

IN THE SUPREME COURT OF THE STATE OF NEVADA

EUGENE ANTHONY LINDER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48369

FILED

APR 24 2007

ORDER OF AFFIRMANCE

JANET M. BLOOM
CLERK OF SUPREME COURT
BY *J. Castells*
DEPUTY CLERK

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; Sally L. Loehrer, Judge.

On November 14, 2005, the district court convicted appellant, pursuant to an Alford plea,¹ of one count of second degree murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after ten years had been served. No direct appeal was taken.

On August 11, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant filed a supplement to the petition. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined

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

to appoint counsel to represent appellant or to conduct an evidentiary hearing. On October 31, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, 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 of a different outcome but for counsel's errors.² In order to demonstrate prejudice to invalidate the decision to enter a guilty plea, a petitioner must demonstrate a reasonable probability that he 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

First, appellant claimed that his trial counsel was ineffective for coercing him into waiving his preliminary hearing. Appellant claimed

²Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

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

⁴Strickland, 466 U.S. at 697.

that trial counsel used appellant's pregnant girlfriend and threats that he would never be a part of his child's life if he went to trial to induce him into waiving his preliminary hearing. Appellant claimed that if a preliminary hearing had been conducted, he would have testified and established that the victim died of a possible drug overdose, that appellant performed CPR and that there were no signs of attack in contrast to the State's theory that appellant strangled the victim. Appellant further claimed that he did not know of the importance of the preliminary hearing.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The justice of the peace personally canvassed appellant about the waiver of the preliminary hearing, and there was no indication in the canvass that appellant was coerced into waiving the preliminary hearing. In fact, the justice of the peace trailed the matter for appellant to have an opportunity to talk with counsel when appellant indicated that he did not understand the rights he was waiving. Appellant failed to demonstrate that even if he had not waived his preliminary hearing that he would not have been bound over to the district court on the original charge of open murder and would not have entered a guilty plea to second degree murder. Appellant's claim that the victim died from a possible drug overdose is not supported by the record on appeal. The record indicates that the victim died from strangulation, and positive drug results in a toxicology report do not

sufficiently establish a drug overdose or an adverse drug interaction. Portions of the autopsy report attached to the petition indicate physical signs of trauma to the victim's neck and throat.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 adequately investigate and present appellant with information about the case. Appellant claimed that trial counsel should have investigated his claims that he did not strangle the victim and that her death was a possible drug overdose. Appellant further claimed that his trial counsel failed to provide him with a copy of the toxicology report until after sentencing.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to indicate what exculpatory information an investigation would have revealed such that there was a reasonable probability of a different outcome. As discussed above, the positive drug results in a toxicology report did not establish a fatal drug overdose or adverse reaction, and thus, appellant failed to demonstrate that the failure to deliver the

⁵Notably, appellant did not provide the entire autopsy report for review—including that portion of the autopsy report that states the cause and manner of death.

toxicology report earlier made a difference in the proceedings. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel failed to prepare a defense because appellant believed that trial counsel was influenced by the victim's family or prosecutor. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. In signing his guilty plea agreement, appellant acknowledged that he had discussed possible defenses with counsel. Appellant failed to demonstrate that there was a defense that trial counsel ignored or failed to pursue that had a reasonable probability of success at trial. Appellant further failed to demonstrate that trial counsel's performance was influenced by the victim's family or the prosecutor. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel failed to file any motions. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to identify the motions that he believed trial counsel should have filed, and appellant failed to demonstrate that any motions would have been successful. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for coercing him into entering a guilty plea. Appellant claimed that trial

counsel contacted his pregnant girlfriend to convince appellant to enter a guilty plea. Appellant claimed that trial counsel informed him that if he did not accept the deal with a minimum parole eligibility term of ten years that he would never be a part of his son's life.⁶ Appellant further claimed that he was told that he could receive a sentence of life without the possibility of parole or a death sentence if he went to trial.

Appellant failed to demonstrate that he was prejudiced by counsel's performance. Appellant was correctly informed of the potential sentences for second degree murder in the written guilty plea agreement. Appellant was further informed during the plea canvass that the maximum sentence he faced under the open murder charge was life without the possibility of parole. In entering his guilty plea, appellant acknowledged that his guilty plea was voluntarily entered. Appellant further acknowledged in the written guilty plea agreement that his guilty plea was not made under duress or coercion. Appellant acknowledged during the guilty plea canvass that he felt that the plea negotiations were in his best interests. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant appeared to claim that his trial counsel informed him that by pleading guilty pursuant to Alford that he would

⁶Appellant was forty-eight years old when he entered his guilty plea.

receive a sentence of five to fifteen years and not a sentence of life imprisonment. Appellant claimed that he would not have entered a guilty plea if he knew that he would receive a life sentence. Appellant failed to demonstrate that he was prejudiced. Appellant was informed of the potential penalties, including the possibility of a life sentence, in the written guilty plea agreement. Further, in signing the guilty plea agreement, appellant acknowledged that he had not been promised or guaranteed a particular sentence by anyone. During the plea canvass, appellant affirmatively acknowledged reading the guilty plea agreement and understanding everything in the guilty plea agreement. Because the record sufficiently establishes that appellant understood the potential penalties, including the possibility of a life sentence, we conclude that the district court did not err in denying this claim.

