

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY PAUL LEAKE,

No. 34071

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

OCT 22 2001

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Roberts*  
CHIEF DEPUTY CLERK

ANTHONY PAUL LEAKE,

No. 35109

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

ORDER OF AFFIRMANCE

Docket Nos. 34071 and 35109 are proper person appeals from orders of the district court denying appellant's post-conviction petitions for writs of habeas corpus. We elect to consolidate these appeals for disposition.<sup>1</sup>

On February 15, 1996, the district court convicted appellant, pursuant to a guilty plea, of two counts of sexual assault. The district court sentenced appellant to serve two concurrent terms of life in the Nevada State Prison with the possibility of parole. Appellant did not file a direct appeal.

Docket No. 34071

On February 14, 1997, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel and filed a supplement to the petition. The State opposed the petition. The district court conducted an evidentiary hearing, and after the evidentiary hearing, appellant and the

<sup>1</sup>See NRAP 3(b).

State filed supplemental petitions. On March 31, 1999 the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his counsel was ineffective for various reasons. 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 fell below an objective standard of reasonableness. Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.<sup>2</sup>

First, appellant claimed that his counsel was ineffective for failing to raise the issue of consent of the victim as a defense to the crime of sexual assault and failing to discuss the defense of consent with appellant. We conclude that the district court did not err in denying these claims. At the evidentiary hearing, appellant's counsel stated that he did discuss the issue of consent with appellant. He also stated that he did not think that consent was a viable defense because the victim was eight years old and it was unlikely that a jury would believe that an eight-year old child would willingly consent to sexual acts with her step-father. Thus, appellant failed to demonstrate that his counsel was ineffective in this regard.

Next, appellant contended that his counsel was ineffective for failing to file a motion to suppress appellant's confession to the police. We conclude that the district court did not err in denying this claim. For an ineffective assistance of counsel claim to have merit when based upon counsel's failure to file a motion to suppress a confession, appellant must show that the motion to suppress was meritorious and that there was a reasonable likelihood that the exclusion of the confession would have changed the outcome.<sup>3</sup> At the evidentiary hearing, appellant's trial counsel stated that he did not challenge appellant's confession because in his professional judgment he believed appellant's confession was constitutional and he did not have a good faith basis to file a motion to

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<sup>2</sup>See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

<sup>3</sup>See Kirksey, 112 Nev. at 990-92, 923 P.2d at 1109-10.

suppress. Appellant failed to demonstrate that a motion to suppress would have been meritorious. Thus, we conclude that his counsel was not ineffective in this regard.

Lastly, appellant claimed that his guilty plea was involuntary because he received ineffective assistance of counsel. Specifically, he claimed that his counsel failed to spend adequate time with appellant resulting in counsel's failure to advise appellant of the waiver of his rights, the consequences of his guilty plea, and the sentencing options of the court.

A guilty plea is presumptively valid, and the petitioner has the burden of establishing that the plea was not entered knowingly and intelligently.<sup>4</sup> Further, this court will not reverse a district court's determination concerning the validity of a plea absent an abuse of discretion.<sup>5</sup>

Our review of the record on appeal reveals that the district court did not err in denying these claims. Appellant was thoroughly canvassed. The court advised him of the constitutional rights he was waiving as a result of pleading guilty. The court also advised appellant of the elements of the crime and elicited a factual admission from appellant. The court asked appellant if he had been able to communicate with his counsel regarding possible defenses, the elements of the offense, and what the State would have to prove if he went to trial. Appellant responded in the affirmative. The court further advised appellant of the possible ranges of his sentences. Specifically, the court advised appellant that he would not be eligible for parole until he had served ten years and had been certified. Appellant responded that he understood the sentences and that sentencing was in the discretion of the trial court. Appellant did not establish that his plea was involuntary or unknowingly entered. Moreover, the State agreed to dismiss other charges in exchange for appellant's guilty plea. Thus, appellant failed to demonstrate that but for counsel's alleged errors he would not have pleaded guilty.

Accordingly, we conclude that the district court did not err in denying appellant's petition, and we affirm the order of the district court.

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<sup>4</sup>See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

<sup>5</sup>See id. at 272, 721 P.2d at 368.

Docket No. 35109

On September 2, 1999, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. 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 October 19, 1999, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than three and one-half years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.<sup>6</sup> Moreover, appellant's petition was successive because he had previously filed a proper person post-conviction petition for a writ of habeas corpus in the district court.<sup>7</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>8</sup>

In an attempt to excuse his procedural defects, appellant argued that he did not previously present the claims in his second petition because he had limited access to the law library and the law clerks in the prison library are not adequately trained in post-conviction proceedings. In addition, appellant claimed that he was actually innocent of the crime because the State could not prove the elements of the alleged crime beyond a reasonable doubt. We conclude that the district court did not err in denying appellant's petition. Appellant failed to demonstrate sufficient cause to excuse his procedural deficiencies.<sup>9</sup> Moreover, appellant pleaded guilty to the crime of sexual assault thereby waiving his right to have the State prove every element beyond a reasonable doubt at trial. Appellant has failed to demonstrate a fundamental miscarriage of justice.<sup>10</sup> Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition.

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<sup>6</sup>See NRS 34.726(1).

<sup>7</sup>See NRS 34.810(2).

<sup>8</sup>See NRS 34.726(1); NRS 34.810(3).

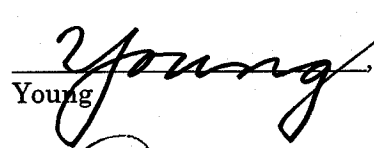
<sup>9</sup>See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994); see also Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).

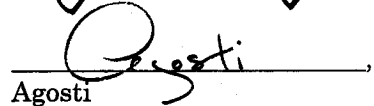
<sup>10</sup>See Mazzan v. Warden, 112 Nev. 838, 921 P.2d 920 (1996); see also Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

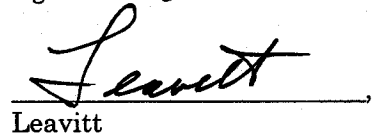
Conclusion

Having reviewed the records 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.<sup>11</sup> Accordingly, we

ORDER the judgments of the district court AFFIRMED.<sup>12</sup>

 J.  
Young

 J.  
Agosti

 J.  
Leavitt

cc: Hon. Peter I. Breen, District Judge  
Attorney General  
Washoe County District Attorney  
Anthony Paul Leake  
Washoe County Clerk

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<sup>11</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

<sup>12</sup>We have considered all proper person documents filed or received in these matters, and we conclude that the relief requested is not warranted.