

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ANGELO DRAKE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38742

FILED

AUG 28 2002

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

MICHAEL ANGELO DRAKE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38743

MICHAEL ANGELO DRAKE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38744

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court order denying appellant Michael Angelo Drake's post-conviction petition for a writ of habeas corpus.

On April 13, 1999, Drake was convicted, pursuant to guilty pleas entered in three separate cases, of two counts of grand larceny and one count of embezzlement. For the grand larceny counts, the district court sentenced Drake to serve two consecutive prison terms of 48 to 120 months. For the embezzlement count, the district court adjudicated Drake to be a habitual criminal and sentenced him to serve a life prison term

with parole eligibility after 10 years. Drake appealed, and this court affirmed his convictions.<sup>1</sup>

On August 9, 1999, Drake filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district court appointed counsel, who supplemented the petition on July 26, 2000. After conducting an evidentiary hearing, the district court denied the petition. Drake filed the instant appeal alleging that his trial and appellate counsel were ineffective.

To state a claim of ineffective assistance of counsel sufficient to 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 and that, but for counsel's error, petitioner would not have pleaded guilty.<sup>2</sup> The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong.<sup>3</sup> We conclude that Drake has not shown that his trial or appellate counsel were ineffective.

First, Drake contends that his trial counsel was ineffective because she had an actual conflict of interest. In particular, Drake alleges that an actual conflict arose between Drake, his Deputy Public Defender Carolyn Tanner, and all other deputies in the Washoe County Public

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<sup>1</sup>Drake v. State, Docket Nos. 34146, 34147 and 34148 (Order Dismissing Appeals, February 25, 2000).

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

<sup>3</sup>Strickland v. Washington, 466 U.S. 668, 697 (1984).

Defender's Office when Drake filed a civil suit against Tanner alleging she violated his civil rights. We conclude that Drake's contention lacks merit.

"The Sixth Amendment guarantees a criminal defendant the right to conflict-free representation."<sup>4</sup> "To establish a Sixth Amendment violation of defendant's right to the effective assistance of counsel based on an attorney's conflict of interest, 'a defendant must show: (1) his attorney actively represented conflicting interests, and (2) an actual conflict of interest affected his attorney's performance.'"<sup>5</sup>

Here, the district court found that there was no evidence of an actual conflict between Tanner and Drake. The district court's finding is supported by substantial evidence.<sup>6</sup> Specifically, the record reveals that Tanner did not represent Drake during the pendency of a civil lawsuit, which Drake filed against Tanner on January 13, 1999. In fact, Tanner withdrew from representing Drake on January 4, 1999, and Deputy Public Defender Mary Pat Barry was reassigned to take over her duties because of a change in caseload at the public defender's office unrelated to the alleged conflict. Additionally, at the evidentiary hearing on the petition, Tanner testified that she was never served with Drake's complaint, and did not believe that she had a conflict of interest with Drake at the time she represented him. Accordingly, the district court did not err in finding that Tanner had no conflict of interest.

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<sup>4</sup>Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993); see also Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992).

<sup>5</sup>Quintero v. United States, 33 F.3d 1133, 1135 (9th Cir. 1994) (quoting Fitzpatrick v. McCormick, 869 F.2d 1247, 1251 (9th Cir. 1989)).

<sup>6</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

In a related argument, Drake contends that he had an actual conflict of interest with the entire Washoe County Public Defender's Office. The district court rejected Drake's argument, finding no actual conflict. That finding is supported by the record.<sup>7</sup> Indeed, despite Drake's belief, he did not sue the Washoe County Public Defender's Office and, instead, sued Tanner in her individual capacity. Moreover, even assuming Drake had sued the Public Defender's Office, the district court found that the allegations in the lawsuit, which was later dismissed, were not based on legitimate grounds of ineffective assistance of trial counsel and, therefore, did not warrant substitution of counsel.<sup>8</sup> Accordingly, the district court did not err in rejecting Drake's claim that he received ineffective assistance of counsel due to an actual conflict of interest.

Second, Drake contends that his trial counsel was ineffective for failing to arrange for Drake to testify in front of the grand jury. We disagree. The district court found that Drake waived his right to testify at the grand jury. The district court's finding is supported by substantial evidence.<sup>9</sup> In particular, Tanner testified that she and Drake discussed whether he should testify at the grand jury proceeding, and Drake took her recommendation not to testify. On November 3, 1998, Tanner notified the State that Drake would not testify and, the next day, the grand jury indicted Drake on grand larceny, embezzlement, and theft charges.

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<sup>7</sup>See id.

<sup>8</sup>See Baker v. State, 97 Nev. 634, 637 P.2d 1217 (1981), overruled on other grounds by Lyons v. State, 106 Nev. 438, 796 P.2d 210 (1990); Junior v. State, 91 Nev. 439, 537 P.2d 1204 (1975).

<sup>9</sup>See Riley, 110 Nev. at 647, 878 P.2d at 278.

Although Drake testified that he told Tanner he wanted to testify at the grand jury proceeding, the district court did not find Drake's testimony credible.<sup>10</sup> Accordingly, the district court did not err in rejecting Drake's claim that his trial counsel was ineffective for failing to arrange his grand jury testimony.

Third, Drake contends that his trial counsel was ineffective for advising him to waive his right to a speedy trial and for waiving Drake's right to a speedy trial without his consent. The district court found that trial counsel was not ineffective for waiving Drake's right to a speedy trial because Drake consented to the waiver. The district court's finding is supported by substantial evidence.<sup>11</sup> In particular, at the evidentiary hearing, Tanner testified that Drake agreed to waive his speedy trial rights, in part, to give the defense more time to both prepare the complex case for trial and to pursue a possible plea bargain. Although Drake testified he was tricked into waiving his right to a speedy trial by Tanner's promises to file a pretrial writ, the district court found his testimony was not credible. Accordingly, the district court did not err in rejecting Drake's claim that counsel was ineffective for waiving his speedy trial rights.

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<sup>10</sup>Although Drake proffered a letter he wrote to Tanner, dated Friday, October 30, 1998, which stated that Drake wanted to testify at the grand jury proceeding, the district court found that Drake failed to show Tanner received the letter before the November 4, 1998, grand jury proceeding.

<sup>11</sup>See Riley, 110 Nev. at 647, 878 P.2d at 278.

Fourth, Drake contends that his appellate counsel Cheryl Bond was ineffective for failing to communicate with him.<sup>12</sup> The district court found that appellate counsel was not ineffective and reasonably communicated with Drake. That finding is supported by the record. In particular, Bond testified that she communicated with Drake, explaining to him the issues he had waived by pleading guilty, the issues he could raise on direct appeal, and the issues he could raise in a post-conviction proceeding. Additionally, the record contained written correspondence between Bond and Drake discussing the appeal. Accordingly, the district court did not err in ruling that Bond adequately communicated with Drake.

Finally, Drake contends that his guilty plea was not knowing and voluntary because he pleaded guilty without knowing the extent to which the plea precluded appellate consideration of errors occurring prior to the entry of the plea.<sup>13</sup> The district court found that Drake's plea was

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<sup>12</sup>Drake also contends that his appellate counsel was ineffective for failing to raise the issues concerning the denial of his right to testify at the grand jury proceeding and speedy trial violation. We conclude the district court did not err in rejecting those claims because Drake waived his right to appeal those issues by pleading guilty. See Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984); Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975). Further, appellate counsel had no likelihood of success on the merits of those claims because the record reveals that Drake waived both his right to testify at the grand jury proceeding and to a speedy trial. See Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

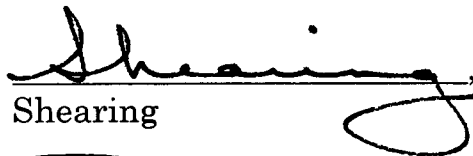
<sup>13</sup>Drake also contends that his guilty plea was invalid because his guilty plea was the product of trial counsel's ineffectiveness and ongoing actual conflict. We conclude that the district court did not err in rejecting Drake's contention. Notably, the district court properly determined that trial counsel was not ineffective and no actual conflict existed. Additionally, Drake received a substantial benefit for his pleas of guilty;

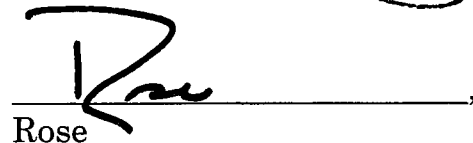
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knowing and voluntary, and that Drake was aware, prior to pleading guilty, of his limited right to appeal. The district court's finding is supported by substantial evidence. In particular, Drake's plea agreements, which he signed and acknowledged stated: "I understand that I have the right to appeal from adverse pretrial rulings on pretrial motions only if the State and the Court consent to my right to appeal. In the absence of such an agreement, I understand that any substantive or pretrial issues or issues which could have been raised at trial are waived by my plea." Accordingly, the district court did not err in rejecting claims that his guilty plea was not knowing and voluntary because that claim was belied by the record.

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

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Becker

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*... continued*

namely, the State agreed to dropped numerous counts of theft filed against Drake and also agreed not to seek a life sentence without parole eligibility.

cc: Hon. Janet J. Berry, District Judge  
Karla K. Butko  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk