

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK BAETA,

No. 37524

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

NOV 02 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
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.

On October 11, 1996, appellant was convicted, pursuant to a guilty plea, of one count of sexual assault and was sentenced to serve life in prison with the possibility of parole after serving 20 years. Appellant did not file a direct appeal.

On November 12, 1996, appellant filed a proper person post-conviction petition for a writ of habeas corpus, contending that his plea was not knowing and that his counsel was ineffective in advising him to plead guilty to sexual assault. Without conducting an evidentiary hearing, the district court denied appellant's petition, finding that his claims were belied by the record. On appeal, this court remanded the case for an evidentiary hearing on appellant's claims.¹

¹Baeta v. State, Docket No. 29687 (Order of Remand, March 27, 1997) (directing the district court to assess appellant's claims that: (1) he pleaded guilty in reliance on his counsel's promise that he would receive a five-year sentence; (2) he was not advised of the elements of sexual assault; and (3) the evidence in his case only supported a charge of lewdness).

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After conducting an evidentiary hearing and considering appellant's petition, supplemental petitions, and post-hearing briefs, the district court again denied appellant's petition. Appellant filed the instant appeal.

Appellant first contends that the district court erred in denying his claim that his counsel was ineffective in that he misinformed appellant about the possible sentencing consequences arising from his guilty plea. Specifically, appellant contends that his counsel misinformed him that the district court would likely sentence him to a five-year prison term, and that appellant pleaded guilty based on this misinformation. We conclude that appellant's contention lacks merit.

In order to state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, an appellant must demonstrate that his counsel's performance fell below an objective standard of reasonableness.² An appellant must also demonstrate a reasonable probability that, but for counsel's errors, appellant would not have pleaded guilty and would have insisted on going to trial.³ Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound trial strategy.⁴

This court has held that a "mere subjective belief of a defendant as to potential sentence, or hope of leniency, unsupported by any promise from the State or indication by the court, is insufficient to

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

³Hill, 474 U.S. at 59.

⁴Strickland v. Washington, 466 U.S. 668, 689 (1984).

invalidate a guilty plea as involuntary or unknowing."⁵ Appellant contends that this rule should not apply to him because he has protested his innocence to the crime of sexual assault and actually only committed the crime of lewdness.

We conclude that appellant's claim is belied by the record. Appellant admitted, at his plea canvass, to placing his tongue on the vagina of a female under fourteen. This conduct constitutes sexual assault.⁶ Moreover, prior to accepting his plea, the district court explained the possible sentencing consequences that appellant faced, which included a life sentence with the possibility of parole after 20 years or a definite prison term of 5 to 20 years. Appellant acknowledged that he understood the possible consequences.

Moreover, at the post-conviction evidentiary hearing, trial counsel testified that he had never guaranteed a particular sentence to any defendant that he represented, and always ensured that the defendants that he represented reviewed the plea agreement prior to pleading guilty. Although appellant testified that he pleaded guilty in reliance on his attorney's promise that he would be sentenced to five years, the district court expressly found that appellant's testimony was not credible. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁷ Appellant has not demonstrated that the district court's findings are not supported by substantial evidence or are clearly wrong.

Appellant next contends that the district court erred in denying his claim that his counsel failed to adequately investigate the

⁵State v. Langarica, 107 Nev. 932, 934, 822 P.2d 1110, 1112 (1991) (quoting Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975)).

⁶See NRS 200.366(1); NRS 200.364(2).

⁷See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

circumstances of his case prior to recommending that he plead guilty.⁸ Appellant contends that a reasonably competent attorney would have interviewed the victim, cross-examined her at the preliminary hearing, or would have requested an evaluation of the victim pursuant to Keeney v. State⁹ before advising appellant to plead guilty.

We conclude that appellant's contention lacks merit because appellant has failed to demonstrate that he was prejudiced by his counsel's conduct. Although appellant alleges that his counsel could have impeached or attacked the credibility of the victim had he conducted further investigation, appellant failed to proffer any evidence at the post-conviction hearing in support of this allegation. Indeed, appellant did not subpoena the victim or the police officer that interviewed her to testify with respect to the sexual assault. Additionally, at the post-conviction evidentiary hearing, trial counsel testified that he has never recommended that one of his clients waive the preliminary examination and enter a plea bargain without first reviewing the discovery and concluding that a plea

⁸In a related argument, appellant contends that his counsel was ineffective in recommending that he plead guilty. Specifically, appellant contends that no reasonable attorney would have advised appellant to plead guilty after reviewing the discovery in appellant's file. We conclude that this contention lacks merit because there was nothing particularly exculpatory in appellant's file that would lead a reasonable attorney to advise his client to go to trial. In the transcript of appellant's police interview, appellant admitted that he was sexually attracted to the victim, a six-year-old girl, and that she twice grabbed his penis and rubbed it causing him to become erect. Appellant also admitted that he told the victim he wanted to see her vagina and that he had licked her stomach. Finally, appellant admitted that he had a problem, that he could not kill the urge, and that if the child-victim had not told somebody of their encounters he would have probably continued them. Although appellant denied licking the victim's vagina in the police interview, we cannot say that a reasonable attorney would not have advised appellant to plead guilty in light of the information contained in appellant's file.

⁹109 Nev. 220, 850 P.2d 311 (1993), overruled in part by Koerschner v. State, 116 Nev. ___, 13 P.3d 451 (2000).

was in the best interest of his client. Because appellant has failed to establish that he would not have pleaded guilty had his counsel conducted further investigation, we conclude that appellant's contention lacks merit.¹⁰

Appellant next contends that his counsel was ineffective in failing to move for a psychological examination and a deposition of the victim. In addition, appellant contends that the district court erred in denying his post-conviction motion for such discovery prior to the evidentiary hearing. We disagree.

In Koerschner v. State,¹¹ this court held that the overriding question to be resolved in determining whether a sexual assault victim should be ordered to undergo a psychological examination is whether a compelling need exists for the psychological examination. Our review of the record reveals that appellant failed to show a compelling need for the examination. In fact, most of the factors outlined in Koerschner,¹² that would favor ordering a psychological examination are not present in this case. First, the State did not employ an expert in psychology or psychiatry to examine the child-victim. Second, appellant admitted to and eventually pleaded guilty to sexually assaulting the victim. Third, there is nothing in the record to suggest that the child-victim's mental or emotional state may have effected her veracity. Accordingly, trial counsel was not ineffective for failing to move for a psychological exam of the victim, and the district

¹⁰See Hill, 474 U.S. at 59 (1985) (holding that where appellant has pleaded guilty, to show prejudice based on the failure to investigate, he must demonstrate that the evidence discovered through further investigation would have led his counsel to change his recommendation that he plead guilty).

¹¹116 Nev. ___, ___ 13 P.3d 451, 455 (2000).

¹²Id.

court did not abuse its discretion in denying appellant's post-conviction request for a psychological examination.

Likewise, we conclude that the district court did not abuse its discretion in denying appellant's motion to depose the victim prior to the post-conviction hearing. NRS 34.780(2) provides that discovery may be permitted in a post-conviction proceeding only for good cause and by leave of the court. A petitioner has shown "good cause" where he alleges specific allegations that give the court reason to believe that, "if the facts are fully developed," petitioner may be entitled to relief.¹³ Here, we conclude that the district court did not abuse its discretion in finding that appellant did not demonstrate "good cause" required to conduct discovery. Appellant did not provide a specific allegation, which if more fully developed would have entitled him to relief. In his motion to depose the victim, appellant alleged that the victim's story was inconsistent, without providing any evidence of an alleged inconsistency, and that the police investigation was suspect without sufficient explanation of the deficient investigative tactics. Moreover, appellant had an adequate opportunity to present his claims concerning the "suspect" nature of the police investigation and the victim's inconsistent statements at the evidentiary hearing, and failed to support his contentions with competent evidence or testimony. Accordingly, the district court did not err in denying appellant's motion to depose the victim.

Finally, appellant contends that his plea was not voluntary because he would not have pleaded guilty had the State not withheld exculpatory evidence. Specifically, appellant contends that the State

¹³Bracy v. Gramley, 520 U.S. 899, 908-09 (1997) (quoting Harris v. Nelson, 394 U.S. 286, 300 (1969)).

committed a Brady violation¹⁴ when it failed to provide the defense with a report from Dr. Leonard Thompson, a physician who examined the victim. Dr. Thompson's report set forth the results from the victim's physical examination, including his conclusion that there was no evidence of "vaginal discharge or obvious evidence of vaginal penetration." In lieu of calling Dr. Thompson to testify at the post-conviction proceeding, the parties stipulated that Dr. Thompson's reference to "penetration" was "not in the legal context as defined in NRS 200.364(2)." Further, the parties stipulated to the admission of a letter from Dr. Thompson wherein he stated that the purpose of his examination was to determine if there was medical evidence of molestation, and that he did not question the victim regarding any form of sexual contact and that she did not volunteer any such information.

A Brady violation occurring after the defense has made a specific request for evidence is material if "there exists a reasonable possibility that the claimed evidence would have affected the judgment of the trier of fact."¹⁵ Here, appellant contends that he would not have pleaded guilty had he received the report because it contained exculpatory evidence; namely, that there was no physical evidence that he sexually assaulted the victim. We conclude that the district court did not err in concluding that the medical report was not exculpatory and that there was no reasonable possibility that it would have affected the proceeding. Because appellant was charged with and pleaded guilty to sexual assault based on cunnilingus, an act that is generally not accompanied by physical evidence, the report that there was no medical evidence of sexual

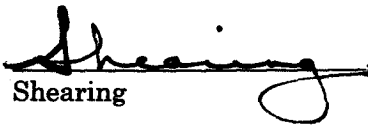
¹⁴Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that due process requires the State to disclose material evidence favorable to the defense).


¹⁵Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996) (quoting Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994)).

intercourse did not tend to make his conviction less likely. Moreover, since Dr. Thompson did not interview the victim about the sexual assault, the fact that the victim did not provide any information with respect to the assault is immaterial.

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

ORDER the judgment of the district court AFFIRMED.¹⁶


Shearing J.


Rose J.


Becker J.

cc: Hon. Brent T. Adams, District Judge
Attorney General
Washoe County District Attorney
Richard F. Cornell
Washoe County Clerk

¹⁶We have considered all proper person documents filed or received in this matter and conclude that the relief requested is not warranted.