IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY ROSEBUSH,
Appellant,
vs.
JACK PALMER, WARDEN OF LOVELOCK CORRECTIONAL CENTER; AND HOWARD SKOLNIK, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS,
Respondents.

No. 57235

FILED

JUL 14 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Gary Rosebush's post-conviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

Rosebush claims that the district court erred by finding that the prosecution's failure to disclose DNA and forensic test results prior to entry of his plea and sentencing did not violate the disclosure requirements of Brady v. Maryland, 373 U.S. 83 (1963), and did not render his plea invalid.

The district court determined that no Brady violation occurred because the undisclosed evidence was not material. We review de novo a district court's determination of whether the State adequately disclosed information under Brady. Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). "Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment." Id. In the context of a guilty plea, undisclosed evidence is material if "there is a reasonable probability that but for the failure to disclose the Brady material, the defendant would have refused to

plead and would have gone to trial." Sanchez v. U.S., 50 F.3d 1448, 1454 (9th Cir. 1998). The test for materiality "is an objective one that centers on the likely persuasiveness of the withheld information." Id. (quotation marks and citation omitted).

Rosebush's claim that he would have gone to trial had he been apprised of the DNA and forensic test results fails to establish materiality. Under the objective test, forensic test results that came back negative for the presence of saliva or foreign material on the victim's genital area were cumulative and not material because Rosebush did not make a specific request for the results and the results did not create "a reasonable doubt which did not otherwise exist." Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996) (quotation marks and emphasis omitted). Therefore, we conclude that the prosecution did not violate Brady by failing to provide the forensic test results[1] and the failure to disclose the results did not render Rosebush's plea invalid.

Rosebush also claims that the district court erred by denying his claims that his counsel was ineffective and due to counsel's ineffectiveness his plea was not knowingly and intelligently entered.

"A defendant who pleads guilty upon the advice of counsel may attack the validity of the guilty plea by showing that he received ineffective assistance of counsel." Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004) (quotation marks omitted). When reviewing the

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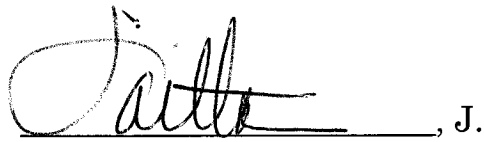
[1]Although Rosebush also argues that the prosecution violated Brady by failing to disclose DNA test results, the record reveals that there were no DNA test results available because DNA tests were never conducted on the samples taken from the victim and Rosebush.

district court's resolution of an ineffective-assistance claim, we give deference to the court's factual findings if supported by substantial evidence and not clearly erroneous 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).

The district court found that counsel's limited pretrial investigation, failure to obtain DNA and/or forensic test results, and failure to provide Rosebush with the test results or police reports before advising him to plead guilty was not deficient and did not prejudice him. Counsel discussed the strengths of the prosecution's case with Rosebush, explained that he lacked a good defense, and presented his options to him. The district court determined that counsel strategically advised Rosebush to accept the plea before the offer was removed from consideration and the reasonableness of this advice was buoyed by the fact that Rosebush had no recollection of the incident and would not be able to testify in his own defense. And Rosebush acknowledged that he entered the plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to an attempt charge in order to avoid a harsher sentence. Compare NRS 201.230(2) (providing sentence of life with possibility of parole after 10 years for conviction for lewdness with a child under age 14), with NRS 193.330(1)(a)(1) (providing a sentencing range of 2 to 20 years for an attempt to commit a category A felony). The district court's determinations are supported by substantial evidence, are not clearly erroneous, and are not wrong as a matter of law, see Hill v. Lockhart, 474 U.S. 52, 58-59 (1985) (identifying two-part test for evaluating claims of ineffective assistance of counsel when judgment is result of a guilty plea); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996) (same), and Rosebush failed to meet his heavy burden to

demonstrate that his plea was not knowingly, intelligently, and voluntarily entered, see Molina, 120 Nev. at 190, 87 P.3d at 537. Therefore, we conclude that the district court did not err by denying these claims.

Having concluded that Rosebush's claims lack merit, we ORDER the judgment of the district court AFFIRMED.



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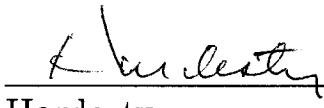

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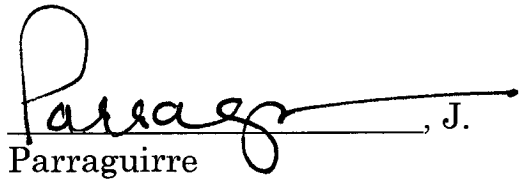

_____, J.
Parraguirre

cc: Hon. Leon Aberasturi, District Judge
Steve E. Evenson
Attorney General/Carson City
Lyon County District Attorney
Lyon County Clerk