

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT J. GIESING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50553

FILED

JUN 09 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

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; Donald M. Mosley, Judge.

On March 1, 2007, the district court convicted appellant, pursuant to a guilty plea, of one count of lewdness with a child under the age of 14 and one count of possession of visual presentation depicting sexual conduct of a person under the age of 16 (child pornography count). The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole on the lewdness count and a concurrent term of 12 to 36 months on the child pornography count. No direct appeal was taken.

On June 8, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, and appellant filed a reply. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On October 24, 2007, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that his guilty plea was not entered voluntarily and knowingly. 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

First, appellant claimed that his plea was not valid because he was not competent to enter a guilty plea. Appellant claimed that he was in shock when he entered his guilty plea because his trial counsel told him that he knew appellant was innocent but that he could not get a fair trial and would be found guilty. Appellant failed to carry his burden of demonstrating that his plea was invalid in this regard. The record on appeal does not support appellant's claim that he was incompetent at the time he entered his plea. 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."⁴ A claim that appellant was in "shock" fell far short of demonstrating that appellant did not have the ability to consult with his attorney with a reasonable degree of

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

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

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

⁴Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (quoting Dusky v. United States, 362 U.S. 402 (1960)).

rational understanding and that he did not have a rational and factual understanding of the proceedings against him. Further, trial counsel testified at the evidentiary hearing that he did not tell appellant that he knew that appellant was innocent and that he believed appellant understood the guilty plea agreement. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his guilty plea was invalid because he did not have time to read and understand the plea agreement before signing it. He claimed that he had less than 5 minutes after he was brought the plea agreement. Appellant failed to carry his burden of demonstrating that his plea was invalid in this regard. Appellant's trial counsel testified at the evidentiary hearing that appellant was under somewhat of a time constraint because the plea offer was being considered four days into the jury trial, but that trial counsel went over the guilty plea agreement with appellant and appellant appeared to understand. Appellant's trial counsel further testified that appellant was not rushed into entry of the plea and that there was a period of one to one and one-half hours between the time they began to discuss negotiations and the time that the plea was entered. During the guilty plea canvass, appellant affirmatively indicated that he had read, signed and understood the guilty plea agreement and that he had no questions. Therefore, we conclude the district court did not err in denying this claim.

Third, appellant claimed his guilty plea was invalid because there was an insufficient factual basis for the lewdness count. Appellant claimed that wrestling with his nephew and accidentally touching his nephew's genitals did not amount to lewdness. Appellant claimed that the State improperly added the phrase "with the intent of arousing sexual desires." Appellant appeared to also attack alleged inconsistencies in the

victim's testimony. Appellant further appeared to attack his guilty plea to count 2 when he believed his conduct better fit into either counts 3 or 4. Appellant failed to carry his burden of demonstrating that his guilty plea was invalid in this regard. Appellant's guilty plea to the charge of lewdness with a child under the age of 14 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 had "touched his nephew's penis during wrestling with the intent of sexual gratification."⁵ Appellant received a substantial benefit by entry of his guilty plea as he avoided a conviction on three additional counts of lewdness with a child. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his guilty plea was invalid because the district attorney did not turn over evidence in a timely manner to allow the defense to examine it. Appellant claimed that the district attorney did not allow a timely examination of the hard drive of his computer in order to show that appellant's family was responsible for "hacking" into the system and downloading the image of child pornography. Appellant failed to carry his burden of demonstrating that

⁵In the indictment, count 2 stated that appellant

did then and there willfully, lewdly, unlawfully, and feloniously commit a lewd or lascivious act with the body of [the victim], a child under the age of fourteen years, by touching the penis and/or scrotum of the [victim] with his hand, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of said Defendant, or said child.

his guilty plea was invalid in this regard. First, we note that trial counsel successfully litigated a motion to sever the child pornography count from the lewdness counts. The lewdness counts went to trial first and it was during this trial that appellant accepted the plea negotiations. Thus, appellant failed to demonstrate that he did not have sufficient time to have the computer hard drive examined. Moreover, appellant's trial counsel testified at the evidentiary hearing that the computer hard drive was examined but that he recalled it was not possible for the expert to conclusively testify that the computer hard drive had been accessed by someone other than appellant. Appellant failed to demonstrate that earlier access to the computer 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 this claim.

Next, appellant claimed that he received ineffective assistance of counsel.⁶ 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.⁷ The court need not address both components of the inquiry if the

⁶To the extent that appellant raised any of the underlying claims independently from his ineffective assistance of counsel claims, those 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. See NRS 34.810(1)(a).

