IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT LANOUE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35947

FILED

OCT 12 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On June 25, 1998, the district court convicted appellant, pursuant to a guilty plea, of one count of lewdness with a child under 14 years (Count I), one count of use of a minor in producing pornography (Count II), and one count of possession of visual presentation depicting sexual conduct of a person under sixteen years of age (Count III).[1] The district court sentenced appellant to serve a term of twenty-four (24) to sixty-two (62) months on Count I, a term of life with a minimum parole eligibility of five (5) years on Count II, to run consecutively to Count I, and a term of twelve (12) to thirty-six (36) months on Count III, to run consecutively to Count II, in the Nevada State Prison. This court dismissed appellant's appeal from his judgment of conviction on October 19, 1999.[2] The remittitur issued on November 16, 1999.

On October 6, 1998, appellant filed a "motion to modify/correct illegal sentence" in the district court. The State opposed appellant's motion. On October 26, 1998, the district court denied appellant's motion

[1]The original judgment of conviction did not reflect that appellant was entitled to credit for time served. An amended judgment of conviction was entered on October 12, 1998, to reflect the proper credits.

[2]Lanoue v. State, Docket No. 32707 (Order Dismissing Appeal, October 19, 1999).

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to modify/correct illegal sentence. Appellant did not appeal from this decision.

On December 14, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. 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 February 23, 2000, the district court denied appellant's petition. This appeal followed.

In his petition, appellant first contended that his plea canvass was insufficient because the district court failed to determine (1) whether appellant understood his waiver of constitutional rights, (2) whether appellant's guilty plea was the product of coercion or threats or a promise of leniency, and (3) whether appellant had discussed the plea agreement with his attorney. Our review of the record on appeal reveals that the district court did not err in denying this claim.[3] First, the written guilty plea agreement informed appellant about the rights he was waiving by entry of his plea and contained statements that appellant's plea was not the product of coercion or improper threats. During the plea canvass, appellant acknowledged having two years of college education, and admitted to reading, signing, and understanding the written guilty plea agreement. Next, the court elicited a factual admission to each count from appellant, advised him of the possible ranges of sentences and that the district court could order that the sentences be served consecutively or concurrently, and also informed appellant that as part of his sentence he would receive lifetime supervision commencing after any period of probation or any term of imprisonment. This explanation was sufficient to assure the district court that appellant's plea was not the product of a promise of leniency. Finally, the written guilty plea agreement stated that appellant discussed the case with his attorney. Moreover, the record reveals that appellant was adequately canvassed in this regard. At the time set for preliminary hearing, the parties indicated to the court that the case had been negotiated. The court then inquired whether appellant had spoken to his attorney about "this plea bargain." Appellant

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[3]See State v. Freese, 116 Nev. __, 13 P.3d 442 (2000); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

acknowledged that he had. Thus, appellant is not entitled to the relief requested.

Second, appellant contended that his trial counsel was ineffective for failing to object to the allegedly insufficient plea canvass. 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.[4] 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.[5] The court need not consider both prongs if the defendant fails to make a showing on either prong.[6] As discussed above, appellant's canvass was sufficient; therefore, appellant's counsel was not unreasonable for failing to object to appellant's plea canvass. Further, in exchange for his plea of guilty, the State agreed to dismiss two (2) counts of lewdness with a child under 14 years, three (3) counts of use of a minor in producing pornography, and sixty-seven (67) counts of possession of visual presentation depicting sexual conduct of a person under sixteen years of age. Thus, appellant has failed to show a reasonable probability that, but for any alleged errors of counsel, he would not have pleaded guilty and would have insisted on going to trial. This contention therefore lacks merit.

Third, appellant contended that his appellate counsel was ineffective for (1) failing to inform appellant that withdrawal of a guilty plea is properly pursued through post-conviction relief remedies or by a motion to withdraw guilty plea, and (2) raising appellant's claim for withdrawal of his guilty plea on direct appeal. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."[7] Appellate counsel is not required to raise every non-frivolous

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[4]See Hill v. Lockhart, 474 U.S. 52, (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

[5]See Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

[6]See Strickland v. Washington, 466 U.S. 668, 697 (1984).

[7]Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

issue on appeal.[8] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[9] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[10] Appellant failed to specify any omitted issue that would have a reasonable probability of success on appeal. Moreover, appellant has challenged the voluntariness of his plea in the instant post-conviction proceeding and therefore has suffered no prejudice. Thus, this claim is without merit.

Finally, appellant contended that he was denied due process of law when the Nevada Department of Prisons applied NRS 213.1214(1) to determine whether he should be released from his first sentence, so that he could begin serving his second sentence.[11] Appellant believed he should not be subject to the certification requirement until he was eligible for a parole to the streets. Nevada Prison Regulation 537(V)(A)(5)(a), however, provides for the application of NRS 213.1214 to institutional parole.[12]

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[8]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[9]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

[10]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[11]NRS 213.1214(1) provides that the parole board shall not "release on parole" a prisoner who has been convicted of certain sexual offenses, including lewdness with a child and pornography involving a minor, unless a psychiatric panel certifies that the prisoner is "not a menace to the health, safety or morals of others."

[12]Nevada Prison Regulation 537(V)(A)(5)(a), in pertinent part, provides:

> There are restrictions placed on parole eligibility for persons convicted of committing or attempting to commit certain offenses which involve sexually deviant behavior or behavior which offends public morals and decency. . . . Persons so convicted may not be paroled from that sentence unless a "Psych Panel" first certifies that the inmate is not a menace to the health, safety or morals of others. . . . Certification for parole eligibility is offense specific, applying only to the singular sentence or concurrent sentences for which it was granted. A separate certification is required for each consecutive sentence which falls under the purview of the Psych Panel.

(Emphasis added.)

Furthermore, parole is an act of grace of the state; a prisoner has no constitutional right to parole.[13] Thus, appellant's final contention is without merit.

Having reviewed the record 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.[14] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[15]

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Ronald D. Parraguirre, District Judge
Attorney General
Clark County District Attorney
Robert Lanoue
Clark County Clerk

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[13]NRS 213.10705; Niergarth v. Warden, 105 Nev. 26, 768 P.2d 882 (1989).

[14]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[15]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.