IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL MCDONALD A/K/A SAMUEL C. MCDONALD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48839

FILED

SEP 25 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
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; David Wall, Judge.

On February 8, 2006, the district court convicted appellant, pursuant to an Alford[1] plea, of lewdness with a child under the age of 14 (Count 1) and attempted sexual assault of a minor under 16 years of age (Count 2). The district court sentenced appellant to serve a term of life with the possibility of parole after 10 years for Count 1, and a consecutive term of 2 to 15 years for Count 2 in the Nevada State Prison. No direct appeal was taken.

On August 21, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed a majority of the claims, but requested an evidentiary hearing on the appeal deprivation claim. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On

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

February 6, 2007, the district court denied appellant's petition after conducting an evidentiary hearing. 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 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.[2] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[3] "[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."[4] Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal.[5]

First, appellant claimed that his counsel was ineffective for advising him to waive his right to a preliminary hearing. Specifically, he asserted that the victims were not present for the preliminary hearing and he would have been exonerated had he not waived his right to the

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

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

[4]Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

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

hearing.[6] Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The record reveals that the preliminary hearing was unconditionally waived as part of the plea negotiations. Even assuming that the victims were not able to be present at the time of the scheduled preliminary hearing, there is no support in the record for appellant's assertion that he would have been exonerated or that the victims would not have testified at a later date or in later proceedings.[7] Moreover, appellant received a substantial benefit by entry of his Alford plea because he avoided a trial and possible conviction for eight counts of sexual assault of a minor under fourteen years of age and two counts of lewdness with a minor under fourteen years of age. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to investigate his case or prepare a defense. He asserted that had his counsel investigated, he would have discovered that the victims resented him for acting as a stepfather and one of the victims had made a prior false allegation of molestation. In addition, he claimed that his

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[6]Appellant submitted a letter that he purportedly sent to his counsel shortly after his sentencing hearing in which he expressed dissatisfaction with his counsel's failure to inform him that the victims were not present for the preliminary hearing.

[7]There is nothing in the record indicating whether the preliminary hearing would have been rescheduled, whether the State would have decided to proceed by indictment, or whether other witnesses were available to establish probable cause sufficient for a bind over to the district court. Appellant's acceptance of the plea negotiations necessarily rendered the record on appeal bereft of such details.

counsel knew that the information provided by the victims about the abuse was beyond their level of sophistication and one of the witnesses was coached by a State agent.

"An attorney must make reasonable investigations or a reasonable decision that particular investigations are unnecessary."[8] A petitioner asserting a claim that his counsel did not conduct a sufficient investigation bears the burden of showing that he would have benefited from a more thorough investigation.[9] Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that further investigation would have altered his decision to enter an Alford plea. While the evidence appellant claimed his counsel was aware of or otherwise failed to investigate may have had some impeachment value, it did not demonstrate that he was actually innocent of all the original charges. Further, appellant's Alford plea signified that he maintained his innocence, but that he believed it was in his best interests to enter a plea.[10] As previously observed, appellant received a substantial benefit by entry of his guilty plea in the

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[8]State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006) (citing Strickland, 466 U.S. at 691).

[9]Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

[10]We note that this court has previously recognized that a claim of innocence is "essentially academic" where a defendant enters a plea pursuant to Alford. See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 226 (1984). Appellant failed to demonstrate that he was actually innocent in the instant case. See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); see also Bousley v. United States, 523 U. S. 614 (1998).

instant case. A conviction on the original charges would have resulted in the imposition of multiple life sentences.[11] Further, appellant would not have been eligible for parole on the life sentences for sexual assault of a minor under the age of fourteen until he had served at least twenty years.[12] Pursuant to the negotiations, the State dropped one count of lewdness with a minor under the age of fourteen and seven counts of sexual assault of a minor under the age of fourteen, and further amended the remaining sexual assault count to attempted sexual assault of a minor under the age of sixteen. In addition, the State stipulated to sentences of life with the possibility of parole after ten years for the lewdness count and fifteen years with the possibility of parole after two years for the attempted sexual assault count. The State also agreed to make no recommendation regarding concurrent or consecutive sentences. Appellant's potential liability was significantly reduced by his Alford plea. Thus, appellant failed to demonstrate that he would have proceeded to trial on the full ten-count criminal complaint if only his counsel had conducted an investigation into his claims. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for failing to advise him that he could not be convicted of both lewdness with a child under the age of 14 and attempted sexual assault of a minor under 16 years of age, as lewdness was a necessary element of sexual assault. Lewdness and sexual assault are redundant only when they are part of

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[11]See NRS 200.366(3)(c); NRS 201.230(2).

