IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVE LELAND TOMES,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36545

FILED

JAN 23 2002

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 February 22, 1999, the district court convicted appellant, pursuant to an Alford plea,[1] of lewdness with a child under the age of 14. The district court sentenced appellant to serve a term of twenty-four to one hundred and twenty months in the Nevada State Prison. This court dismissed appellant's appeal from his judgment of conviction.[2] The remittitur issued on August 3, 1999.

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[1]North Carolina v. Alford, 400 U.S. 25 (1970).

[2]Tomes v State, Docket No. 33926 (Order Dismissing Appeal, July 9, 1999).

On February 8, 2000, appellant filed a motion for modification of sentence in the district court. The State opposed the motion. On February 28, 2000, the district court denied appellant's motion. Appellant did not did not file an appeal from this decision.

On May 24, 2000, 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 July 26, 2000, the district court denied appellant's petition. This appeal followed.

In his petition, appellant first contended that he was coerced into entering his Alford plea. The record on appeal belies appellant's claim.[3] In his signed guilty plea agreement, appellant acknowledged that he was entering his plea voluntarily and that he was "not acting under duress, coercion or by virtue of any promises of leniency." At his plea canvass, appellant reaffirmed that he was pleading guilty freely and voluntarily and that his plea was not the product of "promises or rewards." Thus, we conclude appellant is not entitled to relief on this claim.

Appellant next raised several claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance was deficient, and that the deficient performance

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[3]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

prejudiced the defense.[4] In order to demonstrate prejudice where a conviction is based on a guilty plea, a defendant must demonstrate a reasonable probability that, but for counsel's errors, appellant would not have pleaded guilty and would have insisted on going to trial.[5] The court need not consider both prongs of the Strickland test if the defendant makes an insufficient showing on either prong.[6]

First, appellant appeared to contend that his attorney failed to inform him that an Alford plea carries the same consequences as a plea of guilty. We conclude that appellant cannot demonstrate that he was prejudiced by his attorney's alleged omission because appellant was otherwise fully informed of the consequences of his plea. The record indicates that appellant's plea agreement as well as his plea canvass informed him of the possible range of sentences that the district court might in its discretion impose. In his signed plea agreement, appellant acknowledged that his plea was based upon his belief that the State would present sufficient evidence at trial that a jury would return a verdict of guilty, that he was pleading guilty to avoid additional or greater offenses, and that it was in his best interest to enter an Alford plea. During his plea canvass, the court explained to appellant that by entering his plea he

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[4]See Hill v. Lockhart, 474 U.S. 52 (1985); Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

[5]Hill, 474 U.S. at 59.

[6]Strickland, 466 U.S. at 697.

gave up various constitutional rights, including the right to trial. Moreover, appellant confirmed that he understood the rights he was waiving and the charges against him.

Second, appellant argued that his attorney conducted an inadequate pretrial investigation. Specifically, appellant alleged that his attorney failed to investigate the background of the complaining witnesses, failed to interview the alleged victim, and failed to request that she undergo physical and psychological examinations. Appellant failed to provide any information regarding what such investigation would have revealed or how it would have contributed to his defense. Thus, we conclude that appellant failed to demonstrate that his counsel's performance fell below an objective level of reasonableness or that he was prejudiced by counsel's allegedly deficient performance.

Finally, appellant raised the following two claims of ineffective assistance of counsel: (1) that his attorney waived appellant's preliminary hearing against appellant's wishes and (2) that appellant's attorney failed to present any evidence in mitigation at appellant's sentencing hearing. The record on appeal belies both of these claims. First, at his waiver of preliminary hearing, appellant affirmed that he understood that he was unconditionally waiving his right to a preliminary hearing. Second, at appellant's sentencing hearing appellant's attorney urged the court to grant appellant probation or, in the alternative, to lower the possible maximum sentence from ten to six years. Also, defense counsel presented to the district court that appellant's father would endeavor to provide

appellant with financial assistance should he be granted probation so as to assure appellant's well being and to allow him to enter an appropriate program. Further, appellant's attorney encouraged the district court to follow a psychiatric evaluation that purported that appellant "would not be a menace to the community if released," and defense counsel represented that the allegations against appellant were motivated by hostility. Thus, we conclude that appellant's claims of ineffective assistance of counsel are without merit.

Next, appellant contended that he was denied counsel at his probation revocation hearing. Appellant, however, never received probation. Rather, appellant's plea agreement provided that the district court would stay adjudication and provide appellant with an opportunity to complete the following conditions: (a) that he "stay out of trouble for one year;" (b) that he have no contact with the victims; (c) that he complete 50 hours of community service; (d) that he complete impulse control and sex offender counseling.[7] Appellant violated the conditions of the plea agreement, and consequently suffered the instant judgment of conviction and sentence. Thus, appellant is not entitled to relief on this claim.

Next, appellant appeared to complain of the following: (1) that the victims were coerced into falsely accusing appellant of sexual abuse;

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[7]Had appellant successfully completed these conditions, he would have been allowed to withdraw his plea to lewdness with a child under the age of 14, and plead to two counts of annoying a minor.

(2) that the victims' mother was coerced into refraining from testifying on appellant's behalf; (3) that the "[S]tate waited 15 months before filing the complaint against [appellant];" (4) that the victims' accusations were motivated by hostility; (5) that the State cannot specify the exact date of the alleged incident nor can it prove that appellant lived in the same residence as the victims; (6) improper admission of statements describing appellant's alleged sexual offenses; and (7) that the Division of Parole and Probation misrepresented appellant's criminal history to appellant's detriment.[8] All of these claims fell outside of the narrow scope of claims cognizable in a post-conviction petition for a writ of habeas corpus challenging a conviction based on a guilty plea.[9] Moreover, appellant's Alford plea precluded him from challenging events that preceded entry of the plea.[10]

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[8]To the extent that appellant intended this allegation as a separate motion for modification of sentence, we conclude that he presented nothing more than bare or naked claims for relief that are not supported by specific factual allegations. Appellant neither identified the allegedly "false" arrests or felony convictions contained in the presentence investigation report, nor did he provide an allegedly more accurate record of his criminal history.

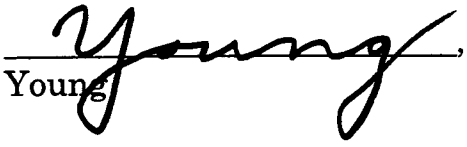
[9]See NRS 34.810(1)(a) (providing that a habeas corpus petition challenging a conviction based upon a plea of guilty is limited to an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without the effective assistance of counsel).

[10]See Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975).

Finally, appellant claimed that he was actually innocent of the charges. This court has previously stated that a challenge to the voluntariness of an Alford plea based upon a claim of actual innocence is "essentially academic."[11] Thus, appellant was not entitled to relief on this claim.

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.[12] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[13]



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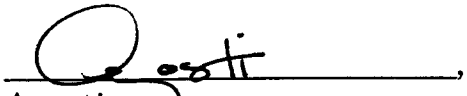
Young



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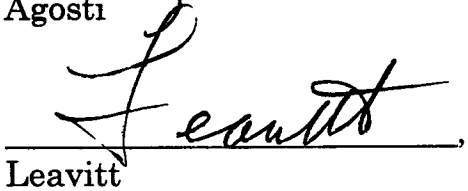

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Leavitt

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[11]See Hargrove, 100 Nev. at 503, 686 P.2d at 226.

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

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

cc: Hon. Mark W. Gibbons, District Judge
Attorney General/Carson City
Clark County District Attorney
Dave Leland Tomes
Clark County Clerk