IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD C. WILLIAMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49648

FILED

JUN 13 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

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; David Wall, Judge.

On September 22, 2005, the district court convicted appellant, pursuant to a guilty plea, of two counts of attempted murder with the use of a deadly weapon, one count of mayhem with the use of a deadly weapon, and one count of child abuse and neglect with substantial bodily harm. The district court sentenced appellant to serve terms totaling approximately 31 years to 96 years in the Nevada State Prison. The term for child abuse and neglect was imposed to run concurrently with the consecutive terms for the attempted murder and mayhem counts. This court affirmed the judgment of conviction and sentence on direct appeal.[1] The remittitur issued on July 25, 2006.

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[1]Williams v. State, Docket No. 45904 (Order of Affirmance, June 29, 2006).

08-15093

On March 13, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. 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 July 13, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of trial 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]

First, appellant claimed that his trial counsel coerced his guilty plea when trial counsel told appellant that if he did not accept the guilty plea he could spend the rest of his life in prison. Appellant further claimed that trial counsel told him that he was in a "no-win" situation because the jury would believe the victim. Additionally, appellant claimed that trial counsel improperly allowed the district attorney to attend negotiation discussions without his consent. Appellant failed to

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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).

demonstrate that his trial counsel's performance was deficient or that he was prejudiced. During the guilty plea canvass and in the guilty plea agreement, appellant affirmatively acknowledged that his guilty plea was not the product of coercion. The original charges included one count of first degree kidnapping—an offense carrying a potential life sentence—and an additional count of child abuse and neglect.[4] Trial counsel's candid advice about the potential outcome of a trial and the strengths and weaknesses of the case, made after review of the discovery and a preliminary hearing, is not deficient. Appellant further failed to demonstrate that he was prejudiced by the district attorney's attendance at the negotiation discussions. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to investigate the case. Appellant claimed that trial counsel never investigated the victim's background, police reports, or the reports of the appellant's parole officer. Appellant asserted that the victim admitted that she cut appellant first with the knife, a fact demonstrated by the DNA report of the crime scene, and that the victim incorrectly testified at the preliminary hearing that appellant was stalking the victim at her workplace. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At the preliminary hearing, appellant's trial counsel, in response to appellant's challenge to trial counsel's preparedness, stated that he had reviewed the discovery before the preliminary hearing. Nothing in the record supports

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[4]See NRS 200.320.

appellant's allegation that the victim admitted to cutting appellant first in the attack. Even assuming that a crime scene report would show that appellant lost blood at the crime scene, this fact would not establish that the victim was the aggressor in the attack. The victim and one of the victim's daughters testified that appellant attacked the victim first by putting her in a chokehold and then stabbing her twenty times. Appellant further failed to demonstrate that any investigation regarding the victim's claim that he stalked her at her workplace would have had a reasonable probability of altering his decision to enter a guilty plea. Therefore, we conclude that the district court did not err in denying these claims.

Third, appellant claimed that trial counsel was ineffective for the following reasons: (1) failing to explain the circumstances of the guilty plea; (2) having a conflict of interest with appellant; and (3) failing to communicate with appellant. Appellant further claimed that trial counsel appointed after he filed his presentence motion to withdraw a guilty plea were ineffective for failing to talk to appellant. Appellant failed to provide any specific facts or arguments in support of these claims.[5] Thus, appellant failed to demonstrate that his trial counsel were ineffective in this regard, and the district court did not err in denying these claims.

Fourth, appellant claimed that trial counsel was ineffective for failing to explain the consequences of the guilty plea, waiver of constitutional rights and right to appeal. Appellant further claimed that he did not understand the elements of the crimes of attempted murder with the use of a deadly weapon and mayhem with the use of a deadly

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

weapon. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The potential maximum terms of imprisonment were set forth in the written guilty plea agreement and set forth during the guilty plea canvass. The written guilty plea agreement further set forth the constitutional rights waived by entry of the guilty plea and specifically included information regarding the limited right to appeal. The elements of the offenses of the attempted murder counts and the mayhem count were set forth in the written guilty plea agreement. In signing the written guilty plea agreement, appellant affirmatively acknowledged that all of the elements, consequences, rights and waiver of rights were thoroughly explained to him by his trial counsel. Appellant failed to demonstrate that further information on any of these points would have had a reasonable probability of altering his decision to enter a guilty plea in the instant case. Therefore, we conclude that the district court did not err in denying these claims.

Fifth, appellant claimed that his trial counsel was ineffective for telling him to say "yes" to every question during the guilty plea canvass. Appellant further claimed that he did not make any factual admissions. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. First, the record does not support appellant's claim that he answered "yes" to every question. Rather, the guilty plea canvass shows that appellant engaged in a dialogue with the district court and provided more than simple "yes" answers to some of the questions. Further, appellant made factual admissions during the guilty plea canvass. Appellant failed to demonstrate how different advice from trial counsel would have had a reasonable probability of altering his decision to enter a guilty plea.

Therefore, we conclude that the district court did not err in denying these claims.

Sixth, appellant claimed that his trial counsel was ineffective for failing to advise him that his offenses were nonprobational. Appellant also appeared to claim that his guilty plea was invalid because the district court failed to personally advise him during the plea canvass that his offenses were not probational.

In Little v. Warden,[6] we held that "a defendant must be aware that his offense is nonprobational prior to entering his guilty plea because it is a direct consequence arising from the plea."[7] In determining whether the defendant was aware that his sentence was nonprobational, the entire record must be reviewed.[8] "Where it appears, in examining the totality of the circumstances, that a defendant knew that probation was not available at the time of the entry of the guilty plea, we will not vitiate an otherwise valid guilty plea."[9] A petitioner is entitled to an evidentiary hearing if he raises claims that, if true, would entitle him to relief and if his claims are not belied by the record.[10]

This court's preliminary review of this appeal revealed that the district court may have erroneously denied this claim without conducting an evidentiary hearing. Here, it appears that a portion of

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[6]117 Nev. 845, 34 P.3d 540 (2001).

[7]Id. at 847-48, 34 P.3d at 542 (emphasis added).

[8]See id. at 851, 34 P.3d at 542.

[9]Id. at 851, 34 P.3d at 544.

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

appellant's claim was not belied by the record, and may, if true, have entitled appellant to relief. In the written guilty plea agreement, appellant was correctly informed that the offenses of attempted murder with the use of a deadly weapon and mayhem with the use of a deadly weapon were probational.[11] Pursuant to NRS 176A.100, the district court shall not grant probation to a person convicted of the offense of child abuse and neglect, a violation of NRS 200.508, unless a psychosexual evaluation is conducted and the offender is certified as not representing a high risk to reoffend based upon currently accepted standards of assessment.[12] In the instant case the written guilty plea agreement and the plea canvass did not set forth this limitation on probation for the offense of child abuse and neglect. Although it appeared that appellant was aware of the psychosexual evaluation requirement after entry of the plea, it was not clear from the record on appeal when he was aware that a psychosexual evaluation was required in order to be eligible for probation for the offense of child abuse and neglect.[13] Further, although appellant raised this claim in a presentence motion to withdraw a guilty plea, the district court failed to specifically address the limitation of probation for the offense of child abuse and neglect when considering his August 24, 2005 supplement to

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[11] See 1999 Nev. Stat., ch. 288, § 10, at 1192-93 (NRS 176A.100); NRS 200.280; NRS 193.330(1)(a)(1); 1995 Nev. Stat., ch. 455, § 1, at 1431 (NRS 193.165).

[12] See 2001 Nev. Stat., ch. 345, § 3, at 1638-39 (NRS 176A.110).

[13] It appears from the record on appeal that appellant declined participation in a psychosexual evaluation.

the presentence motion to withdraw a guilty plea.[14] Thus, this court directed the State to show cause why this issue should not be remanded for an evidentiary hearing.

The State has filed a timely response and opposes an order of remand for an evidentiary hearing on several grounds. First, the State argues that this court improperly framed and expanded the issue as raised by appellant in the district court. Specifically, the State argues that appellant never cited to NRS 176A.110 or asserted that his offense was nonprobational due to the psychosexual requirement. We conclude that this argument lacks merit. Appellant claimed in the pleadings below that his trial counsel failed to inform him that probation was not available to the charges to which he pleaded guilty and that his plea was invalid because he was not correctly informed about the probation consequences of his guilty plea. Although appellant did not include any citations to specific laws regarding this point, this does not render this claim deficient as the form petition informs appellant that he is not to set forth any cases or law in support of his grounds for relief.[15] Further, this court cannot simply ignore the dictates of NRS 176A.110 because appellant did not cite to this provision. In reviewing whether appellant was correctly advised of whether probation was available, the courts must examine the criminal

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[14]Appellate counsel, Mr. Frank P. Kocka, raised a claim that appellant was not adequately informed of the consequences of his guilty plea but did not provide any specific argument about whether appellant was adequately informed of the probation consequence of his guilty plea to the offense of child abuse and neglect.

[15]See NRS 34.735.

statutes relating to probation—NRS 176A.110 is contained within the chapter dealing with probation and suspension of the sentence.

Second, the State appears to argue that appellant was informed of this limitation on probation for the offense of child abuse and neglect. The State asserts that the written guilty plea agreement informed appellant:

> **I understand that I am eligible for probation** for the offenses to which I am pleading guilty. I understand that, **except as otherwise provided by statute**, the question of whether I receive probation is in the discretion of the sentencing judge.
>
> * * *
>
> I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the Court **within the limits prescribed by statute**.

The State appears to argue that the bolded language informed appellant that other statutes may affect probation eligibility. We disagree with the State's assertion that this language informed appellant of the limitation on probation eligibility set forth in NRS 176A.110. Thus, this language alone would not support a knowing and intelligent guilty plea.[16]

Third, the State argues that the limitation in NRS 176A.110 is a "condition precedent" to probation eligibility and that a "condition precedent" has never been determined by this court to be the equivalent of a "nonprobational" offense. The State argues that NRS 176A.100

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[16]See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

specifically defines a "nonprobational offense" as one for which probation is "expressly forbidden"; thus, the requirement set forth in Little v. Warden is inapplicable in the instant case. The State argues that because the failure to obtain a favorable certification is not a "'definite, immediate and largely automatic' result of the guilty plea" it is better described as a "collateral consequence" because it does not "inexorably follow from the conviction of the offense involved in the plea." We disagree. This court has defined a direct consequence as one that has a "'definite, immediate and largely automatic effect on the range of the defendant's punishment.'"[17] In Little v. Warden, this court further observed that probation ineligibility was a direct consequence resulting from the conviction:

> With the glaring exception of the penalty of death, there is perhaps no consequence more direct and immediate on the defendant's range of punishment than ineligibility for probation. After all, ineligibility for probation means incarceration; it means that there is not even a remote possibility that the district court will exercise its discretion and suspend the execution of sentence. The loss of the possibility of probation therefore becomes an inseparable ingredient of the punishment imposed. Its effect is so powerful that it translates the term imposed by the sentencing judge into a mandate of actual imprisonment.[18]

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[17]Little v. Warden, 117 Nev. 845, 849, 34 P.3d 540, 543 (2001) (quoting Torrey v. Estelle, 842 F.2d 234, 236 (9th Cir. 1988)).

[18]Id. (internal quotations and citations omitted).

Appellant was not eligible for probation unless he received a favorable psychosexual evaluation pursuant to NRS 176A.110. Labeling the psychosexual evaluation as a "condition precedent" does not alter the fact that without it appellant was ineligible to receive probation. This ineligibility for probation without a favorable psychosexual evaluation is a direct consequence of the guilty plea. The fact that the favorability of a psychosexual evaluation is in the hands of someone other than the district court would not then mean that the psychosexual evaluation was a collateral consequence. The requirement of the psychosexual evaluation for probation eligibility is a consequence that has a "'definite, immediate and largely automatic effect on the range of the defendant's punishment.'"[19] Without a favorable psychosexual evaluation, the consequence is imprisonment.[20] Thus, pursuant to this court's holding regarding probation ineligibility in Little v. Warden, a knowing and intelligent guilty plea would require that the defendant was aware prior to entry of the plea that he was eligible for probation on the offense of child abuse and neglect only if he received a favorable psychosexual evaluation. The record on appeal contains no indication that appellant was aware of this requirement prior to entry of the guilty plea.

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[19] Id.

[20] Although appellant is certainly not entitled to a favorable psychosexual evaluation merely because he cooperates or participates in the evaluation, the effect of not being aware or informed that a psychosexual evaluation is required for probation eligibility is the automatic removal of the possibility of probation as a consequence of the conviction.

Finally, the State argues that the totality of the circumstances indicates that appellant had no expectation of probation in the instant case. First, the State notes that appellant never expressed surprise at any of the hearings following entry of the plea in which the psychosexual evaluation was discussed. Second, the State argues that appellant could not have reasonably expected probation for his crimes because of the nature of the offenses—appellant placed the victim in a chokehold in front of her children and stabbed the victim 20 times in front of one of her children and trapped them in the apartment when appellant closed the door of the residence after the victim's other daughter ran outside. Additionally, appellant was a two-time convicted felon when he committed the offenses in this case and at the time of sentencing in the instant case was in custody on his California cases. Further, the State argues that appellant's refusal to participate in the presentence investigation interview and the psychosexual evaluation are actions inconsistent with any hope for probation. Finally, the State notes that appellant never asked for probation at sentencing, and appellant avoided a life sentence by entry of the guilty plea.

We conclude that these circumstances do not reveal that appellant was informed prior to entry of the guilty plea that he was only eligible for probation on the child abuse and neglect charge if he received a favorable psychosexual evaluation. Again, this court has held that a defendant must be aware prior to entry of the guilty plea of the ineligibility for probation, and in the instant case appellant was informed that he was eligible for probation without any information regarding the

limitation of probation for the child abuse and neglect charge.[21] Unlike the defendant in Riker v. State,[22] appellant was informed that he was eligible for probation for his offenses and this advisement did not inform appellant that he was ineligible for probation on the offense of child abuse and neglect without a favorable psychosexual evaluation. Although the fact that a defendant did not ask for probation at sentencing is a factor to consider in determining whether appellant was aware of his ineligibility for probation or that he was going to serve a term of actual imprisonment, the situation in the instant case is distinguishable given the protracted nature of the sentencing proceedings—over six months—which makes it difficult to determine from the record alone whether appellant was aware of this limitation prior to entry of the plea.[23] This court further stated in Little v. Warden that "[i]t would be inappropriate for the district court to infer or impute knowledge to a particular defendant based upon a conclusion or an inference that a defendant should have known that probation was unavailable."[24]

The record contains no indication that appellant was aware of the limitation on his eligibility for probation on the offense of child abuse and neglect prior to entry of his guilty plea. Therefore, we reverse the district court's denial of this claim and remand this matter for an evidentiary hearing to determine if facts outside the record, such as an

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[21]Little v. Warden, 117 Nev. at 850, 34 P.3d at 543.

[22]111 Nev. 1316, 905 P.2d 706 (1995).

[23]See Little v. Warden, 117 Nev. at 852, 854, 34 P.3d at 544, 546.

[24]Id. at 854, 34 P.3d at 546.

advisement by trial counsel, demonstrate that appellant was aware of the limitation on eligibility for probation on the offense of child abuse and neglect.

Next, appellant claimed that he received ineffective assistance of appellate counsel. 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.[25] Appellate counsel is not required to raise every non-frivolous issue on appeal.[26] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[27]

Appellant claimed that his appellate counsel was ineffective for failing to conduct any investigations with the appeal. Appellant further claimed that appellate counsel never filed anything on appeal and never answered letters or phone calls or sent appellant his case files. Appellant failed to demonstrate that appellate counsel's performance was deficient or that he was prejudiced. Appellant failed to support this claim with any specific facts or argument, and appellant failed to demonstrate that appellate counsel failed to set forth a specific argument that would

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[25]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

[26]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[27]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

have had a reasonable probability of success on appeal.[28] Therefore, we conclude that the district court did not err in denying these claims.

Next, appellant claimed that his guilty plea was not entered knowingly and voluntarily. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[29] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[30] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[31]

First, appellant claimed that his guilty plea was invalid because he was not fully advised about the deadly weapon enhancement. Appellant failed to carry his burden regarding this claim. Appellant was informed in the written guilty plea agreement and during the guilty plea canvass about the penalty for the deadly weapon enhancement. In entering his guilty plea, appellant admitted that he used a deadly weapon during the commission of the offenses. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his guilty plea was not valid because he was not competent to enter a guilty plea. Appellant failed to

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

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

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

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

carry his burden regarding this claim. This court has held that the test for determining competency is "'whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'"[32] Appellant failed to identify the nature of his psychiatric problems, and thus, he failed to demonstrate that he was unable to consult with his counsel or that he did not have a factual understanding of the proceedings against him. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed: (1) his conviction and sentences violated double jeopardy; (2) his due process and fair trial rights were violated when the district court denied his presentence motion to withdraw a guilty plea; (3) the district court violated his constitutional rights by accepting his guilty plea without advising him of his appeal rights; (4) his conviction violated due process and equal protection because an extradition hearing was not held; and (5) the district court did not determine whether a knife was an inherently dangerous weapon. 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 upon a guilty plea.[33] Moreover, appellant's second claim regarding the denial of his presentence motion to withdraw a guilty plea was

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[32]Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (quoting Dusky v. United States, 362 U.S. 402 (1960)).

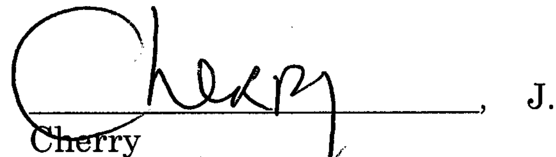
[33]See NRS 34.810(1)(a).

substantially litigated on direct appeal; the doctrine of the law of the case prevents further litigation of this issue.[34] Therefore, we conclude that 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 oral argument and briefing are unwarranted in this matter.[35] Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[36]

_______________, J.
Maupin


_______________, J.
Cherry

_______________, J.
Saitta

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[34]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

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

[36]We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

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