IN THE SUPREME COURT OF THE STATE OF NEVADA

ERNEST A. PELLEGRINO A/K/A ERNIE PELLEGRINO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36782

FILED

APR 06 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 a post-conviction petition for a writ of habeas corpus.

We have reviewed the record on appeal and for the reasons stated in the attached order of the district court, we conclude that the district court properly denied appellant's petition.[1] Therefore, briefing and oral argument are not warranted in this case.[2] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Shearing, J.

Agosti, J.

Rose, J.

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General
Clark County District Attorney
Ernest A. Pellegrino
Clark County Clerk

[1]To the extent that appellant claimed his counsel failed to inform him of his right to a direct appeal, we note the claim is belied by the plea agreement. See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

[2]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

01-05924

(O)-4892

ORIGINAL

W

FILED
AUG 30 10 57 AM '00
CLERK

ORDR
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ERNIE PELLEGRINO, aka Ernest A. Pellegrino,
#1193270

Defendant.

Case No.. C155327
Dept. No. IV
Docket C

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 8/22/00
TIME OF HEARING: 9:00 A.M.

THIS CAUSE having come on for hearing before the Honorable KATHY HARDCASTLE, District Judge, on the 22nd day of August, 2000, the Petitioner not being present, represented in proper person, the Respondent being represented by STEWART L. BELL, District Attorney, by and through BRAD TURNER, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

RECEIVED
AUG 30 2000
COUNTY CLERK

FINDINGS OF FACT

1) On January 5, 1999, Ernie Pellegrino, also known as Ernest A. Pellegrino hereinafter "Defendant," plead guilty to Lewdness with a Child Under the Age of 14, which was committed on or between August 1, 1998 and September 30, 1998.

2) On June 23, 1999 the court adjudicated the Defendant guilty and sentenced the

C155327

Defendant to Life with the possibility of parole after ten (10) years have been served. The Judgment of Conviction was entered into the record on June 30, 1999.

3) The Defendant sexually assaulted his six year old son and his ten year old daughter between August 1998 and September 1998.

4) On November 17, 1998 police were informed of these crimes. When the Defendant was questioned about the assaults he explained that he and his family had recently moved into a new home and they were in over their heads financially.

5) Defendant also indicated that he and his wife had been arguing about disciplining the children. The Defendant stated that the sexual abuse was a way of punishing them for their disruptive behavior.

6) The Defendant's six year old son described the abuse by explaining that his father had peed "white" in his mouth on 10 different occasions. Defendant's ten year old daughter indicated that the Defendant ejaculated on her back on two separate occasions.

7) She told the police that on the second time he had her lick his penis. The Defendant admitted committing these acts while his wife was at work.

8) In his petition the Defendant argues three grounds: 1) an alleged double jeopardy violation, 2) the district court allegedly abused its discretion by failing to advise the Defendant that probation was possible, and 3) defense counsel allegedly failed to inform the Defendant that probation was possible.

CONCLUSIONS OF LAW

9) By pleading guilty, Defendant's claims were waived pursuant to NRS 34.810(1)(a). NRS 34.810 governs the dismissal of petitions for convictions that result from both guilty pleas and jury trials. NRS 34.810(1)(a) specifically addresses the situation presented in the instant petition:

> 1. The court shall dismiss a petition if the court determines that:
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.

10) NRS 34.810(1)(a) mandated that Defendant's claims, except for those of involuntary plea and ineffective assistance of counsel, be dismissed without reviewing the merits of the claims. *See also* Kirksey v. State, 112 Nev. 980, 998-9, 923 P.2d 1102, 1114 (1996) ("[w]here the defendant has pleaded guilty, the only claims that may be raised thereafter are those involving the voluntariness of the plea itself and the effectiveness of counsel").

11) Accordingly, all of Defendant's arguments that are not a part of challenging the voluntary nature of his plea or alleging ineffective assistance of counsel are dismissed for failing to raise a cognizable claim according to NRS 34.810(1)(a).

12) The Defendant's first ground, an alleged double jeopardy issue, did not address the voluntariness of the plea or any purported ineffective assistance of counsel. Pursuant to NRS 34.810(1)(a), this claim was not cognizable.

13) Defendant's plea was knowingly and voluntarily entered. The law in Nevada clearly establishes that a plea of guilty is presumptively valid and the burden is on a defendant to show that the plea was not voluntarily entered. Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975). The case of Patton v. Warden, 91 Nev. 1, 530 P.2d 107 (1975), suggests that the presence and advice of counsel is a significant factor in determining the voluntariness of a plea of guilty. Furthermore, the Nevada Supreme Court makes it clear in the case of Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404 (1973), that the guidelines for voluntariness of pleas of guilty "do not require the articulation of talismanic phrases. It [the court] required only 'that the record affirmatively disclose that a defendant who pled guilty entered his plea understandingly and voluntarily.'" Brady v. United States, 397 U.S. 742, 747-748, 90 S.Ct. 1463, 1470 (1970); United States v. Sherman, 474 F.2d 303 (9th Cir. 1973).

14) Looking at the totality of the circumstances the Defendant could not show a manifest injustice. Specifically, the Defendant did not show that his plea was involuntary. Rather the Defendant claimed that his federal due process and equal protection rights were violated by the court not advising him that the law allows probation as a possible sentence. In determining whether a guilty plea is knowingly and voluntarily entered, the Court will review

the totality of the circumstances surrounding the defendant's plea. Bryant at 271. Moreover, a withdrawal of a guilty plea after sentencing will not be permitted absent a showing of manifest injustice. NRS 176.165.

15) Contrary to the Defendant's claim, probation was not a possible sentence. NRS 201.230 reads as follows:

> A person who willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child, is guilty of a category A felony and *shall be punished by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served*, and may be further punished by a fine of not more than $10,000. (Emphasis added).

(NRS 201.230). The statute mandated life with the possibility of parole after a minimum of ten years. This sentence is what the Defendant received. Moreover, the Defendant signed a Guilty Plea Agreement in which he attested to the fact that he understood that he was not eligible for probation for this offense. (Guilty Plea Agreement, page 2).

16) There was no merit to Defendant's argument that his plea was unintelligently and involuntarily given because of an alleged misapplication of the law regarding probation because this was not a probationable offense. In Defendant's Guilty Plea Agreement, Defendant attested to fact that his plea was voluntarily given. (Guilty Plea Agreement, pages 3-4). Moreover, even if there was a misapplication of the law the Defendant was not harmed. He was told this was not probationable and decided to plead guilty. After pleading guilty he was sentenced according to the strictures of NRS 201.230. Defendant would have a better argument if he had been told that this was a probationable offense and then based on that representation decided to plead guilty and subsequently received the life sentence. That, however, is not the case here. Defendant was told that his offense was not probationable, which it is not, and he acknowledged that it was not probationable in his Guilty Plea Agreement. Moreover, looking at the totality of the circumstances and based on the nature of the crime, probation, even if it were an option, would not have been given. Consequently,

there was nothing unintelligent or involuntary about the Defendant's plea.

17) Defendant's crime was not probationable under NRS 176A.110.[1] Even if this statute were to stand for the possibility of probation in this situation, the Defendant still failed to establish that his plea was involuntary. Specifically, Defendant plead guilty while working under the mind set that he was pleading guilty to a non probationable crime. Defendant could not honestly argue that he would have been less likely to plead guilty if probation was available. If the Defendant was willing to plead guilty under a harsher sentence, he most definitely would have been willing to plead guilty if probation was an option.

18) Moreover, the Defendant could not claim that the plea was not made knowingly and voluntarily because of the alleged probation problem. The State specifically pointed out on the record that the agreement struck by the two sides was based on both sides understanding the fact that the Defendant, regardless of the interpretation of the statutes, was going to receive life with the possibility of parole after ten years. In fact, at sentencing held on June 23, 1999 the State explained the following:

> Ms. Lowry: Actually judge, as far as additions and corrections go there's something that I need to clarify. The Department in their report indicates that lewdness with a child under age fourteen is life, minimum ten and that is correctly what the statute for lewdness says but additionally in the statutes in NRS 176A.110, where they talk about persons convicted of certain offenses required to be certified by a psychologist or psychiatrist before Court suspends sentence or grants probation. Lewdness with a minor is one of the offenses listed there. So it seems to imply that lewdness with a minor with a favorable psychiatric evaluation is probationable. So in the one statute you've go an implication that it's probationable and then in the other it clearly says it's life, minimum ten but I just want to bring that to the defendant's attention and to the Court's attention.
>
> The understanding between the parties has always been that the defendant was pleading to lewdness with a minor and that he was going to get the life minimum ten. That was the expectation. And that's why the case was negotiated, with that expectation. The plea memo indicates that it is life, minimum ten and that he's not eligible for probation. So I just with that, wanted to make a record of that, make sure that we're all on the

---

[1] The District Attorney's Office has submitted a Bill Draft Response to the Legislature to clear up any perceived ambiguities between the statutes.

same page.

(Transcript of Sentencing held on June 23, 1999, pages 2-3). This language clearly established that the Defendant knew that he was not going to receive probation. Since the Defendant failed to meet his burden in showing that his plea was not knowingly and voluntarily entered, his claim is denied.

19) Defendant's plea was entered with effective assistance of counsel. Defendant's claim of ineffective assistance of counsel is meritless because in order to sustain a claim of ineffective assistance of counsel, Petitioner was required to demonstrate both error and prejudice. The Sixth Amendment of the United States Constitution, as incorporated against the states through the Fourteenth Amendment, guarantees that every criminal defendant shall be provided reasonably effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); Riley v. State, 110 Nev. 638, 646, 878 P.2d 272, 277 (1994); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984). Article I, section 8, of the Nevada Constitution similarly provides that a criminal defendant has a right to the effective assistance of counsel. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1997); Buffalo v. State, 111 Nev. 1139, 901 P.2d 647 (1995).[2]

20) It is strongly presumed that counsel rendered adequate assistance and exercised reasonable professional judgment. Strickland, supra, 466 U.S. at p. 690, 104 S.Ct. at p. 2066; Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996). This presumption may only be overcome if the defendant can show that counsel's conduct fell below an objective standard of reasonableness and that the defendant suffered prejudice as a result of counsel's deficiency. Strickland, supra; State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754; Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280.

21) Defendant's allegation that counsel provided ineffective assistance by not telling him

---

[2] The Nevada Constitution is coextensive with the United States Constitution with respect to the right to counsel. McKague v. Whitley, 112 Nev. 159, 163, 912 p.2d 255, 258 (1996). Therefore, any claims of ineffective assistance of counsel may be reduced to a single analysis.

that this offense was probationable is unfounded because pursuant to NRS 201.230, lewdness with a child under fourteen is not probationable. The language reads that a person convicted of NRS 201.230, "shall be punished by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served." Since Defendant's counsel informed him properly regarding the law, said counsel did not err.

22) Moreover, the testimony from Ms. Lowry made it clear that the negotiation was always based on the expectation that the Defendant was going to plead guilty and he would receive life with the minimum of parole after ten years. Consequently, the Defendant could not argue that it was ineffective assistance for his attorney to not tell him the offense was probationable. Since NRS 201.230 is does not provide for probation, and even if it did, the State would not have negotiated the case if life with the minimum of ten was not the sentence. Consequently, even if the defense counsel had told the Defendant, the State was only going to make the deal if the sentence was life with the minimum of ten.

23) Even if Defendant's counsel had committed err, the Defendant still failed to show any prejudice. Specifically, even if this was a probationable offense, which it is not pursuant to the mandatory language of NRS 201.230, the court did not have to award probation. Moreover, considering the facts in this particular case, the Defendant stood no chance of getting probation from the court. Consequently, no prejudice occurred and the Defendant failed to meet the requirements set out in Strickland.

24) Defendant failed to meet his burden of proof according to the standard articulated in Strickland with regard to his allegations that he was denied the effective assistance of counsel. Defendant also failed to show that counsel's assistance was deficient, nor did he show a reasonable probability that but for counsel's errors, the result would have been different. Therefore Defendant's claim of ineffective assistance of counsel is denied

///

///

///