

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD LEWIS PAGE,

No. 36089

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

JUN 18 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

Appellant was originally convicted, pursuant to a guilty plea, of one count of battery with intent to commit sexual assault causing substantial bodily harm. The district court sentenced appellant to serve a prison term of 10 years to life.

Appellant did not file a direct appeal. Appellant did, however, file a timely proper person post-conviction petition alleging that his counsel was ineffective and that his guilty plea was not knowing and voluntary. The district court appointed counsel, and thereafter appellant filed a supplemental petition alleging additional claims of ineffective assistance of counsel. The State filed a motion to strike several of appellant's claims, arguing that they were repelled by the record or were merely "bare" allegations that did not warrant an evidentiary hearing. The district court granted the State's motion to strike. After conducting an evidentiary hearing on appellant's remaining claims, the district court denied appellant's petition.

Appellant first contends that the district court erred in dismissing several of his claims without conducting

an evidentiary hearing. We conclude that this contention lacks merit. "A defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record."¹ Additionally, a defendant is not entitled to an evidentiary hearing on his post-conviction claims that are "bare" or "naked;" rather, a defendant must set forth a sufficient factual background by identifying witnesses or describing potential testimony that would support his allegation.² Here, the claims that the district court dismissed without an evidentiary hearing were either repelled by the record or were "bare" assertions lacking specificity.

First, appellant claimed that his plea was not knowing and that his counsel was ineffective: (1) because his counsel did not inform him of the elements of the charged crimes; and (2) the district court did not adequately apprise him of his constitutional rights. We conclude that the district court did not err in dismissing these claims without an evidentiary hearing because they were belied by the record. The transcript of the plea canvas reveals that, prior to entering his plea, appellant was informed of the elements of the crime when the State described what it intended to prove, and that the district court adequately canvassed appellant.

Second, appellant claimed that his counsel was ineffective in failing to file a pretrial petition for a writ of habeas corpus, challenging the probable cause determination. We conclude that the district court did not err in dismissing this claim because it was belied by the

¹Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

²Id. at 502, 686 P.2d at 225.

transcript of the preliminary hearing wherein the State presented adequate circumstantial evidence that appellant sexually assaulted the victim. Particularly, the State elicited testimony from the victim regarding appellant's flirtatious demeanor prior to the attack and presented evidence that the victim was found with her pants around her ankles and wearing no undergarments.

Third, appellant claimed that his counsel was ineffective in failing to investigate and uncover evidence of his innocence. We conclude that the district court did not err in dismissing appellant's claim without an evidentiary hearing because it was a "bare" claim devoid of specificity. Indeed, appellant did not identify or describe any specific exculpatory witness, testimony, or evidence.³ In contrast, at appellant's preliminary hearing, the State presented compelling evidence of appellant's guilt, including the victim's testimony identifying appellant as her attacker and a police officer's testimony that appellant was found bloody and passed out drunk near the victim at the crime scene.

Fourth, appellant claimed that the district court lacked jurisdiction to enter a judgment of conviction because the State breached the plea agreement. The district court did not err in dismissing this claim without conducting an evidentiary hearing because it was a "naked" claim lacking any description of the promise that the State allegedly breached.

³Appellant also contends that the district court erred in denying his request to amend his petitions to include more specific allegations. Appellant did not file a formal motion to amend his petitions, but instead, in the last sentence of his opposition to the State's motion to strike, requested permission to amend as an alternative to dismissal. We conclude that the district court did not abuse its discretion in denying appellant's request to amend because appellant neither provided the district court nor this court with any specific allegations in support his request. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Further, appellant's claim is repelled by the record, which reveals that the State fulfilled the promises set forth in the plea agreement. Particularly, in exchange for appellant's guilty plea, the State agreed not to recommend life without the possibility of parole and to drop the more serious charges pending against appellant, including attempted murder, attempted sexual assault and sexual assault with the use of a deadly weapon.

Appellant next contends that the district court erred in denying his remaining claims of ineffective assistance after conducting an evidentiary hearing. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance fell below an objective standard of reasonableness; and (2) that but for counsel's deficient performance, the outcome of the proceedings would have been different.⁴

Appellant first contends that his counsel was ineffective in failing to apprise him of his right to appeal. We disagree. The district court did not err in ruling that appellant's counsel was not ineffective in failing to inform appellant of his right to appeal because counsel had no duty to do so. In Thomas v. State, we held that where a defendant pleads guilty, his counsel has no duty to apprise him of his right to appeal unless the defendant inquires about his appellate rights or the circumstances of his case indicate a reasonable likelihood of success on appeal.⁵

Here, the district court properly applied our holding in Thomas, as there is no evidence that appellant

⁴Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); see also Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

⁵115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

timely inquired about an appeal. Further, there is no evidence in the record that appellant had meritorious appellate issues. In fact, by pleading guilty, appellant waived his right to appeal the issue which he now raises; namely, the district court's denial of his pretrial discovery motion and the issue of "prosecutorial misconduct," arising from "over charging with counts that could not be proved at trial."⁶ Further, appellant's contention about the harshness of his sentence lacks merit because appellant's sentence falls within the parameters of NRS 200.400(4), the relevant statute, it does not shock the conscience, and there is no indication that the district court relied on impalpable or suspect evidence in sentencing.⁷

Appellant last contends that his counsel was ineffective in failing to: (1) investigate his prior criminal history; (2) argue at sentencing that appellant's presentence investigation report ("PSI") was inaccurate; and (3) provide the sentencing judge with the factual context of appellant's prior conviction and arrest. More particularly, appellant argued that his counsel should have emphasized that he had yet to be convicted of one of the charges listed on his PSI and that his only conviction for battery with a deadly weapon arose when he confronted the individual who allegedly killed his brother and punched him in the nose while possessing a buck knife.

⁶See Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (holding that the decision to plead guilty generally bars appellant from appealing issues that arose prior to the entry of his guilty plea).

⁷See Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996).

The district court did not err in ruling that counsel's conduct with respect to sentencing did not fall below an objective standard of reasonableness. Particularly, there was sufficient evidence in support of the district court's finding that appellant's counsel reviewed the PSI with appellant prior to sentencing and that it accurately reflected his criminal history. Likewise, the district court's finding that the sentencing judge did not misperceive appellant's criminal history is supported by substantial evidence. In fact, at the sentencing hearing, appellant's counsel argued and the State conceded that appellant's criminal history was "not real serious."

Having considered appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Young J.
Young

Leavitt J.
Leavitt

Becker J.
Becker

cc: Hon. Steven P. Elliott, District Judge
Attorney General
Washoe County District Attorney
Ian E. Silverberg
Washoe County Clerk