IN THE SUPREME COURT OF THE STATE OF NEVADA

DERRICK SUMUEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51475

FILED

DEC 17 2008

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. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On January 22, 2007, the district court convicted appellant, pursuant to a guilty plea, of pandering of a child, battery with intent to commit sexual assault, and use of a minor in producing pornography. The district court sentenced appellant to serve a term of one to ten years in the Nevada State Prison for the pandering count, two years to life for the battery count, and five years to life for the pornography count, all concurrent. No direct appeal was taken.

On December 3, 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 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On April 7, 2008, the district court denied appellant's petition. 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]

First, appellant claimed that trial counsel was ineffective for failing to perform an adequate investigation. Specifically, appellant claimed that further investigation would have revealed that the victim was willing to recant her statements to police, and that the victim's former boyfriend was willing to testify that the victim had been a prostitute prior to meeting appellant. Appellant asserted that had his trial counsel been aware of this testimony, trial counsel would not have "inveigled' him to waive his preliminary hearing and accept the plea agreement. Appellant failed to demonstrate that trial counsel's performance was deficient. Review of the record reveals that defense counsel was aware of these facts well before appellant entered his guilty plea. Accordingly, appellant failed to demonstrate a reasonable likelihood that further investigation by counsel would have led appellant to insist on proceeding to trial. Therefore, the district court did not err in denying this claim.

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[1]Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

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

Second, appellant claimed that trial counsel was ineffective for failing to recognize that there was insufficient evidence to prove beyond a reasonable doubt each element of the crimes to which appellant was pleading guilty. Appellant failed to demonstrate that trial counsel's performance was deficient. Appellant claimed that the purpose of the child pornography statute was to prevent distribution of child pornography, and that because there was no evidence that he was engaged in distribution, he could not have been convicted of the use of a minor to produce pornography. Because distribution was not an element of the crime with which he was charged, appellant's claim was without merit.[3] Appellant also claimed that he could not be convicted of pandering of a child based on the victim's uncorroborated testimony.[4] However, the record reflects that the State was prepared to offer corroborating evidence. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to accurately advise him of the penalty for battery with intent to

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[3]NRS 200.710(1) states that "[a] person who knowingly uses, encourages, entices or permits a minor to simulate or engage in or assist others to simulate or engage in sexual conduct to produce a performance" is guilty of using a minor to produce pornography. "Performance" is defined in the statute as "any play, film, photograph, computer-generated image, electronic representation, dance or other visual presentation." NRS 200.700(1).

[4]See Sheriff v. Gordon, 96 Nev. 205, 206-07, 606 P.2d 533, 534 (1980) (holding that NRS 175.301 prohibits trial of a defendant for pandering when the indictment is supported only by the uncorroborated testimony of the victim). NRS 175.301 was amended in 2005 and the clause cited by the Gordon court was removed from the statute. See 2005 Nev. Stat., ch. 113, § 1, at 308.

commit a crime. Specifically, appellant claimed that he thought the battery count carried a sentence of only 2 to 15 years, rather than the life sentence that he received. Appellant failed to demonstrate that he was prejudiced. Both the guilty plea agreement and the plea canvass reflect that appellant was aware of the sentence he was facing.[5] Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that as a result of the alleged errors of counsel, he did not enter into the guilty plea knowingly and intelligently and should be allowed to withdraw his plea. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[6] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[7] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[8]

We conclude that appellant failed to establish that his plea was entered unknowingly. As stated above, appellant's claims of ineffective assistance of counsel are without merit. Moreover, appellant signed the written guilty plea agreement and informed the district court

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[5]See NRS 200.400(4)(b) (stating that battery with the intent to commit sexual assault is punishable by a prison term of two years to life).

[6]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).

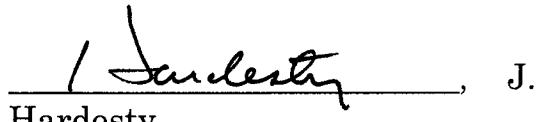
[7]Hubbard, 110 Nev. at 675, 877 P.2d at 521.

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

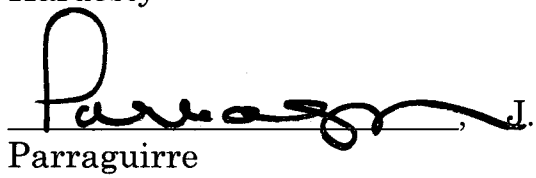
during the plea canvass that he had read and understood its contents. In the written guilty plea agreement and during the plea canvass, appellant admitted to committing each of the crimes of which he was subsequently convicted. Therefore, the district court did not err in denying this claim.

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.[9] Accordingly, we

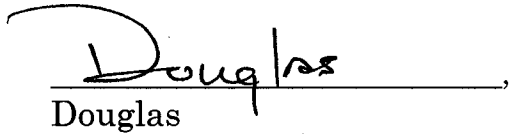
ORDER the judgment of the district court AFFIRMED.[10]



_____, J.
Hardesty



_____, J.
Parraguirre



_____, J.
Douglas

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

[10]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.

cc: Hon. Jackie Glass, District Judge
Derrick Sumuel
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk