IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN RANDALL QUINTERO,
Appellant,
vs.
JACK PALMER, IN HIS OFFICIAL CAPACITY AS WARDEN OF THE LOVELOCK CORRECTIONAL CENTER AND HOWARD SKOLNIK, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS,
Respondents.

No. 55279

FILED

JUN 08 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Ingersoll
DEPUTY CLERK

ORDER OF AFFIRMANCE

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; Brent T. Adams, Judge.

On appeal from the denial of his June 10, 2008, petition, appellant argues that the district court erred in concluding that his guilty plea was voluntary because appellant was misinformed about the conditions under which he would have been eligible for probation.[1] Appellant was not misinformed. Because the crime to which appellant pleaded guilty occurred between July 2002 and July 2003, he would have been eligible for probation only if a psychosexual evaluation concluded

[1]Despite stipulating to a prison sentence, appellant was also informed by the district court that it could sentence him to probation should a psychosexual evaluation reveal that he was not a high risk to reoffend. NRS 176A.110.

that he did not represent a high risk to reoffend. 2001 Nev. Stat., ch. 345, § 3, at 1638. Appellant was correctly advised of this in both the guilty plea memorandum and during his plea colloquy. Because appellant's claim is belied by the record, he was not entitled to relief. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Moreover, as a separate and independent ground to deny relief, it is clear from the totality of the circumstances that appellant was aware that probation was not an option for him. See Little v. Warden, 117 Nev. 845, 849, 851, 34 P.3d 540, 542-43, 544 (2001). Although probation was not foreclosed by statute, appellant stipulated in the written memorandum and during the plea colloquy that he would serve a life sentence with the possibility of parole after ten years and that he would not seek probation. We therefore conclude that the district court did not err in denying this claim.

Appellant also argues that the district court erred in denying his claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate (a) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) resulting prejudice in 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. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown, Strickland v. Washington, 466 U.S. 668, 697 (1984), and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings regarding ineffective

assistance of counsel but review the court's application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant argues that the district court erred in concluding that counsel was not ineffective when he advised appellant to plead guilty without first adequately investigating the case.[2] Appellant fails to demonstrate prejudice. A petitioner claiming counsel did not conduct an adequate investigation bears the burden of showing that he would have benefited from a more thorough investigation. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Appellant presented no evidence of what a more thorough investigation would have yielded or how the additional evidence would have affected his decision to plead guilty. We therefore conclude that the district court did not err in denying this claim.

Second, appellant argues that the district court erred in concluding that counsel was not ineffective when he advised appellant to stipulate to a prison sentence without first investigating appellant's probation eligibility. Appellant fails to allege or demonstrate prejudice.

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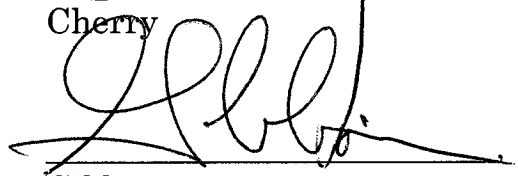
[2]Appellant appears to also argue in conjunction with this claim that counsel was ineffective for failing to advise appellant regarding his likelihood of parole and for failing to address appellant's post-plea contentions that he perjured himself during the plea colloquy. These arguments were not raised in appellant's petition and were not properly before the district court below. See Barnhart v. State, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006). We therefore decline to consider those arguments on appeal. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. at 1012-13, 103 P.3d at 33.

Appellant presented no evidence that the State would have made a different plea offer had a psychosexual evaluation been prepared prior to his pleading guilty. Further, had appellant rejected the plea agreement, he would have faced three counts of sexual assault on a child under 14 years, charges for which probation would not have been an option had he been convicted. See NRS 176A.110(3). We therefore conclude that the district court did not err in denying this claim.

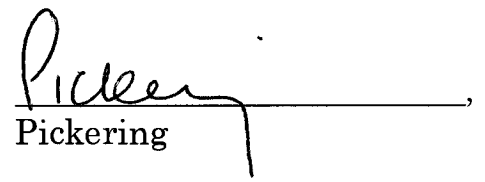
For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.[3]

_____, J.
Cherry



_____, J.
Gibbons



_____, J.
Pickering

cc: Hon. Brent T. Adams, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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[3]We decline the State's invitation to consider whether the district court abused its discretion in deciding to conduct an evidentiary hearing.