

IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE DOCK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54183

FILED

MAR 10 2010

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 a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

In his petition filed on November 17, 2008, appellant claimed that he received ineffective assistance of trial counsel. To show that trial counsel was ineffective, appellant 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 was a reasonable probability of a different result in the proceedings. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984). To show prejudice to invalidate the

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

decision to enter a guilty plea, appellant must demonstrate that he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. 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, Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004), and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant claimed that his trial counsel failed to adequately investigate his innocence and call available witnesses. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel testified at the evidentiary hearing that she personally investigated the matter as well as used an investigator from the Public Defender's Office. Appellant's trial counsel pursued the areas of investigation identified by appellant. Appellant's decision to enter a guilty plea obviated the need for a further investigation and need to call witnesses. Appellant received a substantial benefit by entry of his plea to one count of attempted sexual assault on a minor under the age of 16 because appellant avoided going to trial on the original charges, which included 6 counts of sexual assault on a minor under the age of 16, 1 count of open or gross lewdness, and 4 counts of sexual assault. Under these facts, appellant failed to demonstrate by a reasonable probability that he would not have entered a guilty plea in the

instant case. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for coercing his guilty plea. Appellant claimed that his trial counsel told him that he would be found guilty if he went to trial, that he could receive a 40 to life sentence, and that he had no right to appeal. Appellant failed to demonstrate that his trial counsel's performance was deficient. It is not deficient for trial counsel to provide candid advice about the potential outcome at trial. Appellant's trial counsel testified at the evidentiary hearing that she did not tell appellant that he could not appeal, but they had discussed the merits of any appellate issues. Therefore, we conclude that 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 DNA results, which were inconclusive. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel testified that although she did not have the actual piece of paper in hand, she had received information that appellant was not a match to DNA found in his stepdaughter's bedroom. Appellant's trial counsel further testified that she informed appellant about the results prior to entry of his plea. Thus, appellant failed to demonstrate by a reasonable probability that he would not have entered a guilty plea and would have insisted on going to trial. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to request the victim take a polygraph examination. Appellant

failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel testified that there was no legal authority for seeking a polygraph examination of the victim. See generally Santillanes v. State, 102 Nev. 48, 50, 714 P.2d 186, 186 (1986). In light of the benefit he received, appellant failed to demonstrate by a reasonable probability that he would not have entered a guilty plea and would have insisted on going to trial. Therefore, the district court did not err in denying this claim.²

Fifth, appellant claimed that trial counsel was ineffective for failing to inform the district court of his learning disability—dyslexia. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel testified that she knew about the learning disability but that she had no concerns that the learning disability affected appellant's competency. Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (to show incompetency, a petitioner must demonstrate that he did not have

²To the extent that appellant claimed that his trial counsel should have asked for a psychological evaluation of the victim, appellant's trial counsel testified that she considered whether to file a motion for an evaluation and determined it would likely be denied. Appellant failed to demonstrate that his trial counsel was ineffective in this regard. See Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006) (discussing factors for a psychological evaluation of the victim). Likewise, appellant failed to demonstrate trial counsel was ineffective for failing to request a psychological evaluation of appellant.

sufficient present ability to consult with his lawyer at the time he entered his plea and that he did not have a rational and factual understanding of the proceedings); see also Dusky v. United States, 362 U.S. 402 (1960). She further testified that she was able to communicate with appellant. Appellant failed to demonstrate a reasonable probability of a different outcome had trial counsel informed the district court of this fact. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to adequately explain the waiver of constitutional rights, and consequences of the guilty plea. Appellant failed to demonstrate that he was prejudiced. The written plea agreement, which appellant acknowledged reading, signing and understanding, informed appellant of the waiver of constitutional rights and the consequences of the guilty plea.³ Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for failing to investigate his alibi defense and that his trial counsel promised a lower sentence. Appellant provided no argument during the hearing regarding a possible alibi defense and appellant acknowledged that his trial counsel had not promised a lower sentence. Therefore, the district court did not err in denying these claims.

³Appellant stated at the evidentiary hearing that when he answered "yes" to reading the plea agreement, he meant that his trial counsel had read the plea agreement.

Eighth, appellant claimed that trial counsel was ineffective because a week before trial she was arrested for driving under the influence. Trial counsel testified that this did not affect her representation, and appellant failed to provide any specific facts supporting a claim that this arrest affected her performance. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Therefore, the district court did not err in denying this claim.

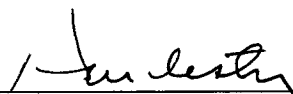
Ninth, appellant claimed that trial counsel was ineffective for failing to file an appeal after being requested to do so.⁴ Appellant failed to demonstrate that trial counsel's performance was deficient because the testimony provided at the evidentiary hearing indicated that appellant requested an appeal after the time period for filing a direct appeal. Further, there was testimony that an appeal had been discussed prior to sentencing as part of the discussion regarding whether to waive the right to trial and enter a plea. Therefore, the district court did not err in denying this claim.

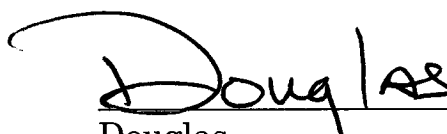
Finally, appellant claimed that the district court abused its discretion in failing to grant his motion for substitute counsel and inquire into his claim of a conflict of interest. This claim fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus

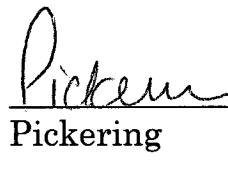
⁴To the extent that appellant claimed that trial counsel was ineffective for failing to inform appellant about the right to appeal, appellant was informed of the limited right to appeal in the written guilty plea agreement. Davis v. State, 115 Nev. 17, 19, 974 P.2d 658, 659 (1999).

challenging a judgment of conviction based on a guilty plea. NRS 34.810(1)(a). Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁵


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Donald M. Mosley, District Judge
Tyrone Dock
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁵We 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.