

IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDALL GAESS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39582

FILED

JAN 24 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying appellant Randall Gaess' post-conviction petition for a writ of habeas corpus.

On February 23, 2000, Gaess was convicted, pursuant to a guilty plea, of lewdness with a child under the age of 14 years (count I), attempted lewdness with a child under the age of 14 years (count II), and indecent exposure (count III). The district court sentenced Gaess to serve a prison term of 48-120 months for count I, a consecutive prison term of 96-240 months for count II, and a concurrent prison term of 19-48 months for count III. Gaess filed a direct appeal, and this court affirmed his conviction.¹

On July 18, 2001, Gaess filed a proper person post-conviction petition for a writ of habeas corpus. On September 19, 2001, Gaess filed a

¹Gaess v. State, Docket No. 35682 (Order Dismissing Appeal, July 28, 2000).

proper person motion for default judgment.² On February 1, 2002, the State opposed the petition and the motion for default judgment. The district court appointed counsel, who supplemented Gaess' petition. Without conducting an evidentiary hearing, the district court denied the petition and the motion for default judgment. Gaess filed the instant appeal.

Gaess alleges numerous instances of ineffective assistance of trial counsel. In order 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.³ A petitioner must also demonstrate

²To the extent that Gaess appeals the district court order denying his motion for default judgment, we conclude the district court did not abuse its discretion in denying that motion. See Warden v. O'Brian, 93 Nev. 211, 212, 562 P.2d 484, 485 (1977) (discussing former version of NRS 34.430 and citing with approval cases holding that "default judgments in habeas corpus proceedings are not available as procedure to empty state prisons" and that courts "'should not blindly and arbitrarily release a prisoner, not entitled to release, because of a late return and answer or even because of total lack of a return or answer'" (quoting Marshall v. Geer, 344 P.2d 440, 442 (Colo. 1959))); see also NRS 34.770(1) ("A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.").

³Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); accord Hill v. Lockhart, 474 U.S. 52 (1985).

a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.⁴

First, Gaess claims that his trial counsel was ineffective in failing to investigate Gaess' alibi witnesses and in failing to conduct adequate pretrial investigation. With the exception of Gaess' claim involving alibi witness Armando Lopez, Gaess' claim that his trial counsel was deficient for not conducting an adequate pretrial investigation fails for lack of specificity.⁵ In the petition, Gaess did not identify the alibi witnesses trial counsel failed to contact or describe the testimony the witnesses would have provided. Likewise, Gaess failed to describe the other sources of exculpatory evidence trial counsel would have uncovered in a pretrial investigation. Accordingly, the district court did not err in finding that Gaess' claim with regard to trial counsel's investigation failed for lack of specificity.

With regard to Gaess' claim that his trial counsel was ineffective for failing to interview alleged alibi witness Armando Lopez, that claim is belied by the record. In the affidavit attached to Gaess' petition, Lopez states that Gaess' trial counsel, in fact, contacted him with regard to Gaess' alibi. Additionally, we note that trial counsel was not deficient in recommending that Gaess plead guilty, despite Lopez'

⁴Hill, 474 U.S. at 59.

⁵See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (a petitioner is not entitled to an evidentiary hearing on claims that lack specificity or are belied by the record).

statement, because his statement is not entirely exculpatory. The counts to which Gaess pleaded guilty were alleged to have occurred over a period of approximately two years between January 1, 1996 and March 14, 1998. Lopez' affidavit only provides Gaess with an alibi for one day -- January 26, 1998. Notably, count I, the lewdness count to which Lopez pleaded guilty, occurred before 1998, sometime between January 1, 1996, and September 1, 1997. Likewise, according to Gaess' own affidavit, the events giving rise to the indecent exposure count occurred on December 17, 1997. Finally, we note that, in exchange for Gaess' plea, the State dropped a number of counts originally filed against Gaess, including one count of lewdness with a minor under the age of 14 years, two counts of indecent exposure, and two counts of open or gross lewdness; there is no indication from the record that those incidents occurred solely on January 26, 1998.

Second, Gaess claims that his trial counsel was ineffective in failing to secure a psychological examination of the child-victims. We conclude that Gaess' contention lacks merit. In Koerschner v. State,⁶ 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 Gaess failed to show a compelling need for the examination. In fact, most of the

⁶116 Nev. 1111, 1116-17, 145, 13 P.3d 451, 455 (2000).

factors outlined in Koerschner⁷ that would favor ordering a psychological examination are not present in this case. First, there is no indication in the record that the State employed an expert in psychology or psychiatry to examine the child-victims. Second, Gaess admitted to engaging in and attempting to engage in lewd acts with the victims. Third, there is nothing in the record to suggest that the child-victims' mental or emotional states may have affected their veracity. Accordingly, the district court did not err in rejecting Gaess' claim that his trial counsel was ineffective for failing to secure a psychological exam of the victim.

