IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILLIP A. PITTENGER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37101

FILED

FEB 14 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
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 13, 1997, the district court convicted appellant, pursuant to a guilty plea, of sexual assault on a child under the age of sixteen (Count I) and use of minors in producing pornography or as subject of sexual portrayal in performance (Count II). The district court sentenced appellant to serve a life term with the possibility of parole after serving twenty years for Count I, and a concurrent term of fifteen years with the possibility of parole after serving five years for Count II in the Nevada

State Prison. This court dismissed appellant's appeal from his judgment of conviction and sentence.[1] The remittitur issued on August 3, 1999.

On March 20, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel and and counsel filed a supplement to appellant's petition. The district court elected to conduct an evidentiary hearing. On November 6, 2000, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that his guilty pleas were unknowingly and involuntarily entered because he was innocent. Specifically, he contended that he was innocent of the crime of sexual assault on a minor under the age of sixteen because he was under the influence of drugs when he committed the crime, he was not sexually excited by the acts, the victims were willing and knowing participants, and he did not understand that age was not an element of sexual assault. He also claimed that he was innocent of the crime of the use of minors in producing pornography because he was not the person responsible for

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[1]Pittenger v. State, Docket No. 30315 (Order Dismissing Appeal, July 6, 1999).

producing the pornography, he did not operate the camera, he did not give instructions to the victims, he did not encourage or entice the victims to act, he was a passive observer, and he never made a factual admission to the crime.

A guilty plea is presumptively valid and the petitioner has the burden of establishing that the plea was not entered knowingly and intelligently.[2] Further, this court will not reverse a district court's determination concerning the validity of a plea absent an abuse of discretion.[3]

Our review of the record reveals that the district court did not err in denying these claims. During the guilty plea canvass, the district court advised appellant of the elements of the offenses, the possible ranges of sentences, that the sentences could be ordered to be served consecutively or concurrently, and that sentencing was determined solely by the court. Appellant acknowledged that he understood. Appellant was also informed of the constitutional rights that he was waiving by pleading guilty, and of the consequences of his guilty plea. Appellant again

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[2]See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

[3]See Hubbard, 110 Nev. at 675, 877 P.2d at 521.

acknowledged that he understood. Appellant also provided the district court with factual admissions. Thus, appellant failed to overcome the burden that his plea was entered unknowingly or involuntarily.

Next, appellant claimed that his guilty plea was unknowingly and involuntarily entered because he was not informed by the court or by counsel that the offenses that he was pleading guilty to were nonprobational. We conclude that the district court did not err in denying this claim. Appellant's claim is not supported by the record. At the evidentiary hearing, appellant's trial counsel testified that he did advise appellant that the offenses were nonprobational. Appellant was further advised in the guilty plea agreement that the offenses that he was pleading guilty to were nonprobational. Specifically, the agreement stated, "I also understand that I am not eligible for probation." In addition, during the plea canvass he was advised that for Count I he could be sentenced to life with the possibility of parole when a minimum of 20 years has been served or for a definite term of not less then 5 years nor more than 20 years with no possibility of parole. He was also advised that for Count II he could be sentenced to life with the possibility of parole beginning when a minimum of 5 years has been served or for a definite period of 15 years with the possibility of parole beginning when a minimum of 5 years had been served. Also, at sentencing his attorney

stated that "I know that you have to give him at least five years but he has already learned that jail is not where he wants to be." Considering the totality of the circumstances, the record reveals that appellant knew that that his guilty plea would result in an actual term of imprisonment.[4] Thus, appellant failed to demonstrate that his guilty plea was entered unknowingly or involuntarily.[5]

Next, appellant claimed that his guilty plea was involuntary because he believed that because of his good record the district court would not sentence him to serve a term of life with a minimum parole eligibility after twenty years had been served. We conclude that the district court did not err in denying this claim. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary or unknowing.[6] Appellant was correctly advised of the potential sentences.

Next, appellant made many claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to

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[4]See Little v. Warden, 117 Nev. ___, 34 P.3d 540 (2001).

[5]See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); see also Bryant, 102 Nev. 268, 721 P.2d 364.

[6]See Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975).

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.[7] 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.[8]

Appellant claimed that his attorney was ineffective for: (1) failing to inform him of the elements of sexual assault; specifically, that age was not a factor; (2) failing to inform him of the elements of the use of minors in producing pornography; (3) failing to inform him of the consequences of his guilty plea; (4) failing to explain his constitutional rights; (5) telling appellant that he would receive a lesser sentence than the sentence he actually received; (6) advising him to plead guilty to crimes he did not commit; and (7) failing to explain to appellant that he was legally innocent. We conclude that the district court did not err in denying appellant's claims. At the evidentiary hearing, appellant's trial counsel testified that he discussed with appellant the statutes for the

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[7]See Strickland v. Washington, 466 U.S. 668 (1984); see also Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

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

particular crimes at issue, which included the possible ranges of sentences and the elements of the offenses. He also testified that he discussed with appellant the possible defenses, and the constitutional rights appellant would be waiving by entering a guilty plea. During the guilty plea canvass, appellant was adequately informed of the elements of the offenses, the consequences of his guilty pleas, the possible range of sentences, and of the constitutional rights that he was waiving by pleading guilty. In addition, at the plea canvass appellant informed the court that he had discussed the case with his attorney including the offenses, penalties, possible defenses, and his constitutional rights. Thus, appellant failed to demonstrate that his counsel rendered ineffective assistance.[9]

Next, appellant claimed that his counsel was ineffective during the arraignment because he failed to prepare a written guilty plea agreement for the arraignment and failed to discuss the terms of the agreement with appellant. Appellant claimed that had his attorney prepared a written guilty plea agreement appellant would have known the consequences of his guilty plea and that probation was not available. We

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[9]See Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107; see also Rouse, 91 Nev. at 677, 541 P.2d at 644.

conclude that the district court did not err in denying this claim. Failure to have a written guilty plea agreement prepared is not per se reversible error.[10] As discussed earlier in this order, considering the totality of the circumstances, appellant's guilty plea was valid. Moreover, appellant was not prejudiced by counsel's actions because in return for appellant's guilty plea other charges were dismissed; thus, appellant failed to show that but for counsel's error he would not have pleaded guilty and would have proceeded to trial.[11] Thus, appellant's counsel was not ineffective in this regard.

Next, appellant claimed that his counsel was ineffective at the sentencing hearing because he failed to adequately prepare for sentencing, failed to meet with his client before the sentencing hearing, and failed to present witnesses to testify on appellant's behalf. We conclude that the district court did not err in denying these claims. Appellant's trial counsel stated that he submitted letters written on appellant's behalf to the court for its consideration during sentencing. Trial counsel also testified that he attempted to have witnesses testify on appellant's behalf at the sentencing hearing, however, none of the potential witnesses wanted to get involved.

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[10]See Ochoa-Lopez v. Warden, 116 Nev. 448, 997 P.2d 136 (2000).

[11]See Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

Therefore, appellant failed to demonstrate that his counsel performance was unreasonable in this regard.[12]

Lastly, appellant claimed that the prosecutor committed "gross misconduct" by (1) charging him with these crimes because appellant was legally innocent; (2) attempting to breach the plea agreement; and (3) charging other participants with the same crimes. We conclude that the district court did not err in denying these claims. Appellant waived these claims by failing to raise them on direct appeal.[13] Moreover, these claims are outside the scope of claims that can be raised in a post-conviction petition for a writ of habeas corpus when the judgment of conviction is based upon a guilty plea.[14]

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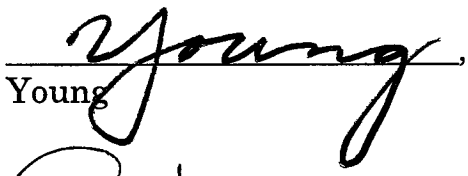
[12]See Strickland, 466 U.S. 668.

[13]See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

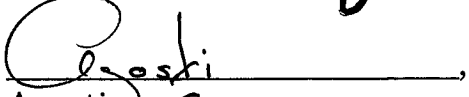
[14]See NRS 34.810(1)(a).

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.[15] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Young



_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Archie E. Blake, District Judge
Attorney General/Carson City
Lyon County District Attorney
Phillip A. Pittenger
Lyon County Clerk

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