⁷Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

petitioner makes an insufficient showing on either one.⁸ A petitioner must prove the factual allegation underlying his ineffective assistance of counsel claim 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.⁹

First, appellant claimed that his trial counsel had failed to explain the nature of the guilty plea, including the potential sentence and the right to appeal. Appellant asserted that his trial counsel informed him that he knew appellant was innocent and that appellant would get probation. Appellant further asserted that his trial counsel did not tell him that he could get any other sentence than probation or that he was giving up the right to appeal or any constitutional rights. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The written guilty plea informed appellant of the elements of the crimes, the potential sentence, the waiver of constitutional rights, and the limited right to appeal from a judgment of conviction based upon a guilty plea. During the guilty plea canvass, appellant affirmatively acknowledged that he had read, signed and understood the guilty plea agreement. Appellant's trial counsel testified during the evidentiary hearing that he had discussed the guilty plea agreement with appellant, the sentencing ranges, and the right to appeal. Appellant's trial counsel further testified that he had not told appellant that he was innocent and he did not promise appellant probation. Appellant's trial counsel testified

⁸Strickland v. Washington, 466 U.S. 668, 697 (1984).

⁹Means 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).

that he believed a guilty plea was in appellant's best interests as he avoided the possibility of being convicted of three additional counts of lewdness with a child, which carried potential penalties of life imprisonment. Appellant's trial counsel further testified that the defense theory, that the victim (appellant's nephew) and the four prior bad act witnesses (appellant's nephews), were lying and in a familial conspiracy, was seriously undermined when a letter surfaced during trial.¹⁰ Therefore, we conclude that the district court did not err in denying these claims.

Second, during the evidentiary hearing, appellant claimed that his trial counsel was ineffective for failing to challenge the 19-month delay between the time of his arrest and the second grand jury indictment. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel testified that he did not believe that a motion to dismiss based on delay would have been successful, and appellant failed to demonstrate in his written pleadings or at the evidentiary hearing that such a motion had a reasonable probability of success. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed: (1) the district attorney in the grand jury and indictment process violated his due process rights by withholding witness credibility information, asking leading questions,

¹⁰Appellant's trial counsel testified that during the trial the district attorney received and turned over a copy of a letter that appellant had written to his brother and a therapist apologizing to the victim and any hurt he had caused the victim in the instant case and the prior bad act witnesses.

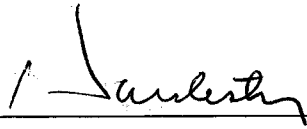
making incriminating statements against the accused without any evidence, presenting an indictment where the alleged acts did not violate the law, presenting evidence illegally obtained, and presenting charges when a previous grand jury rejected one of the charges and when there was no factual support; (2) the testimony of the victim did not support the proposed indictment and the indictment did not detail each element of the charges; (3) the lewdness statute was vague and did not inform a reasonable person of what conduct constituted lewdness; (4) his sentence was cruel and unusual punishment because his conduct amounted only to accidental touching of private parts for a few seconds; (5) his due process rights were violated because the alleged actions did not justify the charges; (6) he was subject to an unreasonable search and seizure; (7) the district court erred in denying his motion to suppress evidence; (8) the district court erred in denying the motion to dismiss the child pornography charge; (9) the district court erred in denying his motion to have an independent psychological examination of the victim; and (10) the district court erred in denying a motion for continuance when the district attorney had not turned over critical evidence. 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.¹¹ At the evidentiary hearing, the district court rejected appellant's attempt to incorporate these claims into his grounds for ineffective assistance of counsel. Because appellant offered no more than a statement that he wished to incorporate the grounds and provided no cogent analysis or argument of what errors were committed by trial counsel regarding these

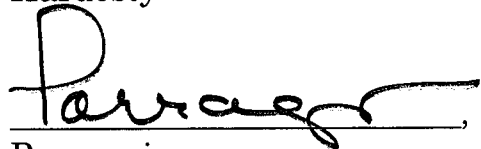
¹¹See NRS 34.810(1)(a).

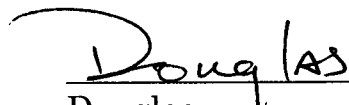
claims and how these alleged errors made a difference to the outcome of the proceedings, we conclude that the district court did not abuse its discretion in rejecting appellant's attempt to incorporate these claims into his grounds for ineffective assistance of counsel.¹² Therefore, we conclude that 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 appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Robert J. Giesing
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹²See generally NRS 34.750(5).

¹³See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).