IN THE SUPREME COURT OF THE STATE OF NEVADA

KURT AUSTIN HEILIG A/K/A KENT HEILIG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50820

FILED

JUL 11 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 appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On August 24, 2006, the district court convicted appellant, pursuant to a guilty plea, of attempted lewdness with a minor under the age of fourteen. The district court sentenced appellant to serve a term of 24 to 96 months in the Nevada State Prison. No direct appeal was taken.

On July 17, 2007, 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 January 7, 2008, the district court denied appellant's petition after conducting an evidentiary hearing. This appeal followed.

In his petition, appellant contended 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.[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 claimed that his guilty plea was invalid because the State improperly threatened to use a non-Mirandized[4] statement taken after appellant had invoked his right to counsel that appellant had made if appellant proceeded to trial. Appellant did not identify the statement, or specific circumstances during which he provided the statement to the police.[5] Therefore, the district court did not err in denying this claim.[6]

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[1]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).

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

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

[4]Miranda v. Arizona, 384 U.S. 436 (1966).

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

[6]To the extent that appellant claimed that his counsel was ineffective for failing to move to suppress appellant's statements to the police, appellant failed to demonstrate that his counsel was deficient or that appellant was prejudiced for the reasons discussed above.

Next, appellant claimed that he received ineffective assistance of counsel. 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.[7] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[8] "[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."[9] 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.[10]

First, appellant claimed that his trial counsel was ineffective for failing to arrange for a psychological evaluation of the victim. He asserted that such an evaluation would have revealed that the victim had been coached by her mother. Appellant provided no support

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

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

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

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

demonstrating that his counsel could compel the victim to undergo a psychological evaluation.[11] Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to investigate or interview witnesses. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Appellant did not specifically identify the possible or potential witnesses that he asserted his counsel failed to interview or identify the information the witnesses would have provided.[12] Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to inform him of the specific conditions of lifetime supervision.

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[11]During the pendency of appellant's case in the district court, this court required that a defendant seeking to compel a child victim to undergo a psychological evaluation had to show that (1) the State had notified the defense that it intended to examine the victim with his own expert, and (2) the defendant made a prima facie showing of a compelling need for a psychological evaluation. State v. District Court (Romano), 120 Nev. 613, 623, 97 P.3d 594, 600 (2004), overruled by Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006). Whether the need was compelling was determined by "(1) whether little or no corroboration of the offense exist[ed] beyond the victim's testimony, and (2) whether there [was] a reasonable basis 'for believing that the victim's . . . emotional state may have affected his or her veracity.'" Romano, 120 Nev. at 623, 97 P.3d at 600 (quoting Koerschner v. State, 116 Nev. 1111, 1117, 13 P.3d 451, 455 (2000)).

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

He further claimed that his counsel failed to inform him that those conditions were unconstitutional. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. 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.[13] 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 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.[14]

Appellant's claim that he was unaware of the consequence of lifetime supervision is belied by the record.[15] The plea agreement, which appellant signed, informed appellant that appellant's sentence would include lifetime supervision "commencing after any period of probation or any term of imprisonment and period of release upon parole" and that the "special sentence of lifetime supervision must begin upon release from

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

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

[15]Hargrove, 100 Nev. at 503, 686 P.2d at 225.

incarceration." Further, during the plea canvass, appellant acknowledged that his sentence would include a special sentence of lifetime supervision, that he understood what the sentence of lifetime supervision entailed, and that his counsel had answered all appellant's questions about lifetime supervision. Moreover, because the conditions of lifetime supervision are not determined until after a hearing is conducted just prior to the sex offender's completion of a term of parole or probation, or release from custody,[16] appellant's counsel could not have challenged any particular condition as unconstitutional. Therefore, the district court did not err in denying this claim.[17]

Fourth, appellant claimed that his trial counsel was ineffective for failing to withdraw as counsel due to a conflict of interest. Specifically, appellant testified at the evidentiary hearing that his counsel's act of representing both appellant and his wife in the dissolution of a temporary protective order created a conflict of interest in appellant's criminal representation in the instant case. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. To show a Sixth Amendment violation of his right to counsel, appellant must demonstrate

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[16]NRS 213.1243(1); NAC 213.290.

[17]To the extent that appellant claimed that his guilty plea was invalid due to ineffective assistance of counsel, appellant failed to carry his burden of demonstrating that his guilty plea was entered involuntarily or unknowingly for the reasons discussed above. See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 367-68 (1986).

both an actual conflict and an adverse effect on his attorney's performance.[18] "'In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties.'"[19] Where a petitioner demonstrates an actual conflict of interest which adversely affects his counsel's performance, this court presumes prejudice to the petitioner.[20] Appellant did not demonstrate that his counsel represented adverse interests. Appellant's wife was not an adverse party in the subsequent criminal action against appellant. Further, appellant's counsel stated that he did not learn any confidential or privileged information from appellant's wife that would have hindered his ability to represent appellant.[21] The district court determined that appellant failed to demonstrate by a preponderance of the evidence that appellant's counsel

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[18]Cuyler v. Sullivan, 446 U.S. 335, 348 (1980); see also Burger v. Kemp, 483 U.S. 776, 783 (1987) (providing that prejudice 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" (internal quotation marks omitted, citation omitted, emphasis added)).

[19]Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

[20]Id.

[21]See Mannon v. State, 98 Nev. 224, 226, 645 P.2d 433, 434 (1982) (providing that counsel should have withdrew when the attorney's duty to protect the confidentiality of one client's statement conflicted with appellant's duty to vigorously defend another client).

represented adverse interests, and substantial evidence supports the district court's determination.[22] Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel failed to file an appeal despite appellant's timely request that he 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."[23] "The burden is on the client to indicate to his attorney that he wishes to pursue an appeal."[24]

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant testified that he asked his counsel prior to the sentencing hearing if there were any issues that could be appealed at that point. His counsel told him there were none. Appellant admitted that he did not ask for an appeal after sentencing. Appellant's trial counsel testified that appellant never asked

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[22]State v. Rincon, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) (emphasizing that "the district court is in the best position to adjudge the credibility of the witnesses and the evidence," and this court should not disturb that determination unless it has a "'definite and firm conviction that a mistake has been committed'") (quoting State v. McKellips, 118 Nev. 465, 469, 49 P.3d 655, 658 (2002)).

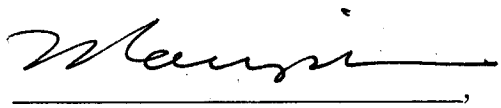
[23]Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994); see Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

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

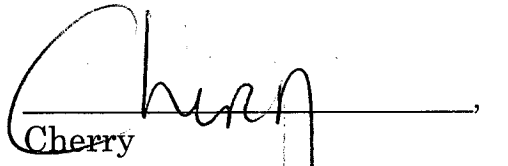
for an appeal. The district court determined that appellant failed to demonstrate by a preponderance of the evidence that he requested a direct appeal after sentencing, and substantial evidence supports the district court's determination.[25] Therefore, the district court did not err in denying this claim.

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.[26] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Maupin



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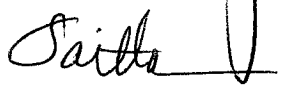

_____, J.
Saitta

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[25]Rincon, 122 Nev. at 1177, 147 P.3d at 238 (quoting McKellips, 118 Nev. at 469, 49 P.3d at 658-59).

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

cc: Hon. Michelle Leavitt, District Judge
Kurt Austin Heilig
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk