

IN THE SUPREME COURT OF THE STATE OF NEVADA

DOYLE DOLEN LANCASTER A/K/A
DOYLE DOLAN LANCASTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49844

FILED

FEB 08 2008

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying in part a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On July 2, 2003, the district court convicted appellant, pursuant to a guilty plea, of four counts of lewdness with a child under the age of fourteen. The district court sentenced appellant to serve four concurrent terms of life in the Nevada State Prison with the possibility of parole. No direct appeal was filed.

On July 1, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to assist appellant, and post-conviction counsel filed a supplement to the petition. The State opposed the petition. On June 13, 2007, after conducting an evidentiary hearing, the district

court denied appellant's petition in part, but granted relief as to one claim—an appeal deprivation claim. This appeal followed.¹

In his petition, appellant contended that his trial counsel was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that there is a reasonable probability of a different result in the proceedings.² To establish prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner must demonstrate 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.³ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁴ A petitioner must demonstrate the facts underlying a claim of ineffective assistance of

¹After the appointment of post-conviction counsel, appellant filed a number of proper person documents in the district court. The district court denied these documents as fugitive documents in light of the appointment of counsel. We conclude that the district court did not abuse its discretion in so denying these proper person filings.

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.

counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁵

First, appellant claimed that trial counsel was ineffective for failing to investigate. Appellant claimed that his trial counsel failed to present favorable evidence in mitigation of the original charges and failed to present favorable evidence in mitigation at sentencing. Appellant claimed that there were numerous character witnesses that would have testified in his defense.

Appellant failed to demonstrate that he was prejudiced in the instant case. Appellant's trial counsel testified at the evidentiary hearing that he reviewed discovery materials in the instant case, including the police report and the State's theory of prosecution. Appellant's trial counsel further testified that he had hired an investigator who interviewed the victim. In light of the damaging nature of the victim's potential testimony about the sexual contact and appellant's admissions to police and another law enforcement agency, trial counsel testified that he advised appellant that a guilty plea was in his best interests to avoid the possibility of harsher sentences based upon the original, alternative charges of sexual assault on a minor under the age of fourteen. Trial counsel further testified that the victim was not available to testify at

⁵Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

sentencing because she was at an undisclosed location, but that the victim's wishes were expressed to the district court in the letters of the family. Trial counsel presented numerous letters from friends and family and appellant's medical history in mitigation at sentencing. Appellant failed to specify what further investigation counsel should have conducted such that there would be a reasonable probability of a different outcome in the instant case. 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 object to errors contained in the presentence investigation report. Appellant, in reliance upon Blakely v. Washington,⁶ claimed that the presentence investigation report contained factual allegations that were neither submitted to a jury nor proven beyond a reasonable doubt. In particular, appellant claimed that the presentence investigation report falsely stated that he received a 30-day jail sentence on a prior offense and that appellant had touched the victim's vaginal area with his hands and admitted to rubbing the victim's vaginal area six to eight times over the past year.

Appellant failed to demonstrate that he was prejudiced in the instant case as he failed to demonstrate that there was a reasonable probability of a different sentence had trial counsel objected to these

⁶542 U.S. 296 (2004).

errors.⁷ First, these facts were not required to be presented to the jury as they did not increase the sentence beyond the statutory maximum.⁸ Second, appellant failed to demonstrate that any palpable or highly suspect evidence was relied upon by the district court in sentencing appellant.⁹ Appellant failed to demonstrate that any inclusion of misinformation about a 30-day jail sentence for a conservation offense made any difference in the sentence in the instant case. During the guilty plea canvass, appellant admitted that he had on three separate occasions rubbed or touched the victim's vagina and had on one occasion kissed the victim's breast. The guilty plea agreement, which appellant acknowledged reading, signing and understanding, further specifically informed appellant that the district court could consider at sentencing any counts which were dismissed and any other cases charged or uncharged which were to be dismissed or which were not pursued by the State. One of the

⁷At the evidentiary hearing, appellant also claimed that information that he had oral sex with the victim was false and that he only admitted to the incidents because of trial counsel's advice. The district court, however, limited the evidentiary hearing to the claims as raised in the original proper person pleading and counsel's supplemental pleading. We conclude that the district court did not abuse its discretion in limiting the evidentiary hearing to the claims as set forth in the original proper person pleading and counsel's supplemental pleading. See Barnhart v. State, 122 Nev. 301, 130 P.3d 650 (2006).

⁸See Blakely, 542 U.S. at 301.

⁹See Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976).

psychosexual evaluations stated that appellant admitted that sexual incidents with the victim occurred over 20 times during a four to five year period. Appellant's trial counsel vigorously argued for probation during the sentencing hearing. Under these facts, appellant failed to demonstrate that inclusion of information regarding the number of sexual contacts prejudiced him at sentencing in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to give proper advice about the consequences of the guilty plea. Specifically, appellant claimed that trial counsel led him to believe that he would receive probation. Appellant further claimed that he was not able to fully understand the district court during the plea canvass because of hearing difficulties and a mental impairment related to a stroke.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. First, appellant failed to demonstrate by a preponderance of the evidence that he was promised probation in the instant case. Appellant was correctly informed of the potential sentences in the written guilty plea agreement as well as being informed of the potential sentences during the plea canvass. Although appellant testified that he thought that he would be granted probation if he received positive results in the psychosexual evaluation, appellant himself admitted during the evidentiary hearing that he was not guaranteed probation. Appellant's trial counsel further testified that he did not make any promises that appellant would receive probation,

although he believed that appellant had a “good shot” at probation. Appellant’s mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea.¹⁰ Appellant’s trial counsel further testified that appellant’s hearing difficulties and any mental impairment did not interfere with the attorney-client relationship and that he did not believe during his representation that a mental evaluation was necessary. The record indicates that appellant answered questions put to him during the plea canvass, the sentencing hearing and evidentiary hearing appropriately. Appellant failed to demonstrate by a preponderance of the evidence that he had a mental impairment that rendered him incompetent during the trial proceedings.¹¹ Therefore, we conclude that the district court did not err in denying these claims.

Fourth, appellant claimed that trial counsel was ineffective for failing to have his confession suppressed based upon diminished capacity due to a recent stroke. Appellant failed to demonstrate that his trial counsel’s performance was deficient or that he was prejudiced. Appellant failed to demonstrate by a preponderance of the evidence that an alleged


¹⁰See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

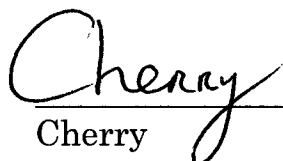
¹¹See Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (holding that the test for determining competency is “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him”) (quoting Dusky v. United States, 362 U.S. 402 (1960)).


mental impairment affected or coerced his statements to the police; thus, appellant failed to demonstrate that a motion to suppress would have been meritorious. Therefore, we conclude that the district court did not err in denying this claim.

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.¹² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. Jerome Polaha, District Judge
Doyle Dolen Lancaster
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹²See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).