IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN KINFORD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56491

FILED

SEP 29 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Steven Kinford's post-conviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; David A. Huff, Judge.

Kinford pleaded guilty to one count of lewdness with a child under the age of 14 years. This court dismissed Kinford's subsequent direct appeal pursuant to a request for voluntary dismissal. Kinford v. State, Docket No. 52377 (Order Dismissing Appeal, August 10, 2009). Kinford then filed a timely post-conviction petition for a writ of habeas corpus, raising claims of ineffective assistance of trial counsel and attacking the validity of his guilty plea. The district court held an evidentiary hearing where the only evidence considered was the record of prior proceedings. The district court denied his petition and Kinford now appeals, raising three claims of error.

First, Kinford claims that his plea was involuntarily entered because of impermissible judicial involvement in the plea negotiations. At his third arraignment, Kinford's counsel represented that the parties had negotiated a plea arrangement, but Kinford began to equivocate. The district court explained the sentence Kinford would receive under the plea

deal and the sentence he could possibly face if convicted of all the counts charged and sentenced consecutively. The district court also stated that if Kinford did not reach an agreement it would remand the case for a preliminary hearing and that he was required to decide whether or not to plead before the end of the day. The district court then continued the matter to afford Kinford an opportunity to consult with his counsel. After reconvening, the district court received Kinford's guilty plea and thoroughly canvassed him.

Kinford claims that the district court's comments violated the "bright-line rule" forbidding most judicial involvement in plea negotiations adopted by this court in Cripps v. State, 122 Nev. 764, 137 P.3d 1187 (2006). We agree that the district court's comments crossed this line. See U.S. v. Johnson, 89 F.3d 778, 783 (11th Cir. 1996) (noting that federal courts have consistently held that district courts are precluded from discussing "the penal consequences of a guilty plea as compared to going to trial" because such discussions are "inherently coercive, no matter how well-intentioned"). However, we conclude the error was harmless. See Cripps, 122 Nev. at 771, 137 P.3d at 1192 (approving the federal bright-line approach against judicial involvement in plea negotiations while concluding that such involvement "may constitute harmless error").

The focus of harmless-error review "'is whether the district court's [erroneous participation] may reasonably be viewed as having been a material factor affecting the defendant's decision to plead guilty.'" Id. (quoting U.S. v. Daigle, 63 F.3d 346, 349 (5th Cir. 1995)). Aside from the transcript of the arraignment, Kinford offered no evidence at his evidentiary hearing that the district court's comments caused him to plead guilty, but stated only that such a result must be inferred from the record.

The plea agreement was apparently settled in principle before the arraignment, but Kinford began to vacillate when the moment to enter the plea arrived. After the district court contrasted the penal consequences of going ahead with a trial—implying that, if convicted, the district court may impose consecutive sentences—with what was offered in the plea agreement, the court continued the matter to allow Kinford time to discuss the situation with his counsel. Kinford was then thoroughly and patiently canvassed, stating that he understood the rights he was surrendering, the sentence he would be serving, and that he had not been coerced into taking the plea. At the evidentiary hearing, the district court found that its intervention was intended only to "explain to the defendant the alternatives to the plea bargain" and that its intervention was not intimidating or coercive, particularly where Kinford was allowed time to consult with his attorney. Under these circumstances and presented with no evidence other than the face of the record, we are compelled to agree. We therefore conclude that although the district court erred in discussing penal consequences in order to facilitate a yet-unfinalized plea agreement, the error was harmless where Kinford has failed to prove that the intervention was a material factor in his decision to plead guilty.

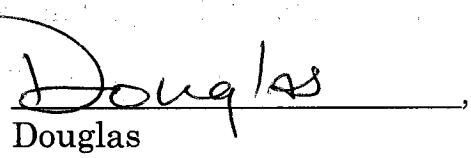
Second, Kinford makes a related claim that his counsel was ineffective for not intervening to stop a coerced plea. Kinford was granted an evidentiary hearing on this issue and provided no evidence to support this contention. The record shows that counsel conferred with Kinford and secured a plea agreement in which two counts of sexual assault of a child were dismissed, a deal that was arguably quite favorable. We conclude that Kinford has failed to meet his burden of proving that counsel's performance was deficient or that, but for counsel's allegedly deficient

performance, he would not have pleaded guilty and would have insisted on proceeding with the trial. See Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996); Hill v. Lockhart, 474 U.S. 52, 58-59 (1985).

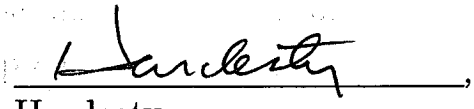
Third, Kinford argues that appellate counsel was ineffective for failing to recognize appealable issues and therefore incorrectly advising him that he had no basis to lodge a direct appeal. As this claim was not raised in his petition below, we decline to address it on appeal. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (noting that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

Having considered Kinford's claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Douglas



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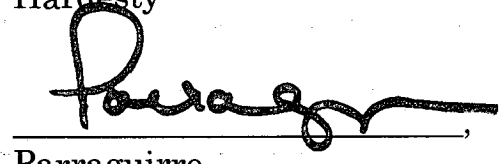

_____, J.
Parraguirre

cc: Hon. David A. Huff, District Judge
Erik R. Johnson
Attorney General/Carson City
Lyon County District Attorney
Lyon County Clerk