

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY LAWRENCE DAYMON
A/K/A GREG DAYMON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50082

FILED

JAN 30 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Yama
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; Michelle Leavitt, Judge.

On March 23, 2006, the district court convicted appellant, pursuant to a guilty plea, of three counts of attempted lewdness with a child under the age of fourteen. The district court sentenced appellant to serve a term of 48 to 120 months in the Nevada State Prison for each count. Counts 1 and 2 were ordered to run consecutive to each other, while count 3 was ordered to run concurrently to counts 1 and 2. This court affirmed the judgment of conviction on appeal. Daymon v. State, Docket No. 47148 (Order of Affirmance, August 14, 2006). The remittitur issued on September 8, 2006.

On April 20, 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 August 23, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that the district court abused its discretion when it denied his motion to withdraw his guilty plea. He further claimed that the district court erred when it failed to discuss its reasoning for the denial. Additionally, appellant claimed that the record did not reflect the basis for the district court's and State's diatribes concerning the living arrangements of the victim. This court considered and rejected this claim on appeal. The doctrine of the law of the case prevents further litigation of this issue and cannot be avoided by a more detailed and precisely focused argument. Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, the district court did not err in denying this claim.

Next, appellant claimed that the district court was biased against appellant. As appellant's claim did not address the voluntariness of his plea or whether his plea was entered without the effective assistance of counsel, the claim fell outside the scope of claims permissible in a habeas corpus petition challenging a judgment of conviction based upon a guilty plea. NRS 34.810(1)(a). Therefore, the district court did not err in denying this claim.

Appellant also claimed that he received ineffective assistance of defense 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. Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland v. Washington, 466 U.S. 668, 697 (1984).

First, appellant claimed that his counsel was ineffective for failing to advise him to enter a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), instead of a guilty plea. He contended that had he entered an Alford plea, there would have been a strong possibility that he would have been permitted to withdraw his plea based on his claim of innocence. Appellant failed to demonstrate that he was prejudiced. In his motion to withdraw his guilty plea, appellant asserted that the victim's recantation of abuse constituted sufficient grounds to permit him to withdraw his guilty plea. However, we have recognized that "[t]he question of an accused's guilt or innocence is generally not at issue in a motion to withdraw a guilty plea." Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 226 (1984). Moreover, as a defendant who enters an Alford plea maintains his innocence, a "claim of innocence is essentially academic," id., and thus, not sufficient to support a motion to withdraw an Alford plea. 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 promptly interview the victim prior to appellant pleading guilty. He claimed that when his counsel finally met with the victim, the victim recanted her allegations against appellant. Appellant failed to demonstrate that he was prejudiced. At the hearing on the motion to withdraw the guilty plea, appellant's counsel stated that the victim recanted to him when he met with her after appellant's plea. However, the victim resided with appellant after his guilty plea and prior to the imposition of his sentence. In addition, appellant received a substantial benefit by entry of his guilty plea in the instant case. A conviction on the original charges set forth in the complaint could have resulted in the imposition of multiple life sentences. See 2003 Nev. Stat., ch. 461, § 2, at 2826 (former NRS 201.230); 1999 Nev. Stat., ch. 105, § 5, at 471-72 (former NRS 201.230). Pursuant to the negotiations, the State agreed not to pursue ten counts of lewdness with a minor under the age of fourteen, three counts of open and gross lewdness, and one count of attempted sexual assault of a minor under the age of fourteen. Thus, in light of the significant reduction in appellant's potential liability and problematic circumstances underlying the recantation, appellant failed to demonstrate that he would have proceeded to trial on the full fourteen-count criminal complaint if only his counsel had interviewed the victim sooner. Therefore, we conclude that the district court did not err in denying this claim.

Appellant also claimed that he received ineffective assistance of appellate counsel. To state a claim of ineffective assistance of appellate

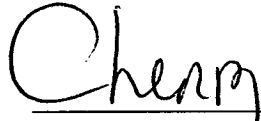
counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 987, 998, 923 P.2d 1102, 1107, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. See Jones v. Barnes, 463 U.S. 745, 751 (1983). This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

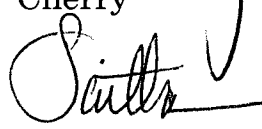
Appellant claimed that, on appeal from the district court's denial of his motion to withdraw his guilty plea, counsel was ineffective for failing to argue that his guilty plea was not entered voluntarily. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. In his motion to withdraw his guilty plea, appellant did not contend that his guilty plea was not entered voluntarily. Thus, this court would not have considered any such argument on appeal. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004); see also Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986). Therefore, the district court did not err in denying this claim.

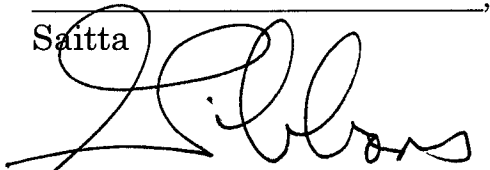
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that

briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Gregory Lawrence Daymon
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.