

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN CHRISTOPHER EARLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48755

FILED

MAY 11 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant John Christopher Earley's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Earley was convicted, pursuant to a guilty plea, of one count of attempted sexual assault. The district court sentenced Earley to serve 24-60 months in prison and imposed a special sentence of lifetime supervision to commence after his release. Earley did not pursue a direct appeal from the judgment of conviction.

On February 3, 2006, Earley filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Earley and counsel filed a supplement to the petition. The State opposed the petition. The district court conducted an evidentiary hearing, and on December 7, 2006, denied Earley's petition. This appeal followed.

First, Earley contends that the district court erred by not finding that he had a conflict of interest with his privately-retained

counsel. Earley claims that he is entitled to a new sentencing hearing with different counsel. We disagree.

Prior to trial, Earley's counsel, Walter Fey, filed a motion to withdraw as counsel of record, citing his concern about Earley's lack of cooperation and ability to pay his fees. The district court conducted a closed hearing on the matter in chambers. After the hearing, and after Earley spent time discussing the situation with Fey, Fey noted for the record that he was withdrawing his motion and that Earley wished "to take advantage of the plea negotiations" offered by the State. Upon questioning by the district court, Earley confirmed that he was proceeding freely, without feeling pressured, and that it was his desire to accept the plea bargain.

At the evidentiary hearing on Earley's habeas petition, Fey testified that Earley requested that he remain on the case. The district court subsequently rejected Earley's claim. Our review of the record reveals that Earley has failed to demonstrate that any perceived conflict adversely affected counsel's performance or that the district court's inquiry into the matter was deficient. Therefore, we conclude that the district court did not err in rejecting this claim.¹

Second, Earley contends that the lifetime supervision clause is unconstitutional. Specifically, Earley argues that (1) the sentencing

¹See Young v. State, 120 Nev. 963, 972, 102 P.3d 572, 578 (2004); see also Garcia v. State, 121 Nev. 327, 113 P.3d 836 (2005).

scheme requires judicial fact-finding in violation of Apprendi,² (2) the requirements of NRS 213.1245 are overly restrictive and broad, and (3) NRS 176.0931 violates the First Amendment right to travel. Additionally, Earley claims that the sentence imposed was excessive. We conclude that these issues are not appropriately raised in a post-conviction habeas petition, and thus, will not be addressed. This court has stated repeatedly that “claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings.”³ Accordingly, we conclude that Earley waived his right to raise these issues by failing to pursue them in a direct appeal.

Finally, Earley contends that counsel was ineffective for failing to file a direct appeal. We disagree. The district court found that Earley was “equivocal” regarding whether he informed counsel about his wish to pursue a direct appeal. Fey testified at the evidentiary hearing that Earley never expressed a desire to appeal. The district court found the testimony of Fey to be credible and rejected the claim. The district court’s factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁴ Earley has not demonstrated that the district court’s findings of fact are not

²Apprendi v. New Jersey, 530 U.S. 466 (2000).


³Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); see also NRS 34.810(1)(a).

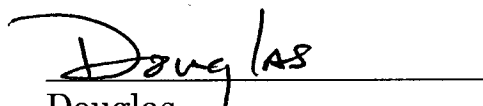
⁴See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

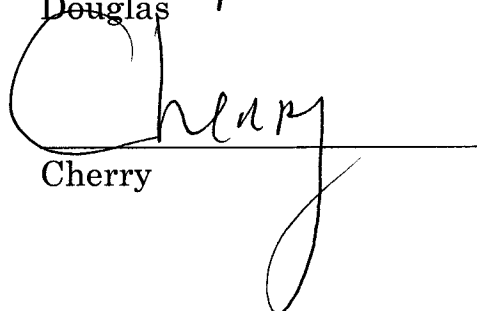
supported by substantial evidence or are clearly wrong. Moreover, Earley has not demonstrated that the district court erred as a matter of law.

Therefore, having considered Earley's contentions and concluded that they are without merit or not properly raised, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Connie J. Steinheimer, District Judge
Karla K. Butko
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk