

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID HAROLD BALLARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51928

FILED

JUL 07 2009

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant David Harold Ballard's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On October 13, 2004, the district court convicted Ballard, pursuant to a guilty plea, of one count of sexual assault. The district court sentenced Ballard to serve a prison term of 10 to 25 years with credit for 112 days time served. Ballard did not file a direct appeal.

On July 27, 2005, Ballard filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Ballard. Counsel filed a supplemental petition and, later, a motion for discovery of the victim's school records. The State opposed the discovery motion, the district court denied the motion, and this court dismissed Ballard's appeal from the order denying the motion. Ballard v. State, Docket No. 47541 (Order Dismissing Appeal, September 6, 2006).

On September 13, 2006, Ballard filed a motion for an evidentiary hearing regarding discovery of the victim's school records. The

State opposed the motion, Ballard filed a reply, and the district court granted the motion. During the evidentiary hearing, the district court heard the testimony of Ballard's defense counsel, Ballard, and Ballard's wife. Thereafter, the district court entered an order facilitating the discovery of the victim's school records.

On May 8, 2007, Ballard requested an informal hearing, without a court reporter, to consider the victim's school records, because they were protected by the Family Educational Rights and Privacy Act. See 20 U.S.C. § 1232g. The State did not oppose the request. The district court granted the request, conducted the informal hearing, and subsequently denied Ballard's petition and supplemental petition for a writ of habeas corpus. This appeal followed.

Ballard challenges the district court's ruling on one of his claims of ineffective assistance of 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 was deficient, and that the petitioner was prejudiced by counsel's performance. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1987)). To show prejudice, a petitioner who has entered a guilty plea must demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 988, 923 P.2d at 1107 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)) (emphasis omitted). The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong. See Strickland, 466 U.S. at 697. Further, a petitioner must demonstrate the factual allegation underlying his


ineffective assistance of counsel claim by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

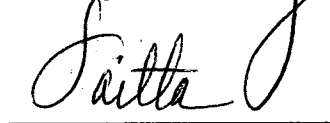
Ballard contends that defense counsel was ineffective for failing to obtain and review the victim's school records before encouraging him to plead guilty to sexual assault. Ballard claims that the victim's school records show that she was 17 years old at the time of the incident and that she had the mental capacity to engage in consensual sexual intercourse. Ballard argues that these records presented a defense of consent to the charge of sexual assault. Ballard asserts that he would not be guilty of any crime if the victim had the mental capacity of a 17-year-old and consented to the sexual intercourse or he would be guilty of statutory sexual seduction if the victim had the mental capacity of someone less than 16 years of age and consented to the sexual intercourse. And Ballard states that defense counsel failed to inform him of the defense of statutory sexual seduction before advising him to plead guilty to sexual assault.


The district court determined that this claim was without merit. During the evidentiary hearing, defense counsel testified that (1) during an interview, the victim told him that she did not want to have sexual intercourse with Ballard, she tried to push him off, and he forced himself upon her; (2) the victim made a credible and sympathetic witness; (3) Ballard thought that a jury was more likely to believe the victim; (4) had Ballard insisted on going to trial, the State would have filed additional charges based on sexual acts Ballard admitted to performing on the victim when she was 15 years old; (5) Ballard had at least four misdemeanor convictions for indecent exposure, which the State would have tried to get before the jury; and (6) Ballard told defense counsel that

he did not want to go to trial because he thought the risk in terms of the penalty was too great and he did not think the jury would believe him. We also note that the victim was 17 years old and, therefore, statutory sexual seduction was not a possible defense to the charge of sexual assault. See NRS 200.364(3); Slobodian v. State, 98 Nev. 52, 53, 639 P.2d 561, 562 (1982) (“[t]he crime of statutory sexual seduction requires a victim under the age of sixteen”). Given these circumstances, we conclude that Ballard failed to demonstrate that he would not have pleaded guilty and would have insisted on going to trial had defense counsel obtained and reviewed the victim’s school records before advising him to plead guilty. Consequently, Ballard has failed to show that the district court abused its discretion by denying this claim, and we

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Cherry

 _____, J.
Saitta

 _____, J.
Gibbons

cc: Hon. Steven R. Kosach, District Judge
Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk