IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGG EUGENE EBELING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50782

FILED

MAY 14 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Gregg Ebeling's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On July 30, 2001, the district court convicted appellant, pursuant to a jury verdict, of seven counts of lewdness with a child under 14, four counts of sexual assault on a child under 14, one count of attempted sexual assault on a child under 14, and three counts of indecent exposure. The district court sentenced appellant to serve terms in the Nevada State Prison totaling life with the possibility of parole after 80 years. On appeal, this court affirmed in part, but reversed in part because of redundant charges on one lewdness and two indecent exposure charges. Ebeling v State, 120 Nev. 401, 91 P.3d 599 (2004). The remittitur issued on July 13, 2004.

On June 2, 2005, appellant filed a timely post-conviction petition for a writ of habeas corpus. The State opposed the petition. Counsel was appointed to represent appellant and filed a supplemental

petition. After conducting an evidentiary hearing, the district court denied appellant's petition on October 1, 2007. This appeal follows.

Ineffective Assistance of Trial Counsel

Appellant argues that the district court erred in denying his claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test set forth in Strickland). The court need not consider both prongs if the petitioner makes an insufficient showing on either prong. Strickland, 466 U.S. at 697. A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel 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. Means 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).

First, appellant claims that his trial counsel was ineffective for failing to adequately cross-examine the child witnesses. At the evidentiary hearing, one of appellant's trial counsel testified that he had wished co-counsel performed better during her cross-examination of the children in that she was not aggressive enough. Appellant claims that his trial counsel should have questioned the child witnesses on their motivation to lie, inconsistencies with prior statements, and their lack of

credibility. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel asked appellant's son and the other child witnesses if they wanted appellant to get in trouble so that appellant's son could move back in with his mother and if they had discussed the case with each other prior to trial. Further, appellant's trial counsel questioned each of the child witnesses concerning any inconsistencies between their trial testimonies and previous statements. Also, appellant's trial counsel asked the child witnesses if they had lied in the past and questioned them concerning their mental health. As such, appellant failed to demonstrate that there was a reasonable probability that there would have been a different outcome of the trial had trial counsel asked additional questions in these areas. In addition, appellant failed to specify what additional questions should have been asked, what additional impeachment could have been performed and failed to present the child witnesses at the evidentiary hearing. The district court concluded that appellant's trial counsel was not ineffective for failing to adequately cross-examine the child witnesses. Substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.[1]

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[1]Appellant argues in his reply brief that his trial counsel should have requested a competency hearing for each of the child witnesses, and therefore, appellant received ineffective assistance of his trial counsel. However, appellant did not raise the issue of ineffective assistance of trial counsel on this issue in his opening brief, and because reply briefs are limited to countering any matter set forth in answering briefs, we decline to consider this claim. See NRAP 28(c); see also Elvik v. State, 114 Nev. 883, 888, 965 P.2d 281, 284 (1998).

Second, it appears that appellant argues that his trial counsel was ineffective for failing to require the district court to provide notice to appellant of lifetime supervision pursuant to NRS 176.0927 and that this lack of notice violated his due process rights. Further, it appears that appellant argues that he was not given notice of his duty to register as a sex offender. Appellant fails to demonstrate that he suffered prejudice. Appellant claims that he should be allowed to withdraw his guilty plea due to lack of notice; however, appellant was convicted pursuant to a jury verdict. In addition, appellant fails to demonstrate how notice undermines confidence in the jury's verdict or would have had a reasonable probability of altering the outcome of the proceedings. Therefore, the district court did not err in denying this claim.[2]

Ineffective Assistance of Appellate Counsel

Next, appellant argues that the district court erred in denying his claims of 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. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). This court has held that appellate counsel will be

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[2]To the extent that appellant claims his appellate counsel was ineffective for failing to raise this claim on direct appeal, we conclude that appellant fails to demonstrate that this issue had a reasonable probability of success on direct appeal. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, appellant claims that his appellate counsel was ineffective for failing to argue on direct appeal that the district court erred in limiting questioning of the child witnesses' mental health assessments, prior sexual activities, and the children's observations of pornographic movies. Appellant argues that he was denied his Sixth Amendment right to confrontation by the district court's limitation on the questioning of the children. Appellant fails to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. A review of the record reveals that the district court limited questioning of a defense expert witness in these areas, but allowed questioning of the child witnesses concerning their mental health, prior sexual activities, and observations of pornography. On cross-examination, the child witnesses each testified concerning their sexual history, viewing of pornographic material, and any mental health problems. As such, appellant failed to demonstrate a reasonable probability of a different outcome at trial had there been further testimony in the challenged areas. The district court concluded that appellate counsel was not ineffective for failing to challenge the limitation of questioning of the child witnesses and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Second, appellant claims that his appellate counsel should have argued on direct appeal that the district court erred in excluding a defense expert witness' testimony concerning the child witnesses' sexual history, mental health problems and his conclusions as to how those areas would have affected the children's testimony. Appellant claims that this

testimony should have been admitted to show whether the children's behavior was inconsistent with that of victims of sexual assault. Appellant fails to demonstrate that his appellate counsel was deficient or that he was prejudiced. Appellant's appellate counsel raised the issue of limitations placed on the testimony of the expert witness on direct appeal and this court considered and rejected that challenge. Because this court had rejected the merits of the underlying claim, appellant cannot demonstrate that his appellate counsel was deficient or that he was prejudiced. Further, on cross-examination, the child witnesses each testified concerning their sexual history and any mental health problems. As such, appellant fails to demonstrate a reasonable probability of a different outcome at trial had the expert witness testified concerning those areas. The district court concluded that appellant's appellate counsel was not ineffective for failing to challenge the limitation on the testimony of the expert witness and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Conflict of Interest

Next, appellant claims that his appellate counsel operated under a conflict of interest, which denied him his right to a speedy trial and appeal. Prior to trial, the public defender's office withdrew due to a conflict because they represented the mother of one of the child victims in a criminal matter. Following trial and appellant's conviction, the public defender's office was appointed to represent appellant in his direct appeal. The public defender's office again withdrew, citing a conflict of interest because the district attorney who had prosecuted appellant at trial had subsequently been hired by the public defender's office. However, the former district attorney left the public defender's office soon after the

office withdrew from this case. This court was notified that the conflict from the former district attorney no longer existed, and the public defender's office was reappointed by order of this court. Ebeling v. State, Docket No. 38315 (Order Vacating Prior Order and Reinstating the Washoe County Public Defender as Appellate Counsel, August 28, 2002).

In the context of an ineffective assistance of counsel claim based on an alleged conflict of interest, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" Strickland, 466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 350, 348 (1980)); see Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992); but see Cuyler, 446 U.S. at 348 (holding that prejudice is presumed if the district court fails to provide a defendant the opportunity to show that a potential conflict of interest, that the defendant has timely objected to, impermissibly imperils his right to a fair trial). The existence of an actual conflict of interest must be established on the specific facts of each case, but "'[i]n general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties.'" Clark, 108 Nev. at 326, 831 P.2d at 1376 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

In the instant case, appellant fails to demonstrate that an actual conflict of interest existed. Appellant's appellate counsel testified that the public defender's office stopped work on the appeal when the former district attorney began employment with their office and only began work after the conflicted attorney left employment with the public defender. Further, at the evidentiary hearing, the former district attorney testified that she had no involvement with appellant's direct appeal. In

regards to the public defender's representation of a victim's mother in a separate matter, appellant did not demonstrate that any conflict of interest adversely affected his appellate counsel's performance. In addition, appellant failed to demonstrate that there was a violation of his speedy trial rights. Furbay v. State, 116 Nev. 481, 484-85, 998 P.2d 553, 555 (2000). Further, appellant failed to demonstrate that the delay in his direct appeal affected the outcome. The district court concluded that appellant failed to demonstrate a conflict of interest and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Lifetime Supervision

Next, appellant makes numerous challenges to the imposition of lifetime supervision. Appellant raised these claims in his petition before the district court under a claim of ineffective assistance of appellate counsel, but elected to challenge them directly in his brief before this court. Appellant argues as follows: (1) that lifetime supervision violates due process and the double jeopardy clause of the constitution, (2) that lifetime supervision imposes an enhancement that was not presented to a jury, (3) that lifetime supervision violates appellant's constitutional right to travel, and (4) that lifetime supervision unconstitutionally restricts appellant's first amendment rights. Claims (1) and (2) could have been raised on appellant's direct appeal, and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b); see also Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Further, it appears that claims (3) and (4) are not ripe as no specific conditions have been imposed at this time. Palmer v. State, 118 Nev. 823, 827, 59

P.3d 1192, 1194-95 (2002). Therefore, the district court did not err in denying these claims.

To the extent that appellant claims that his appellate counsel was ineffective for failing to argue on direct appeal that the imposition of lifetime supervision was unconstitutional, appellant failed to demonstrate that any omitted issue had a reasonable probability of success on appeal, and thus, appellant failed to demonstrate that his appellate counsel was ineffective for failing to present these issues. In his petition below, appellant's contention that lifetime supervision is unconstitutional under Blakely v. Washington, 542 U.S. 296 (2004) becaus e it functions as a sentencing enhancement, which must be presented to and found by a jury, unless waived by the defendant, is without merit. Lifetime supervision does not increase the maximum possible sentence based on additional facts not found by a jury or admitted by a defendant. See id. at 303; Apprendi v. New Jersey, 530 U.S. 466, 483, 488 (2000). Rather, lifetime supervision is a mandatory special sentence imposed upon sex offenders upon release after the expiration of the offender's prison term or parole or probationary period. Palmer, 118 Nev. at 827, 59 P.3d at 1194. As such, appellant failed to demonstrate that there was a reasonable probability of altering the outcome of his direct appeal had this issue been raised. Therefore, the district court did not err in denying this claim.

In his petition below, appellant claimed that his appellate counsel was ineffective for failing to argue that should he be paroled, subjecting him to the parole conditions for sexual offenders and lifetime supervision violates due process and double jeopardy principles, as well as his right to travel and freedom of speech. See NRS 213.1245; NRS 213.1255. Appellant failed to demonstrate that he was prejudiced. NRS

176.0931(2) provides that lifetime supervision does not begin until the conclusion of "any period of probation or any term of imprisonment and any period of release on parole." Thus, appellant will not face conditions imposed by lifetime supervision at the same time that he is subject to parole conditions.

Should appellant's parole term ever be terminated in the future, appellant's claim is without merit. Lifetime supervision was enacted by the legislature and codified in NRS 176.0931. Even assuming, without deciding, that NRS 176.0931 provides a cumulative punishment for the same offense, "the question of whether double jeopardy is violated by cumulative sentences for the same offense depends solely on the legislature's intent in authorizing such sentences." Talancon v. State, 102 Nev. 294, 298-99, 721 P.2d 764, 767 (1986). By virtue of the fact that NRS 176.0931 was enacted by the legislature, it is clear that the legislature intended that a defendant convicted of a sexual offense be subjected to certain conditions if paroled and lifetime supervision. In addition, appellant's claims concerning his right to travel and freedom of speech are not ripe as no specific conditions have been imposed at this time. Palmer, 118 Nev. at 827, 59 P.3d at 1194. Thus, appellant failed to demonstrate a reasonable probability that these claims would have been successful on direct appeal. Therefore, the district court did not err in denying this claim.

Cruel and Unusual Punishment

Next appellant claims that his sentence is cruel and unusual punishment. Appellant raised this claim in his petition before the district court under a claim of ineffective assistance of appellate counsel, but elected to challenge it directly in his brief before this court. To the extent

appellant directly challenges his sentence, appellant could have raised this claim in his direct appeal, and appellant failed to demonstrate good cause for his failure to due so. NRS 34.810(1)(b); see also Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Therefore, the district court did not err in denying this claim.

To the extent that appellant claims that he received ineffective assistance of appellate counsel for failing to argue that his sentence was cruel and unusual, appellant failed to demonstrate that this issue had a reasonable probability of success on appeal, and thus, appellant failed to demonstrate that his appellate counsel was ineffective for failing to present this issue on direct appeal. Appellant failed to demonstrate that his sentences were unreasonably disproportionate to the crimes committed in the instant case. See Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion). The record reveals that appellant sexually assaulted and committed lewd conduct with five children on multiple occasions over a number of years. The district court imposed sentences within the statutory limits.[3] Therefore, the district court did not err in denying this claim.

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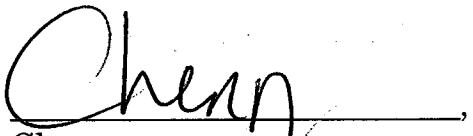
[3]See NRS 201.230 (providing for a term of life with the possibility of parole after 10 years for lewdness with a child under the age of 14); 1999 Nev. Stat., ch. 105 § 23 at 432 (providing for a term of life with the possibility of parole after 20 years for sexual assault with a child under the age of 14); NRS 193.330 (providing for a term 2 to 20 years for attempted sexual assault on a child under the age of 14); NRS 201.220 (providing that indecent exposure is a gross misdemeanor).

Conclusion

Accordingly, having considered Ebeling's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
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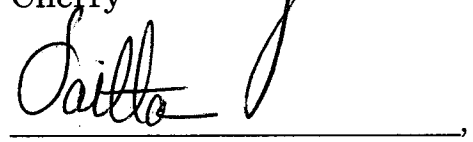

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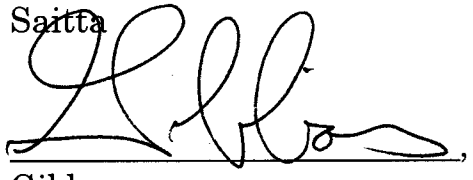

_____, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
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