[12]See NRS 200.366(3)(c).

the same act.[13] Appellant failed to show that his counsel's performance prejudiced him. The State originally charged appellant with eight counts of sexual assault involving three victims and two counts of lewdness with a minor involving two of the victims set forth in the sexual assault counts. The amended information alleged one count of lewdness with a child under the age of fourteen naming all three victims and one count of attempted sexual assault of a minor under sixteen years of age naming all three victims. Appellant acknowledged that he read and was pleading, pursuant to Alford, to both counts of the amended information. Moreover, the district court incorporated the police report, which detailed three separate sexual assaults of each of the three victims and one separate act of lewdness on one of the victims, as the factual basis for the Alford plea. There were sufficient multiple acts upon which to base both charges and appellant agreed to as much during his plea hearing. Thus, appellant did not show that he was prejudiced by counsel's advice. Therefore, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for failing to file an appeal despite his timely request to do so. Appellant submitted a copy of a letter he purportedly sent to his counsel on February 6, 2006, which stated that he asked for an appeal immediately after his sentencing and was renewing his request in the letter.[14]

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[13]Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002) (holding that a conviction for both lewdness and sexual assault would be unlawful if the convictions were based on the same act).

[14]Appellant declined the opportunity to testify at the evidentiary hearing.

"[A]n attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction."[15] "The burden is on the client to indicate to his attorney that he wishes to pursue an appeal."[16]

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel testified that appellant never asked for an appeal. Appellant's counsel further testified at the evidentiary hearing that he received one letter from appellant requesting his file, but appellant did not ask for an appeal in the letter. Moreover, he was not aware of any non-frivolous issues that he could have raised in an appeal. The district court determined that appellant failed to demonstrate by a preponderance of the evidence that he asked his counsel to file an appeal, and substantial evidence supports the district court's determination.[17] Accordingly, the district court did not err in denying this claim.

Next, appellant claimed that his plea was involuntary. A guilty plea is presumptively valid, and appellant carries the burden of

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[15]Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994); see Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

[16]See Davis, 115 Nev. at 20, 974 P.2d at 660.

[17]State v. Rincon, 122 Nev. ___, ___, 147 P.3d 233, 238 (2006) (emphasizing that "the district court is in the best position to adjudge the credibility of the witnesses and the evidence," and this court should not disturb that determination unless it has a "'definite and firm conviction that a mistake has been committed'") (quoting State v. McKellips, 118 Nev. 465, 469, 49 P.3d 655, 658-59 (2002)).

establishing that the plea was not entered knowingly and intelligently.[18] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[19] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[20]

First, appellant claimed that his plea was involuntary because he was not advised of the specific conditions of lifetime supervision.[21] Under Nevada law, the 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.[22] In light of the fact that the conditions of lifetime supervision applicable to a specific individual are not generally determined until long after the plea canvass, an advisement about those conditions is not a requisite of a valid guilty plea. Rather, all that is constitutionally required is that the totality of the circumstances demonstrate that

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

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

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

[21]Appellant also included a copy of a letter he purportedly wrote to his counsel after his sentencing hearing in which he stated that he would not have agreed to plead guilty had he known of the specific conditions of lifetime supervision.

[22]Palmer v. State, 118 Nev. 823, 827, 59 P.3d 1192, 1194-95 (2002).

appellant was aware that he would be subject to the consequence of lifetime supervision before entry of the plea.[23]

Appellant's claim that he was unaware of the consequence of lifetime supervision is belied by the record.[24] The plea agreement, which appellant signed, provided that appellant's sentence would include lifetime supervision "commencing after any period of probation or any term of imprisonment and period of release upon parole" and that the "special sentence of lifetime supervision must begin upon release from incarceration." Therefore, we conclude that appellant was properly advised of the lifetime supervision requirement and thus, his plea was not involuntary for this reason.[25]

Second, appellant claimed that his plea was involuntary based on the State's promise to not argue for consecutive sentences at his sentencing hearing. Appellant failed to carry his burden of demonstrating that his plea was invalid. Contrary to his assertion, the State did not argue for consecutive sentences at his sentencing hearing. Further, 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.

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[23]Id. at 831, 59 P.3d at 1197.

[24]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

[25]Appellant also contended that his counsel was ineffective for failing to inform him that his sentence would include lifetime supervision. However, as discussed above, appellant was adequately advised of the lifetime supervision requirement. Accordingly, we conclude that appellant failed to demonstrate that his counsel was ineffective in this regard.

Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed lifetime supervision is unconstitutional because it constitutes a bill of attainder, is vague and ambiguous, and violates Apprendi.[26] These claims were not properly brought in a post-conviction petition for a writ of habeas corpus where the conviction is based upon a guilty plea.[27] Therefore, we conclude that the district court did not err in dismissing 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.[28] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

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[26]Apprendi v. New Jersey, 530 U.S. 466 (2000).

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

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

cc: Hon. David Wall, District Judge
Samuel McDonald
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk