


IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID M. CHUTE,
Appellant,
vs.
WARDEN, LOVELOCK
CORRECTIONAL CENTER, JACK
PALMER,
Respondent.

No. 54778

FILED

JAN 13 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County, Steven P. Elliott, Judge.

Appellant argues the district court erred in denying four claims of ineffective assistance of counsel without conducting an evidentiary hearing. To prove ineffective assistance of counsel at sentencing, appellant must demonstrate that trial 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, the outcome of the proceedings would have been different. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). To prove prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner must demonstrate 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. Kirksey, 112 Nev. at 988, 923 P.2d at 1107. Both components of the inquiry must be shown. Strickland v. Washington, 466

U.S. 668, 697 (1984). A petitioner is only entitled to an evidentiary hearing on claims supported by specific facts not belied by the record that, if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, appellant claims that trial counsel was ineffective for failing to investigate his statement made to the police and for failing to consult with appellant regarding that statement in preparation for sentencing. Appellant fails to demonstrate that he was prejudiced because he fails to demonstrate a reasonable probability of a different outcome at sentencing had trial counsel reviewed the police statement and consulted with appellant regarding his statement. The district court stated at sentencing that the reason he could not impose probation was because of the harm suffered by the victim. Therefore, the district court did not err in denying this claim.

Second, appellant claims that trial counsel was ineffective for failing to present argument in appellant's favor at sentencing. Appellant fails to demonstrate that trial counsel was deficient or that he was prejudiced. Most of the arguments that appellant claimed should have been presented were presented during sentencing. Further, appellant fails to demonstrate a reasonable probability of a different outcome at sentencing had trial counsel presented the other arguments. Therefore, the district court did not err in denying this claim.

Third, appellant claims that trial counsel was ineffective for failing to request a continuance at sentencing because of an error under Buschauer v. State, 106 Nev. 890, 804 P.2d 1046 (1990). Appellant failed to provide any specific, cogent argument regarding this claim on appeal. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Therefore, we conclude that appellant fails to demonstrate that the district court


erred in denying this claim. Further, the underlying claim was raised on direct appeal and was rejected under the plain error standard. Because this court has already concluded that appellant's underlying claim did not demonstrate prejudice sufficient to warrant reversal, appellant necessarily fails to demonstrate prejudice from trial counsel's failure to request a continuance based on this claim. Therefore, the district court did not err in denying this claim.

Finally, appellant claims that the district court erred in denying without an evidentiary hearing his claim that trial counsel was ineffective regarding his plea. Specifically, appellant claims that trial counsel was ineffective for advising him to withdraw his first plea agreement and enter into a second, different agreement. Under the first plea agreement, appellant was informed he was facing three possible sentences: life in prison with the possibility of parole after ten years, a term of two to twenty years, or probation based on the offense occurring between June 19, 2000, and June 17, 2005. Under the second plea agreement, appellant's possible sentences were set forth as life in prison with the possibility of parole after ten years or probation based on the offense occurring between June 19, 2000, and September 30, 2003.¹ The first plea agreement included the possibility of an illegal sentence. While it appears from the record that trial counsel attempted to clarify why

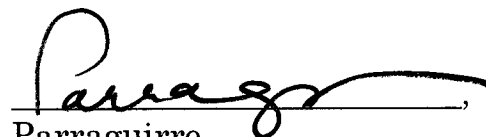
¹Between the years of 2000 and 2003, the possible penalty for lewdness with a minor under the age of fourteen was either life in prison with the possibility of parole in ten years or probation. 1999 Nev. Stat., ch. 105, § 49, at 471-72; 1997 Nev. Stat., ch. 641, § 19, at 3190. In 2003, the legislature revised the possible penalties by eliminating probation as a sentencing option and adding a term of two to twenty years. 2003 Nev. Stat., ch. 461, § 2, at 2826.

appellant was electing to withdraw from the first plea agreement, our review of the record reveals that counsel may have incorrectly informed appellant that he had to choose a specific time period for when the crime occurred in order to make the plea agreement valid. In Nevada, a defendant can agree to an illegal sentence. Breault v. State, 116 Nev. 311, 314, 996 P.2d 888, 889 (2000). Because the record is not clear on whether counsel advised appellant that he could stipulate to a potential illegal sentence, this case must be remanded to the district court for an evidentiary hearing to explore whether appellant was fully informed of the law in Nevada prior to making his decision. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Steven P. Elliott, District Judge
Dennis E. Widdis
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk