IN THE SUPREME COURT OF THE STATE OF NEVADA

MARJORIE ESCARENO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48067

FILED

MAY 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 January 29, 2004, the district court convicted appellant, pursuant to an Alford[1] plea, of two counts of sexual assault of a minor 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 after twenty years. This court affirmed the judgment of conviction and sentence on direct appeal.[2] The remittitur issued on June 7, 2005.

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[1]North Carolina v. Alford, 400 U.S. 25 (1970).

[2]Escareno v. State, Docket No. 42754 (Order of Affirmance, May 12, 2005).

On May 31, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed and moved to dismiss the petition. Appellant filed a response. 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 23, 2006, the district court denied appellant's petition. This appeal followed.

In her petition, appellant claimed that her Alford plea was not knowingly and voluntarily entered. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[3] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[4] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[5]

First, appellant claimed that her plea was involuntary because her counsel informed her that she would only be able to see her mother and her children if she signed the plea agreement. Although the record indicates that when she entered her plea appellant requested a contact

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

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

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

visit with her mother and her children, appellant failed to demonstrate that she only entered the plea as a result of a promise of a contact visit. The record reveals that appellant entered her Alford plea after lunch on the second day of trial and after both victims had testified. Appellant was facing eleven counts of sexual assault of a minor under the age of fourteen, two counts of lewdness with a child under the age of fourteen, one count of open and gross lewdness, one count of first-degree kidnapping and one count of incest if she continued with the trial. By entering an Alford plea to two counts of sexual assault of a minor under the age of fourteen, appellant did not admit guilt, but rather conceded that the State would be able to prove these two charges against her. Appellant was informed of the possible sentences she would face if she entered an Alford plea, and appellant specifically inquired whether the district court would impose the sentences to run concurrently before entering her plea. Appellant's counsel stated at the plea canvass that he went over the written plea agreement with appellant "word by word" and believed that she understood the plea and that she was entering the plea freely and voluntarily. Additionally, appellant affirmatively acknowledged that she read and understood the plea agreement and was entering the plea freely and voluntarily. Finally, although the record indicates that the district court stated it would sign an order for a contact visit if appellant entered a plea, it is not clear from the record that entry of a plea was a prerequisite

for the granting of a contact visit.[6] Because the totality of the circumstances indicate that appellant entered her plea knowingly and voluntarily, we conclude the district court did not err in denying this claim.

Second, appellant claimed that her plea was involuntary because her counsel gave her the impression that she would only go to prison for "a while" and then the charges would be dropped through a direct appeal and appellant could go home. Appellant failed to demonstrate that her plea was not knowingly or voluntarily entered. As noted above, the record reveals that appellant was aware of the charges she was facing for the two counts of sexual assault of a minor under the age of fourteen, and she specifically asked whether the district court would run the sentences concurrently before she agreed to enter her plea. The totality of the circumstances indicates that when she entered her plea, appellant was aware that if she entered her plea she would be facing a minimum of life with the possibility of parole after twenty years.[7] Further, the record indicates that appellant's counsel informed appellant that although she only had a limited right to an appeal, he guaranteed appellant that this court would consider a constitutional challenge to her

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[6]We note that the record indicates that, on the first day of trial, appellant's counsel and the prosecution discussed the possibility of a contact visit with appellant's mother.

[7]See NRS 200.366(3).

judgment of conviction and sentence. Although the record reveals that appellant's counsel promised to pursue an appeal on appellant's behalf, it does not appear that appellant's counsel guaranteed appellant that the appeal would be successful. Appellant's hope that she would succeed on appeal is insufficient to invalidate a plea as unknowing or involuntary. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed that her plea was involuntarily entered because she was incompetent to enter the plea. Appellant failed to demonstrate that she was incompetent to enter her plea. On direct appeal, this court affirmed the district court's determination that appellant was competent to stand trial.[8] Because appellant was competent to stand trial, appellant was also competent to enter her Alford plea.[9] Accordingly, we conclude the district court did not err in denying this claim.

Next, appellant contended that she received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on an Alford plea, a petitioner must demonstrate that her counsel's performance was deficient

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[8]Escareno v. State, Docket No. 42754 (Order of Affirmance, May 12, 2005).

