IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO TULIO PATINO-MARTINEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50483

FILED

JAN 20 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
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. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

On May 25, 2005, the district court convicted appellant, pursuant to a guilty plea, of lewdness with a minor under the age of fourteen. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after ten years. No direct appeal was taken.

On February 9, 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 appointed counsel to represent appellant. Counsel filed two supplemental pleadings. On October 2, 2007, the district court denied appellant's petition after conducting an evidentiary hearing. This appeal followed.

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 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.[1] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[2] "[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."[3] 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.[4]

First, appellant claimed that his trial counsel was ineffective for failing to investigate or create a defense strategy. Specifically, he claimed that his counsel would have discovered that (1) appellant's brother would have testified that they were together during the time of the molestation; (2) the owner of the business where the molestation occurred would have testified that the business was not open on the day of the incident and appellant did not have a key to the business; (3) the victim had engaged in sexual activity prior to the molestation, had a

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

[2]Strickland v. Washington, 466 U.S. 668, 697 (1984).

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

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

strained relationship with appellant's wife, provided inconsistent statements throughout the investigation, and may have recanted; and (4) there was no DNA evidence linking appellant to the molestation.[5]

"An attorney must make reasonable investigations or a reasonable decision that particular investigations are unnecessary."[6] A petitioner asserting a claim that his counsel did not conduct a sufficient investigation bears the burden of showing that he would have benefited from a more thorough investigation.[7]

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant did not show that further investigation would have altered his decision to enter a guilty plea. At the evidentiary hearing, appellant's trial counsel testified that he discussed all the discovery materials with appellant prior to appellant's decision to plead guilty. Further, appellant's counsel also discussed the likelihood of the State introducing prior bad act evidence concerning past incidents of molestation of appellant's daughters. Appellant did not put forth any evidence in support of his brother's or former employer's testimony, or an alleged recantation of the victim, despite the opportunity to do so. Moreover, appellant received a

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[5]To the extent that appellant claimed that, based on these assertions, he was actually innocent, we conclude that appellant failed to demonstrate that he was actually innocent. Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001).

[6]State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006) (citing Strickland, 466 U.S. at 691).

[7]Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

substantial benefit by entry of his guilty plea in the instant case. Pursuant to the plea negotiations, the State dropped a count of sexual assault of a minor under the age of fourteen. A conviction on the original charges would have resulted in the imposition of multiple life sentences.[8] Appellant would not have been eligible for parole on the life sentence for sexual assault of a minor under the age of fourteen until he had served at least twenty years.[9] Appellant's potential liability was significantly reduced by his guilty plea. Thus, appellant failed to demonstrate that he would have proceeded to trial on the original information if his counsel had conducted an investigation into his claims. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel failed to file an appeal despite his timely request that counsel do so. He further claimed that the Lozada remedy is constitutionally inadequate. "[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."[10] "The burden is on the client to indicate to his attorney that he wishes to pursue an appeal."[11]

Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. In his petition, appellant stated that he asked

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[8]See NRS 200.366; NRS 201.230.

[9]See 2003 Nev. Stat., ch. 461, § 1, at 2825-26 (NRS 200.366(3)(c)).

[10]Lozada 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).

[11]See Davis, 115 Nev. at 20, 974 P.2d at 660.

his counsel to file a direct appeal and his counsel failed to do so. However, appellant's trial counsel testified that he did not remember appellant requesting that he file a notice of appeal. Moreover, appellant also testified that he did not ask his counsel to file 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.[12] As appellant failed to demonstrate that he was entitled to relief under Lozada, we need not discuss the merits of his claim that the Lozada remedy is inadequate. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that his guilty 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.[13] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[14] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[15]

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[12]See State v. Rincon, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006).

[13]Bryant 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).

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

[15]State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367.

First, appellant claimed that his counsel and the district attorney told him that his family wanted him to plead guilty. He further claimed that his counsel physically assaulted him while visiting him in jail in an effort to coerce him into pleading guilty. Appellant failed to demonstrate that his plea was invalid. Appellant stated in the plea agreement and during the plea canvass that he was not pleading guilty as a result of coercion or promises. Further, appellant's counsel testified that he did not assault appellant. The district court determined that appellant failed to demonstrate by a preponderance of the evidence that his guilty plea was coerced, and substantial evidence supports the district court's determination.[16] Therefore, the district court did not err in denying this claim.[17]

Second, appellant claimed that his plea was invalid because he was not advised of the specific consequences of lifetime supervision. Under Nevada law, the particular conditions of lifetime supervision are tailored to each individual case and, notably, are not determined until after a hearing is conducted just prior to the expiration of the sex offender's completion of a term of parole or probation, or release from custody.[18] In light of the fact that the conditions of lifetime supervision applicable to a specific individual are not generally determined until long after the plea canvass, an advisement about those conditions is not a

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[16]See Rincon, 122 Nev. at 1177, 147 P.3d at 238.

[17]To the extent that appellant claimed that his counsel was ineffective for coercing him to plead guilty, the district court did not err in denying this claim for the reason set forth above.

[18]Palmer v. State, 118 Nev. 823, 827, 59 P.3d 1192, 1194-95 (2002).

requisite of a valid guilty plea. Rather, all that is constitutionally required is that the totality of the circumstances demonstrate that appellant was aware that he would be subject to the consequence of lifetime supervision before entry of the plea.[19]

Appellant's claim that he was unaware of the consequence of lifetime supervision is belied by the record.[20] The plea agreement, which appellant signed, provided that appellant's sentence would include lifetime supervision pursuant to NRS 176.0931. Further, he was advised of the consequence of lifetime supervision during the plea canvass. Therefore, we conclude that appellant was properly advised of the lifetime supervision requirement and thus, his plea was not involuntary for this reason.[21]

Next, appellant claimed lifetime supervision is unconstitutional because it constitutes a bill of attainder and violates due process. This claim is not properly brought in a post-conviction petition for a writ of habeas corpus where the conviction is based upon a guilty plea.[22] Therefore, the district court did not err in denying this claim.

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[19]Id. at 831, 59 P.3d at 1197.

[20]Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

[21]Appellant also contended that his counsel was ineffective for failing to inform him that his sentence would include lifetime supervision. However, as discussed above, appellant was adequately advised of the lifetime supervision requirement. Accordingly, we conclude that appellant failed to demonstrate that his counsel was ineffective in this regard.

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

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.[23] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[24]

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Brent T. Adams, District Judge
Francisco Tulio Patino-Martinez
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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

[24]We 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.