

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAUL CEBALLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50292

FILED

JUL 17 2008

TRACIE KINDEMAN
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 appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

On March 8, 2006, the district court convicted appellant, pursuant to a guilty plea, of attempted lewdness with a child under the age of fourteen (Count 1) and child abuse and neglect (Count 2). The district court sentenced appellant to serve a term of 36 to 96 months for Count 1 and 12 to 36 months for Count 2 in the Nevada State Prison. No direct appeal was taken.

On December 1, 2006, 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, the district court declined to appoint counsel to represent appellant. On September 25, 2007, the district court denied appellant's petition after conducting an evidentiary hearing. This appeal followed.

In his petition, appellant contended that his plea was invalid. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.¹ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.² In determining the validity of a guilty plea, this court looks to the totality of the circumstances.³

Appellant contended that his plea was invalid because it was not based on an adequate factual basis. Specifically, he claimed that the allegation that he intended to be aroused by the act conflicted with evidence in the record that he was not aroused. Appellant failed to carry his burden of demonstrating that his guilty plea was invalid in this regard. Appellant's guilty plea to attempted lewdness with a minor under the age of fourteen and child abuse and neglect relieved the State of its obligation of proving the elements of the charged crimes with proof beyond a reasonable doubt. Appellant made a factual admission during the guilty plea canvass that he touched the victim's genital area with his genital area, "with the intent of arousing, appealing to, or gratifying his lust, passions, sexual desires, or her said desires." Further, the crime of

¹Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

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

³State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 272, 721 P.2d at 368.

attempted lewdness with a minor did not require the actual arousal of the perpetrator.⁴ Moreover, appellant received a substantial benefit by entry of his guilty plea because he avoided a trial and possible conviction for two counts of lewdness with a minor under the age of fourteen, one count of sexual assault of a minor under the age of fourteen, three counts of child abuse and neglect, one count of first-degree kidnapping, one count of second-degree kidnapping, and one count of possession of a controlled substance with the intent to sell in another case. Therefore, the district court did not err in denying this claim.

Appellant also contended that his trial counsel was ineffective. 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 that the 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.⁵ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁶ "[A]

⁴See NRS 201.230(1) (providing that the crime of attempted lewdness with a minor under the age of fourteen requires "the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of [the perpetrator] or of [the] child").

⁵Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

⁶Strickland v. Washington, 466 U.S. 668, 697 (1984).

habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence.”⁷ 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.⁸

First, appellant claimed that his counsel was ineffective for advising appellant to waive his preliminary hearing and plead guilty when appellant’s counsel knew that the child victim lived out of state at the time that she reported the abuse. Specifically, he claimed that he was denied the right to confront the witnesses against him. Appellant failed to demonstrate that his counsel 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 victim was not able to be present at the time of the scheduled preliminary hearing, there is no support in the record for the contention that appellant might have been exonerated or that the victim would not have testified at a later date or in later proceedings.⁹ Moreover, appellant received a substantial benefit by

⁷Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

⁸Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁹There is nothing in the record indicating whether the preliminary hearing could have been rescheduled, whether the State would have decided to proceed by indictment, or whether other witnesses were available to establish probable cause sufficient to bind over to the district court. Appellant’s acceptance of the plea negotiations necessarily rendered the record on appeal bereft of such details.

entry of his guilty plea as discussed above. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to scrutinize evidence. Specifically, appellant claimed that his counsel failed to question the fact the State only had a statement from the victim that she was three or four years old when appellant molested her. Further, appellant's counsel did not question the inconsistent reports from the Department of Youth and Family Services that indicated that they received information that a child might have been assaulted on June 10, 2004, when the victim in this case did not report the abuse until August 26, 2004. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. The record on appeal does not support the apparent contradiction that appellant contends exists. Instead, the record indicates that the victim reported abuse on at least two separate occasions to separate authorities. Appellant did not allege what other facts his counsel could have used to undermine the victim's statement.¹⁰ Thus, as appellant's allegation of an inconsistency did not rise to the level of a significant substantive defect in the State's case, he did not demonstrate that he would not have pleaded guilty or would have insisted upon going to trial. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for failing to file motions or otherwise object to the State's case prior to

¹⁰Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

appellant pleading guilty. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not identify the potential motions or objections he contended that his counsel should have filed.¹¹ Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for coercing him to plead guilty based on counsel's promise that appellant would receive probation if he received a favorable psychological evaluation. Appellant further claimed that his counsel instructed him to admit to the crime or else he faced life in prison. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant stated, in the plea agreement and during the plea canvass, that he was not pleading guilty as a result of threats, coercion, or promises of a more lenient sentence. Appellant also acknowledged that the district court had sole discretion in sentencing him and that the plea agreement did not guarantee him any particular sentence. Further, at the evidentiary hearing, appellant's counsel testified that she did not promise appellant a sentence of probation if he passed the sexual evaluation. While she may have advised him that his offense was probationable, she did not guarantee him a sentence of probation. Moreover, counsel informed appellant that his sentence was up to the sentencing judge. Therefore, the district court did not err in denying this claim.

¹¹Id.

Fifth, appellant claimed that his counsel was ineffective for failing to file an appeal despite his timely request that counsel do so. “[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.”¹² “The burden is on the client to indicate to his attorney that he wishes to pursue an appeal.”¹³

Appellant failed to demonstrate that his trial counsel’s performance was deficient or that he was prejudiced. In his petition, appellant stated that he asked his counsel to file a direct appeal and his counsel failed to do so. Appellant did not testify at the evidentiary hearing but stated that he would rely on the averments in his petition. Appellant’s trial counsel testified that appellant never asked for an appeal. The district court determined that appellant failed to demonstrate by a preponderance of the evidence that he requested a direct appeal after sentencing, and substantial evidence supports the district court’s determination.¹⁴ Therefore, the district court did not err in denying this claim.


¹²Lozada 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).


¹³See Davis, 115 Nev. at 20, 974 P.2d at 660.

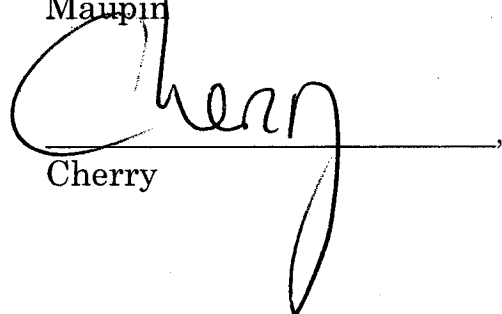
¹⁴State v. Rincon, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) (quoting State v. McKellips, 118 Nev. 465, 469, 49 P.3d 655, 658-59 (2002)).

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.¹⁵ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Maupin


_____, J.
Cherry

cc: Hon. David B. Barker, District Judge
Raul D. Ceballo
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).