

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER WAYNE ANGELO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 47960

**FILED**

**JAN 08 2007**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. [Signature]*  
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. Third Judicial District Court, Lyon County; David A. Huff, Judge.

On December 12, 2001, the district court convicted appellant, pursuant to an Alford plea,<sup>1</sup> of one count of lewdness with a child under the age of fourteen, and pursuant to a guilty plea, of a second count of lewdness with a child under the age of fourteen. The district court sentenced appellant to serve two concurrent terms of life in the Nevada State Prison with the possibility of parole.

Following a direct appeal from the judgment of conviction and a stipulation from the parties that appellant had been sentenced to an incorrect penalty, this court remanded the matter to the district court to conduct a new sentencing proceeding.<sup>2</sup> At the second sentencing hearing, appellant was sentenced to serve two consecutive terms of ten years, and

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<sup>1</sup>North Carolina v. Alford, 400 U.S. 25 (1970).

<sup>2</sup>Angelo v. State, Docket No. 39047 (Order of Remand, October 23, 2002).

an amended judgment of conviction was entered on January 23, 2003. No appeal was taken from the 2003 amended judgment of conviction. Rather, appellant filed a post-conviction petition for a writ of habeas corpus in the district court. During an evidentiary hearing on the petition, the parties stipulated to a third sentencing hearing in front of a different district court judge. The district court then dismissed the petition pursuant to the stipulation.

On November 15, 2004, a sentencing hearing was conducted before a different district court judge. The district court sentenced appellant to serve two consecutive terms of ten years in the Nevada State Prison and entered an amended judgment of conviction on December 7, 2004. This court affirmed the judgment of conviction and sentence on direct appeal.<sup>3</sup> The remittitur issued on February 7, 2006.

On June 30, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On August 15, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of counsel at the second sentencing hearing. Specifically, appellant claimed that his counsel at the second sentencing hearing was ineffective for failing to object to the fact that the State argued for consecutive sentences in violation of the terms of the plea

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<sup>3</sup>Angelo v. State, Docket No. 44388 (Order of Affirmance, January 12, 2006).

agreement. Appellant claimed that he should have received concurrent terms pursuant to the plea agreement.

The district court rejected this claim of ineffective assistance of counsel noting that appellant was "not currently serving a sentence imposed at the [second sentencing hearing]. . . . Any failure of action by [appellant's] counsel at the [second sentencing hearing] is rendered moot by the [third sentencing hearing]." Based upon our review of the record on appeal, we conclude that the district court did not err in determining that this claim lacked merit. Appellant is not serving a sentence based upon the second sentencing hearing, and thus, any alleged deficiencies could not have prejudiced appellant in the third sentencing hearing and the sentence he is currently serving.<sup>4</sup> Appellant failed to demonstrate that there was a reasonable probability of a different outcome in the proceedings had his counsel objected at the second sentencing hearing. Further, appellant's argument that he was entitled to the imposition of concurrent sentences was belied by the record on appeal. The written guilty plea agreement stated that the State would be free to argue the facts of the case, but would not recommend a specific length of sentence. However, appellant was informed in both the written guilty plea agreement and during the plea canvass that sentencing decisions were within the discretion of the district court. The State did not argue for a particular term or consecutive sentences at the third sentencing hearing. Therefore, we conclude that the district court did not err in denying this claim.

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<sup>4</sup>See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

Second, appellant claimed that his due process rights were violated because the State violated the plea agreement by not standing silent at the sentencing hearing. Again, appellant claimed that he was entitled to concurrent sentences as part of the plea agreement.

First, 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.<sup>5</sup> To the extent that appellant claimed that his guilty plea was involuntary or unknowing because of the alleged breach, appellant failed to carry his burden of demonstrating that his guilty plea was invalid.<sup>6</sup> The State was not required to remain silent at sentencing, and as discussed above, the State did not argue for a particular sentence or consecutive sentences during the third sentencing hearing. Any errors relating to the second sentencing hearing were rendered moot by the third sentencing hearing. Further, as discussed above, the plea agreement did not guarantee appellant concurrent sentences, and appellant was correctly informed that the decision of concurrent or consecutive sentences was within the discretion of the district court. Therefore, we conclude that the district court did not err in denying this claim.


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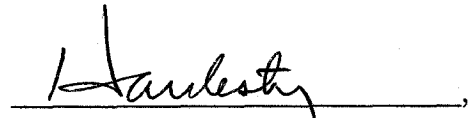
<sup>5</sup>See NRS 34.810(1)(a).

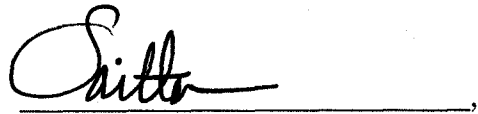
<sup>6</sup>See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

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.<sup>7</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
Parraguirre J.

  
Hardesty J.

  
Saitta J.

cc: Hon. David A. Huff, District Judge  
Christopher Wayne Angelo  
Attorney General Catherine Cortez Masto/Carson City  
Lyon County District Attorney  
Lyon County Clerk

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<sup>7</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).