Third, Gaess claims that his trial counsel was ineffective at sentencing by failing to present character witnesses and mitigating testimony. In the petition, Gaess alleged that he had a "plethora of available witnesses to speak on his behalf. Each of the numerous, identified witnesses were each available to testify but were never contacted by defense counsel." Gaess' claim with respect to his trial counsel's failure to present character witnesses and mitigating testimony fails for lack of specificity. Gaess has failed to identify the character witnesses who would have testified on his behalf or describe the testimony the witnesses would have provided. Likewise, Gaess failed to identify the other sources of mitigating evidence trial counsel could have presented at the sentencing hearing. Accordingly, the district court did not err in finding Gaess' claim that his trial counsel was ineffective at sentencing failed for lack of specificity.

⁷Id.

Fourth, Gaess claims that his trial counsel was ineffective in failing to properly advise Gaess of the direct consequences of his guilty plea and in coercing him to plead guilty. In particular, Gaess contends that he was not aware that prison time could be imposed, and that Gaess' trial counsel promised him he would receive probation. Gaess' claim that his plea was not knowing and voluntary is belied by the record. At the plea canvass, Gaess was expressly advised of the possible prison terms that could be imposed. Additionally, Gaess was advised that he was ineligible for probation unless a psychologist certified that he was not a menace to the health, safety or morals of others, and was advised that sentencing was within the district court's discretion. Finally, Gaess acknowledged that he had discussed his possible defenses with his attorney and that he was pleading guilty because he committed the charged crimes. Accordingly, the district court did not err in rejecting Gaess' claim that his trial counsel was ineffective with respect to his guilty plea because Gaess' plea was knowing and voluntary.⁸

Fifth, Gaess claims that his trial counsel was ineffective in failing to attack probable cause infirmities in the warrant.⁹ In particular,

⁸See Nollette v. State, 118 Nev. ___, ___, 46 P.3d 87, 92-93 (2002).

⁹Gaess also contends that his appellate counsel was ineffective for failing to challenge the warrant due to insufficient probable cause. We reject Gaess' contention. Appellate counsel was not ineffective for failing to raise that issue because Gaess waived it by pleading guilty. See Tollett v. Henderson, 411 U.S. 258, 267 (1973) (holding that, in pleading guilty, appellant waives all errors, including the deprivation of constitutional

continued on next page . . .

Gaess alleges that the warrant was defective because it was based solely on the uncorroborated "hearsay recitation of the false allegations by the minor children," and there is no indication that the child-victims were reliable. We conclude that Gaess' contention lacks merit.

"The finding of probable cause to support a criminal charge 'may be based on slight, even "marginal" evidence, . . . because it does not involve a determination of the guilt or innocence of an accused.'"¹⁰ "To commit an accused for trial, the State is not required to negate all inferences which might explain his conduct, but only to present enough evidence to support a reasonable inference that the accused committed the offense."¹¹ Here, the child-victims testified at the preliminary hearing describing the lewd acts attempted or committed by Gaess. That testimony alone is sufficient to support a reasonable inference that Gaess committed the charged offenses.¹² Moreover, even assuming trial counsel

. . . continued

rights occurring prior to entry of his guilty plea); see also Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975).

¹⁰Sheriff v. Crockett, 102 Nev. 359, 361, 724 P.2d 203, 204 (1986) (quoting Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980)).


¹¹Id. (quoting Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971)).

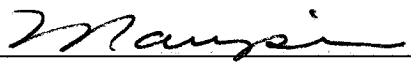
¹²We reject Gaess' argument that the child-victims were akin to informants whose testimony was suspect and, therefore, a finding of probable cause required corroboration as set forth in Illinois v. Gates, 462 U.S. 213 (1983). Additionally, we reject Gaess' argument that the district court abused its discretion in denying his motion for a default judgment.


could have successfully challenged the sufficiency of the warrant, the fact that Gaess was arrested without probable cause would not have constituted grounds for barring subsequent prosecution or grounds for reversal of his conviction.¹³ Thus, the district court did not err in rejecting Gaess' claim that his trial counsel was ineffective in failing to challenge the sufficiency of the arrest warrant because such a challenge would not have changed the outcome of the proceedings.

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

ORDER the judgment of the district court AFFIRMED.¹⁴


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

¹³See United States v. Crews, 445 U.S. 463, 474 (1980) ("An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction.").

¹⁴We have considered all proper person documents filed or received in this matter, and we conclude the relief requested is not warranted.

cc: Hon. Michael A. Cherry, District Judge
Clark County Public Defender
State Public Defender/Carson City
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk