sufficiently established by the evidence presented.

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

[13]Palmer, 118 Nev. 823, 59 P.3d 1192.

[14]Bousley v. United States, 523 U.S. 614, 623-24 (1998) (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)).

[15]Id. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)).

Fourth, appellant claimed that counsel was ineffective for failing to file a direct appeal after appellant asked him to do so. This court has held that if a defendant expresses a desire to appeal, counsel is obligated to file a notice of appeal on the defendant's behalf.[16] Prejudice is presumed where a defendant expresses a desire to appeal and counsel fails to do so.[17] During the evidentiary hearing, appellant produced a copy of a letter allegedly sent to counsel. The letter was not part of the record on appeal. However, even assuming that the letter had been part of the record, counsel testified during the evidentiary hearing that the letter was not part of his file, and although he did not recall appellant asking him to file a direct appeal, it was counsel's standard practice to file an appeal if he had been asked. Appellant failed to demonstrate that he had actually mailed the letter in a timely fashion and that counsel had received it. Thus, the district court did not err in denying this claim.

Appellant additionally claimed that lifetime supervision violated the United States Constitution in that it was a bill of attainder, it was vague, ambiguous, and overbroad and required a jury finding pursuant to Apprendi v. New Jersey.[18] These claims are beyond the scope of a petition for a writ of habeas corpus challenging a judgment of

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[16]See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470 (2000).

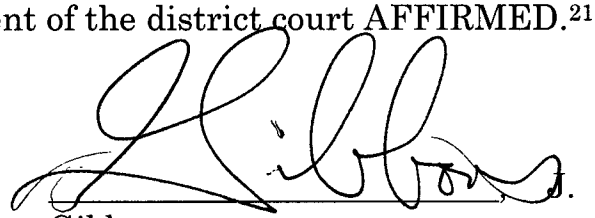
[17]Mann v. State, 118 Nev. 351, 353-54, 46 P.3d 1228, 1229-30 (2002).

[18]530 U.S. 466 (2000).

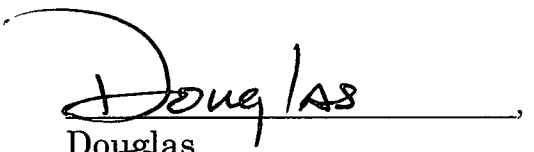
conviction based on a guilty plea.[19] Thus, the district court did not err in denying these claims.

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.[20] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[21]



_____, J.
Gibbons



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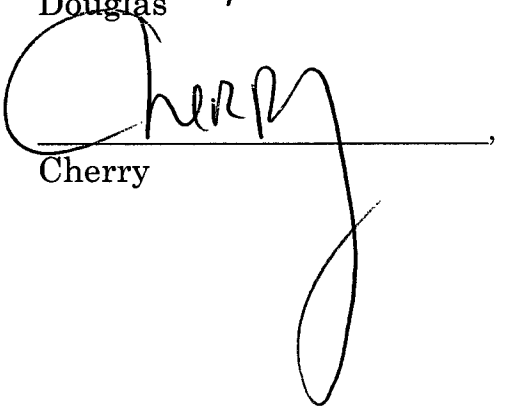
Douglas



_____, J.
Cherry

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[19]NRS 34.810(1)(a).

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

[21]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.

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