Seventh, in a somewhat contradictory fashion, appellant claimed that his trial counsel was ineffective for informing him that with his good criminal record and good conduct in prison that he would be out of prison in ten years. Appellant appeared to claim that this was misinformation because there was no possibility of release after serving ten years because good time credits do not apply to reduce the time served for a life sentence.⁷ Appellant failed to demonstrate that his trial counsel's

⁷See Hunt v. Warden, 111 Nev. 1284, 903 P.2d 826 (1995).

performance was deficient or that he was prejudiced. The district court sentenced appellant to serve a term of life in prison with the possibility of parole after serving ten years. Thus, appellant's parole eligibility would begin after service of ten years regardless of any good time credits. As noted above, appellant acknowledged that he was not promised a particular sentence by anyone, and thus, the district court did not err in denying this claim.

Eighth, appellant claimed that trial counsel was ineffective at sentencing for failing to present the district court with fifteen positive character letters at sentencing, failing to present live testimony from character witnesses, failing to inform the district court about appellant's positive achievements, morals, work ethic, and making negative statements about appellant emphasizing his abhorrence of the crime and justifying the life sentence recommended by the Department of Parole and Probation. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. When trial counsel mentioned that appellant wanted additional time to present more letters, the district court indicated that additional letters would not make a difference as the minimum sentence available was ten years whether a life sentence was imposed or a definite term was imposed. Defense counsel emphasized that the murder was a single act of aberrant behavior on appellant's part and that appellant felt bad for the family. Five victim impact statements were presented to the court. Appellant failed to

demonstrate that there was a reasonable probability of a different result absent trial counsel's alleged errors. Therefore, we conclude that the district court did not err in denying this claim.

Ninth, appellant claimed that trial counsel was ineffective for failing to file an appeal. Appellant failed to demonstrate that his trial counsel was ineffective in this regard. The written guilty plea agreement correctly informed appellant of his limited right to a direct appeal.⁸ Appellant did not state that he asked counsel or otherwise expressed a desire for an appeal to his counsel after the sentencing proceeding.⁹ Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that his guilty plea was involuntarily 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.¹⁰ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a

⁸See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

⁹See id.

¹⁰Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

clear abuse of discretion.¹¹ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.¹²

Appellant claimed that his guilty plea was not entered knowingly and voluntarily because of a cursory plea canvass. Appellant complained that the district court did not specifically ask him if his guilty plea was entered under a threat or promise of leniency, failed to explain the consequences of an Alford plea, failed to determine that there was a factual basis for the plea, failed to resolve his claim of innocence with the waiver of the right to trial, failed to ask appellant about any prior convictions, failed to secure an admission to the elements of the offense or an acknowledgement that appellant understood the elements of the offense, and failed to advise appellant about the potential sentences.

Based upon our review of the record, we conclude that the totality of the circumstances supports the district court's determination that appellant failed to carry his burden of demonstrating that his guilty plea was involuntarily and unknowingly entered. Appellant affirmatively acknowledged that he had read and discussed the guilty plea agreement with this counsel and that he understood everything in it. The written

¹¹Hubbard, 110 Nev. at 675, 877 P.2d at 521.

¹²State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

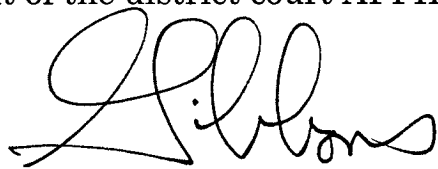
guilty plea agreement informed him of the potential sentences for second degree murder and set forth the elements of the offense in the attached information. In signing the guilty plea agreement, appellant acknowledged that his guilty plea was not made under duress, coercion or a promise of leniency. Appellant further affirmatively acknowledged in the written guilty plea agreement that he had discussed the elements of the offense and the possible defenses with his trial counsel. During the plea canvass, the district court explored appellant's understanding of an Alford plea and informed him that he was mistaken that an Alford plea meant that he would necessarily receive a reduced sentence. Even after this correction from the district court, appellant affirmatively acknowledged that it was in his best interests to enter an Alford plea and not go to trial. The State set forth the facts that would be proven had the case gone to trial. It does not appear that appellant had any previous convictions, and thus, the district court did not err in failing to seek information about previous convictions. Therefore, we conclude that the district court did not err in denying this claim.

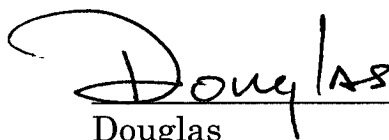
Finally, appellant claimed that the district court erred in denying his request for the appointment of new counsel or a continuance to secure private counsel. This claim fell outside the scope of claims

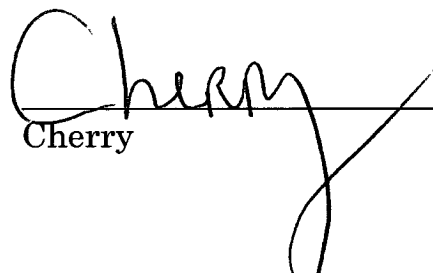
permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea.¹³

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.¹⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁵


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

¹³See NRS 34.810(1)(a).

¹⁴See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁵We 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. Sally L. Loehrer, District Judge
Eugene Anthony Linder
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk