IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRENCE L. LOVOLL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34571

FILED

APR 12 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus.

On January 6, 1998, the district court convicted appellant, pursuant to a nolo contendere plea,[1] of one count of sexual assault. The district court sentenced appellant to life in prison with the possibility of parole. Appellant did not pursue a direct appeal.

On December 31, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus. 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 May 6, 1999, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised numerous claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel's performance fell below an

[1]Appellant pleaded guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). Under Nevada law, "whenever a defendant maintains his or her innocence but pleads guilty pursuant to Alford, the plea constitutes one of nolo contendere." State v. Gomes, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996).

objective standard of reasonableness, and (2) but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial.[2] The court need not consider both prongs of the test if the petitioner makes an insufficient showing on either prong.[3]

First, appellant contended that trial counsel was ineffective for failing to investigate the charges and the victim. Appellant, however, failed to allege sufficient facts that, if true, would entitle him to relief.[4] In particular, appellant failed to allege what information would have been revealed as a result of additional investigation or how that information would have affected his decision to plead guilty. Appellant therefore failed to demonstrate that counsel provided ineffective assistance.

Second, appellant contended that trial counsel was ineffective for failing to file a pretrial motion to suppress evidence. Again, appellant failed to allege sufficient facts that, if true, would entitle him to relief.[5] In particular, appellant failed to specify what evidence trial counsel should have moved to suppress or on what grounds such a motion should have been based. We therefore conclude that appellant failed to demonstrate that counsel provided ineffective assistance.

Third, appellant contended that trial counsel was ineffective for failing to explain appellant's rights, the State's burden of proof, the elements of the charged offenses, and the consequences of his nolo plea. Our review of the

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

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

[4]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[5]See id.

record reveals that these allegations are belied by the record, and therefore appellant is not entitled to relief.[6] The written guilty plea agreement states that trial counsel explained the elements of the offenses, the consequences of the plea, and the waiver of rights set forth in the plea agreement. During the plea canvass, appellant stated that he had read and signed the plea agreement and that he understood the plea agreement before he signed it. Moreover, during the plea canvass, the district court addressed the consequences of the plea and the facts that the State could prove at trial. Under the circumstances, appellant cannot demonstrate that counsel's performance was deficient or that he was prejudiced.

Fourth, appellant contends that trial counsel was ineffective for failing to ask the district court to canvass appellant regarding the intent element of sexual assault. As previously mentioned, the record reveals that appellant was aware of the elements of the charges. Additionally, during the plea canvass, the prosecutor gave a lengthy statement regarding the facts that the State could prove if the case went to trial. Because appellant entered his plea pursuant to Alford, he was not required to admit any of the elements of the charge.[7] We therefore conclude that appellant cannot demonstrate that trial counsel was ineffective for failing to ask the district court to canvass appellant regarding his intent.

Fifth, appellant contended that trial counsel was ineffective for failing to file a pretrial challenge to the sufficiency of the evidence. A pretrial petition for a writ of habeas corpus may be filed to challenge an indictment based

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[6]See id.

[7]See North Carolina v. Alford, 400 U.S. 25 (1970).

on lack of probable cause.[8] But our review of the grand jury proceedings reveals more than sufficient evidence to establish probable cause. Accordingly, we conclude that trial counsel was not ineffective for failing to file a pretrial petition on this ground or for failing to discuss such a petition with appellant.

Sixth, appellant contended that trial counsel was ineffective for failing to request a competency hearing. Appellant failed to allege sufficient facts that, if true, would entitle him to relief on this claim.[9] In particular, appellant failed to allege any facts that would have given trial counsel cause to question appellant's competency.[10] Accordingly, we conclude that appellant has not demonstrated that counsel was deficient for failing to request a competency hearing.

Seventh, appellant contends that trial counsel was ineffective for failing to move to withdraw the plea because appellant did not receive the benefit of his bargain: a sentence concurrent to his sentences in district court case C144545. The district court minutes for case C144545 indicate that the sentences in that case are to be served concurrently with the sentence in this case. Accordingly, we conclude that appellant has not demonstrated that counsel's performance was deficient or that he was prejudiced by counsel's performance.

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[8]See NRS 34.500.

[9]See Hargrove, 100 Nev. 498, 686 P.2d 222.

[10]Cf. Jones v. State, 107 Nev. 632, 638, 817 P.2d 1179, 1182 (1991) (noting that district court is not required to order competency examination absent reasonable doubt as to defendant's competency); Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (noting that, in determining whether competency hearing is required, court should consider any history of irrational behavior by defendant, defendant's demeanor, and any prior medical opinion of defendant's competency).

Eighth, appellant contended that trial counsel was ineffective for failing to challenge one of the sexual assault charges on the ground that sodomy is not a sexual act in ordinary sexual intercourse. NRS 200.364(2) specifically provides that "sexual penetration" for purposes of the sexual assault statute includes "any intrusion . . . of any part of a person's body . . . into the . . . anal opening[] of the body of another." We therefore conclude that appellant cannot demonstrate that trial counsel was deficient for failing to challenge the sexual assault charge on the ground raised by appellant.

Ninth, appellant contended that trial counsel was ineffective for failing to move to dismiss the indictment on the ground that appellant did not receive notice of the grand jury proceedings as required by Sheriff v. Marcum, 105 Nev. 824, 783 P.2d 1389 (1989) and NRS 172.241. Even assuming that appellant did not receive adequate Marcum notice, we conclude that appellant failed to demonstrate prejudice as a result of counsel's failure to move to dismiss the indictment.[11] Appellant has not alleged that the State could not have obtained a second indictment, or that the second indictment would have been any different from the first.[12] Moreover, by entering a nolo plea, appellant waived any procedural defects

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[11]We note that in its opposition to appellant's petition, the State represented that appellant received oral notice of the grand jury proceedings approximately ten days before those proceedings. Given the fact that the charged offenses were discovered during appellant's trial on other similar charges, it seems likely that the State's representation is accurate. However, there is nothing in the record to support the State's representation. Accordingly, for purposes of this decision, we have assumed that appellant did not receive adequate notice.

[12]See Sheriff v. Walsh, 107 Nev. 842, 844-45, 822 P.2d 109, 110 (1991).

occurring prior to entry of the plea.[13] Under the circumstances, we conclude that appellant cannot demonstrate prejudice as a result of counsel's failure to challenge the indictment.

Finally, appellant contended that trial counsel failed to properly advise him of his right to appeal. Based on our review of the record, we conclude that, even assuming counsel failed to advise appellant of his right to appeal, appellant cannot demonstrate prejudice because the written guilty plea memorandum adequately advised appellant of his limited right to appeal.[14]

Appellant also contended that his nolo plea was involuntary and was not knowingly and intelligently entered. As previously mentioned, the record on appeal, including the written plea agreement and the plea canvass, indicate that appellant entered his plea knowingly and intelligently. The record also reveals that appellant was not coerced into entering the plea. We therefore conclude that appellant failed to overcome the presumption that his plea is valid.[15]

Last, appellant contended that the State breached the plea agreement. This claim falls outside the narrow scope of issues that may be raised in a post-conviction petition challenging a judgment of conviction upon a nolo plea.[16] Moreover, appellant waived this issue by failing to raise it

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[13]See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975).

[14]See Davis v. State, 115 Nev. 17, 19, 974 P.2d 658, 659 (1999).

[15]See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

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

on direct appeal.[17] Nonetheless, we note that appellant's contention is without merit. Our review of the record reveals that the prosecutor did not breach the plea agreement at sentencing.

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.[18] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Young, J.

Leavitt, J.

Becker, J.

cc: Hon. John S. McGroarty, District Judge
Attorney General
Clark County District Attorney
Terrence L. Lovoll
Clark County Clerk

[17]See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

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