IN THE SUPREME COURT OF THE STATE OF NEVADA

BERTON GARTH TOAVS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49109

FILED

MAR 06 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On August 14, 2001, appellant Berton Garth Toavs was convicted, pursuant to a guilty plea, of two counts of lewdness with a child under the age of 14 years and one count of sexual assault. The district court sentenced Toavs to three consecutive terms of life in prison with the possibility of parole after 10 years and imposed a special sentence of lifetime supervision. Toavs appealed and this court affirmed the judgment of conviction.[1]

Toavs then filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The district court ordered the State to answer the petition, appointed counsel to represent Toavs, and conducted an evidentiary hearing. Thereafter, the district court denied the petition. This appeal followed.

[1]Toavs v. State, No. 38488 (Order of Affirmance, March 1, 2002).

On appeal, Toavs argues that the district court (1) abused its discretion in denying his oral motion for a continuance, (2) abused its discretion in denying his request to amend his petition at the evidentiary hearing, and (3) erred in rejecting his claim that trial counsel provided ineffective assistance. He also argues that this court should allow him to withdraw his guilty plea because he was not informed of a direct consequence of his plea. We conclude that Toavs's arguments lack merit.

First, the district court did not abuse its discretion in denying the motion for a continuance so that Toavs could locate two witnesses to testify that he was intoxicated when he entered his guilty plea. Toavs admitted that he was aware of the intoxication claim almost one year before the evidentiary hearing and that he only informed counsel of the claim a few months before the evidentiary hearing. And during the months before the evidentiary hearing, counsel was unable to locate the two witnesses identified by Toavs. Despite this, counsel did not file a written motion for a continuance or attempt to make an offer of proof regarding the witnesses' testimony or present testimony from another witness who could have testified as to Toavs's condition when he entered the guilty plea—Toavs's trial counsel. Under the circumstances, we conclude that the district court was within its discretion in denying the motion for a continuance.[2]

Second, the district court did not abuse its discretion in refusing to allow Toavs to amend his petition at the evidentiary hearing to include a claim that his guilty plea was invalid because he was intoxicated

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[2]See Mulder v. State, 116 Nev. 1, 9, 992 P.2d 845, 850 (2000).

when he entered the plea. Given the substantial period of time between the pleadings and the hearing and that counsel learned of the new claim several months before the hearing, we conclude that the district court did not abuse its discretion in denying Toavs's request to amend the petition at the evidentiary hearing.[3]

Third, the district court did not err in rejecting Toavs's ineffective-assistance claim. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, Toavs had to demonstrate that his counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial.[4] Toavs argues counsel was ineffective because he only met with Toavs twice before the plea canvass and recommended a guilty plea without a preliminary hearing and without interviewing witnesses; however, those were not the claims that Toavs raised in his petition. In his petition, Toavs claimed that counsel was ineffective for failing to inform him of the consequences of his guilty plea—specifically, that he would have to be certified by a psychiatric panel

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[3]See Barnhart v. State, 122 Nev. 301, 303, 130 P.3d 650, 651-52 (2006) (holding that the district court has discretion under certain circumstances to allow a petitioner to assert new claims at an evidentiary hearing but that generally the district court should consider only those claims that were pleaded in the petition or a supplemental petition and to which the State has had an opportunity to respond); id. at 304, 130 P.3d at 652 (noting that "it will be the exception, rather than the rule, that a petitioner will be allowed to raise new issues" at the evidentiary hearing).

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

before he could be paroled.[5] Toavs cannot change his theory or present a new claim for the first time on appeal.[6] Accordingly, we only address the ineffective-assistance claim that Toavs pleaded in the district court. That claim lacks merit because counsel is only required to advise a client of the direct consequences of a guilty plea[7] and the panel certification requirement is a collateral, not a direct, consequence of a guilty plea.[8] The district court also found that Toavs's plea was not induced by any promises regarding the possibility of parole or the conditions for parole eligibility and that Toavs's testimony to the contrary was not credible. Toavs has not demonstrated that those findings are not supported by substantial evidence.[9]

Fourth, we decline to allow Toavs to withdraw his guilty plea on the ground that he was not advised about lifetime supervision. Toavs raised this issue for the first time on appeal, and we therefore need not consider it.[10] Further, the claim lacks merit for two reasons. First, the

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[5]NRS 213.1214.

[6]See Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995); McNelton v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

[7]Nollette v. State, 118 Nev. 341, 349-50, 46 P.3d 87, 92-93 (2002).

[8]Bargas v. Burns, 179 F.3d 1207, 1216 (9th Cir. 1999) (holding that Nevada statutory requirement that petitioner be certified for parole by psychiatric panel is collateral consequence of plea); see Anushevitz v. Warden, 86 Nev. 191, 467 P.2d 115 (1970) (holding that defendant's prospects for parole are collateral consequence of plea).

[9]See Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994).

[10]McNelton, 115 Nev. at 416, 990 P.2d at 1276.

claim is belied by the record: the written guilty plea agreement states that Toavs understood that he would be required to be on lifetime supervision, and Toavs stated during the plea canvass that he had read the agreement and had an opportunity to discuss it with counsel. Second, our decision in Palmer v. State,[11] that lifetime supervision is a direct consequence of which a defendant must be advised before pleading guilty, does not apply in this case because Toavs's judgment of conviction was final before Palmer was decided.[12]

Having considered Toavs's claims and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Steven P. Elliott, District Judge
Hardy & Associates
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[11]118 Nev. 823, 59 P.3d 1192 (2002).

[12]Avery v. State, 122 Nev. 278, 129 P.3d 664 (2006) (holding that Palmer does not apply retroactively to convictions that were final before it was decided).