[9]See Riker v. State, 111 Nev. 1316, 1324, 905 P.2d 706, 711 (1995) (holding that there is no higher standard of competency required to plead guilty than to stand trial).

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.[10] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[11]

First, appellant claimed that her counsel was ineffective for failing to explain the legal proceedings to her or explain the defense he was going to pursue at trial. Appellant failed to demonstrate that she was prejudiced. The record reveals that appellant was aware of the legal process as well as the charges and possible sentences she was facing. Appellant insisted that her counsel defend her on the basis of her religious beliefs, and appellant's counsel made an opening statement that was consistent with pursuing this defense. Appellant entered her Alford plea after the lunch break on the second day of trial, prior to the close of the State's case in chief. Appellant failed to demonstrate how additional information about the legal process or the defense that was going to be pursued by her counsel would have altered her decision to enter an Alford plea and continue with the trial. Accordingly, we conclude the district court did not err in denying this claim.

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

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

Second, appellant claimed that her counsel was ineffective for failing to answer written correspondence and failing to take her collect calls. Appellant failed to demonstrate that she was prejudiced. The record on appeal reveals that appellant's counsel visited with her several times prior to the commencement of the trial. Appellant failed to demonstrate how additional communication with her counsel would have altered her decision to enter her Alford plea and continue with the trial. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed that her counsel was ineffective because the visits he made to her left her more confused. Appellant failed to demonstrate that she was prejudiced because she failed to demonstrate how more clarification during her visits with her counsel prior to trial would have altered her decision to enter an Alford plea and continue with the trial. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed that her trial counsel was ineffective for refusing to use her religious beliefs and "writings" as a defense. This claim is belied by the record.[12] The record indicates that, had the trial continued, appellant's counsel was going to move to admit her "writings" as a defense exhibit at trial and that he was going to base

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[12]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

appellant's defense on her religious beliefs. Accordingly, we conclude the district court did not err in denying this claim.

Fifth, appellant claimed that her counsel was ineffective for failing to address her claims that while she was housed at the Clark County Detention Center, she was housed in segregation, she was punished for walking around during her floor time, and she was not allowed to attend any religious services. Appellant failed to demonstrate that her counsel was deficient. All of these claims challenged the conditions of her confinement and were not relevant to appellant's criminal trial. Additionally, even assuming appellant's claims were true, appellant failed to demonstrate that she was prejudiced. Appellant failed to demonstrate that if the conditions of her confinement were different she would not have entered an Alford plea and would have continued with her trial. Accordingly, we conclude the district court did not err in denying this claim.

Sixth, appellant claimed that her counsel was ineffective for depriving her of a public trial by allowing the trial to be held in a closed courtroom. This claim is belied by the record.[13] The record reveals that although her counsel invoked the exclusionary rule,[14] the trial was a public trial and the district court granted a motion for camera access to

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[13]See id.

[14]See NRS 50.155.

the trial proceedings.[15] Accordingly, we conclude the district court did not err in denying this claim.

Seventh, appellant claimed that her counsel was ineffective for failing to ask the potential jurors any questions during voir dire. Appellant failed to demonstrate that she was prejudiced. Appellant did not allege that any of the jurors that were impaneled were biased, or that she was forced to enter her Alford plea based on any perceived bias on the part of the impaneled jury. Accordingly, we conclude the district court did not err in denying this claim.

Eighth, appellant claimed that her counsel was ineffective for failing to cross-examine any of the State's witnesses and for failing to ask the child victims the questions counsel asked her to write down. Appellant failed to demonstrate that her counsel was deficient or that she was prejudiced. "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."[16] The record reveals that appellant's counsel cross-examined some, but not all, of the State's witnesses. Additionally, counsel stated outside of the presence of the jury that he did not ask some of the questions that appellant had written down because he thought they were irrelevant to the trial and inappropriate. The district court agreed that the questions written by appellant were not proper and

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[15]See SCR 230.

[16]Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691).

some were prejudicial to appellant. Appellant failed to demonstrate that, but for her counsel's decisions not to ask the written questions, she would not have entered an Alford plea and would have continued with the trial. Accordingly, we conclude the district court did not err in denying this claim.

Ninth, appellant claimed that her counsel was ineffective for failing to subpoena any witnesses to testify on her behalf. Appellant failed to identify the witnesses her counsel should have called, or what their testimony would have been such that had her counsel subpoenaed those witnesses appellant would not have entered an Alford plea and would have continued with the trial.[17] Accordingly, we conclude the district court did not err in denying this claim.

Tenth, appellant claimed that her counsel was ineffective for failing to introduce half of her "writings" into evidence. Appellant failed to demonstrate that her counsel was deficient. The record reveals that appellant's counsel was going to introduce all of the "writings" that they had for appellant. It appears that some of appellant's "writings" had either been sent to the State Bar or directly to the district court clerk and were not included as part of the court file, and therefore these "writings" were unavailable to counsel to include with appellant's other "writings." Further, appellant failed to demonstrate that she was prejudiced. Appellant failed to demonstrate that, had the additional "writings" been

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[17]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

available, she would not have entered an Alford plea and would have continued with the trial. Accordingly, we conclude the district court did not err in denying this claim.

Eleventh, appellant claimed that her counsel was ineffective for failing to call appellant to testify on her own behalf. Appellant failed to demonstrate that her counsel was deficient. Appellant entered her Alford plea prior the close of the State's case in chief. Therefore, appellant's counsel did not have an opportunity to call any witnesses on appellant's behalf. Accordingly, we conclude the district court did not err in denying this claim.

Twelfth, appellant claimed that her counsel was ineffective for failing to explain what an Alford plea was.[18] Appellant failed to demonstrate that she was prejudiced. The record reveals that the district court explained an Alford plea to appellant. Accordingly, we conclude the district court did not err in denying this claim.

Appellant also claimed that her appellate counsel was ineffective because neither counsel nor the defense investigator visited her regarding the appeal and neither corresponded with her. Appellant failed

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[18]To the extent that appellant argued that her plea was involuntary because she did not understand the nature of an Alford plea, we conclude the district court did not err in denying this claim. The totality of the circumstances indicates that appellant entered her plea knowingly and voluntarily. See Bryant, 102 Nev. 268, 721 P.2d 364; Hubbard, 110 Nev. at 675, 877 P.2d at 521 (1994); Freese, 116 Nev. 1097, 13 P.3d 442.

to demonstrate that she was prejudiced.[19] Appellant failed to identify any claims not raised by counsel that she wanted raised on direct appeal. Accordingly, we conclude the district court did not err in denying this claim.

Finally, appellant claimed that the district court erred because it accepted her Alford plea even though the court believed that appellant was incompetent and because the court created a conflict by appointing her trial counsel to represent her on her direct appeal. These claims 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.[20] As a separate and independent ground for denying these claims, they lacked merit. The record reveals that appellant was competent to enter her Alford plea. Additionally, the record reveals that appellant informed her counsel that she would enter the plea only on the condition that he promised to pursue an appeal on her behalf. Upon hearing this condition, the district court appointed appellant's trial counsel to represent her on appeal. Appellant failed to demonstrate that

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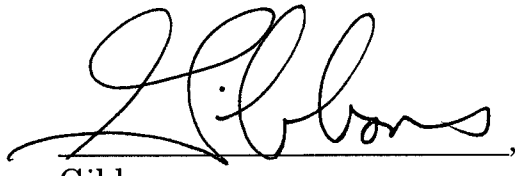
[19]See Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (holding that to state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal) (citing Strickland, 466 U.S. 668 (1984)).

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

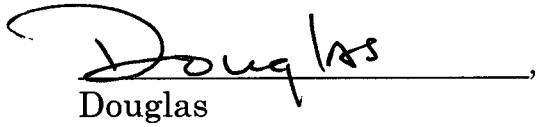
the appointment of trial counsel as her appellate counsel created a conflict of interest. Accordingly, we conclude the district court did not err in denying these claims.

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.[21] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons



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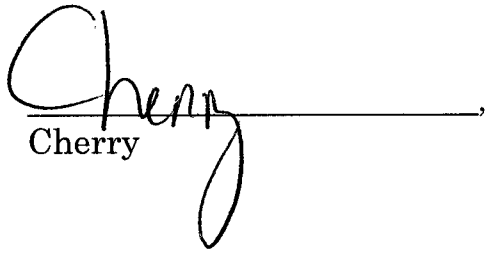

_____, J.
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cc: Eighth Judicial District Court Dept. 6, District Judge
Marjorie Escareno
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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