IN THE SUPREME COURT OF THE STATE OF NEVADA

VERN LUCAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39761

FILED

APR 0 9 2003

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

On September 17, 2001, the district court convicted appellant Vern Lucas, pursuant to an Alford[1] plea, of three counts of use of a minor in the production of pornography. The district court sentenced Lucas to serve two consecutive terms of sixty to one hundred and eighty months and one concurrent term of sixty to one hundred eighty months, in the Nevada State Prison, and imposed a special sentence of lifetime supervision. No direct appeal was taken.

On February 26, 2002, Lucas filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent Lucas or to conduct an evidentiary hearing. On May 24, 2002, the district court denied Lucas's petition. This appeal followed.[2]

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[1]See North Carolina v. Alford, 400 U.S. 25 (1970).

[2]On February 5, 2002, Lucas filed a motion to withdraw a guilty plea. On February 28, 2002, the district court denied the motion. On

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In his petition, Lucas claimed he received ineffective assistance of counsel. To establish ineffective assistance of counsel, a petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.[3] To show prejudice, a petitioner must show a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.[4] "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."[5] A court may consider the two test elements in any order and need not consider both prongs if an insufficient showing is made on either one.[6]

First, Lucas claimed that counsel was ineffective for failing to "order the right psych eval [sic] from the right person." Lucas does not dispute that his counsel procured a psychological evaluation for him in

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June 3, 2002 Lucas filed a notice of appeal designating the district court's denial of both his motion to withdraw a guilty plea and the habeas corpus petition. To the extent that Lucas seeks to appeal the district court's denial of his motion to withdraw a guilty plea, this court lacks jurisdiction because the notice of appeal was untimely filed. See Lozada v. State, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994).

[3]Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[4]Kirksey, 112 Nev. at 988, 923 P.2d at 1107; citing Strickland, 466 U.S. at 694.

[5]Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691).

[6]Strickland, 466 U.S. at 697.

order to assure his competency. Lucas did not state in what way the exam was deficient other than it was "rush[ed]" and was "a 20 minute $200 exam at CCDC.[7] Additionally, Lucas argued that an evaluation by the "right" person would have shown that he is "mentally retarded." Even assuming Lucas is mentally challenged, that would not necessarily have rendered him incompetent to enter a guilty plea.[8] Therefore, Lucas failed to establish that counsel was ineffective in this regard.

Second, Lucas claimed that counsel was ineffective for failing to inform the district court "of the true nature of [Lucas's] mental incompetence;" specifically that his IQ is below normal and he is "mildly retarded" and "slow." A guilty plea is presumptively valid, and the appellant bears the burden of establishing it was not.[9] A defendant is competent to enter a plea if he has: (1) "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding'"; and (2) "'a rational as well as factual understanding of the proceedings against him.'"[10] Even assuming Lucas was mentally challenged, and the district court had been so informed, that fact alone

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[7]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[8]See Riker v. State, 111 Nev. 1316, 1325, 905 P.2d 706, 711-12 (1995).

[9]Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

[10]See Godinez v. Moran, 509 U.S. 389, 396 (1993) ((quoting Dusky v. United States, 362 U.S. 402, 402 (1960)); see also Riker, 111 Nev. at 1325, 905 P.2d at 711).

would not have rendered him incompetent to enter a plea.[11] Therefore, Lucas failed to establish that counsel was ineffective in this regard.

Third, Lucas claimed that counsel was ineffective for failing to inform him that under the terms of the plea agreement he could be subject to lifetime supervision. The written plea agreement states that as a consequence of his plea Lucas would be subject to a special sentence of lifetime supervision upon his release from incarceration, and Lucas was thoroughly canvassed by the district court. Therefore, Lucas failed to establish that counsel was ineffective in this regard.

Fourth, Lucas claimed that counsel was ineffective for failing to inform him that he could not receive parole unless a psych panel first found that he was not a menace to the health, safety or morals of others. A defendant entering a plea of guilty need not be informed of the parole consequences in order for the plea to valid.[12] Therefore, Lucas failed to establish that counsel was ineffective in this regard.

Fifth, Lucas claimed that counsel was ineffective for failing to inform him that he had a right to appeal. The language in the written plea agreement informing Lucas of the limited right to appeal adequately informed him of his right to appeal.[13] Therefore, Lucas failed to establish that counsel was ineffective in this regard.

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[11]See Riker, 111 Nev. at 1325, 905 P.2d at 711-12.

[12]See Anushevitz v. Warden, 86 Nev. 191, 195, 467 P.2d 115, 118 (1970) ("'[E]ligibility for parole is not a 'consequence' of a plea of guilty, but a matter of legislative grace.'") (quoting Smith v. United States, 324 F.2d 436, 441 (1963)).

[13]See Davis v. State, 115 Nev. 17, 19, 974 P.2d 658, 659 (1999).

Sixth, Lucas claimed that counsel was ineffective for forcing him to enter a plea agreement. Essentially, Lucas argued that counsel's ineffectiveness left him no other option than to plead guilty. This claim is unsupported by any specific factual allegation that would, if true, entitle Lucas to relief.[14] Moreover, for the reasons discussed in this order, we conclude that Lucas's plea was valid. Therefore, Lucas failed to establish that counsel was ineffective in this regard.

Next, Lucas claimed that his plea was involuntary. Appellant entered an Alford plea and was therefore not required to make a factual admission when pleading guilty.[15] However, in accepting an Alford plea, the district court must determine that there is a factual basis for the plea, and resolve the conflict between waiver of trial and the claim of innocence.[16] In exchange for his plea, the State agreed to drop thirty-four counts of possession of a visual presentation depicting sexual conduct of a person under 16 years of age. Lucas signed a written plea agreement which thoroughly stated the consequences of the plea. The district court conducted a plea canvass during which Lucas stated that he had read the plea agreement, understood it, the plea was made freely and voluntarily, and that he was entering an Alford plea in order to avoid a harsher sentence.[17] Based on our review of the entire record and the totality of the

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[14]See Hargrove, 100 Nev. 498, 686 P.2d 222.

[15]See Alford, 400 U.S. 25.

[16]Tiger v. State, 98 Nev. 555, 558, 654 P.2d 1031, 1033 (1982); see also State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996).

[17]See Lundy v. Warden, 89 Nev. 419, 422, 514 P.2d 212, 213-14 (1973) ("When an accused expressly represents in open court that his plea

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circumstances, we conclude that the district court did not abuse its discretion in finding that Lucas's plea was valid.[18]

Finally, Lucas claimed that he was subjected to an illegal search and seizure. Lucas waived this claim by entry of his guilty plea.[19] Therefore, the district court did not err in denying this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Lucas is not entitled to relief and that briefing and oral argument are unwarranted.[20] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[21]

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

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is voluntary, he may not ordinarily repudiate his statements to the sentencing judge.").

[18]See Gomes, 112 Nev. at 1481, 930 P.2d at 706; Bryant, 102 Nev. at 272, 721 P.2d at 368.

[19]See Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 166 (1975); Williams v. State, 103 Nev. 227, 231, 737 P.2d 508,511 (1987).

[20]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

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

cc: Hon. Joseph T. Bonaventure, District Judge
Vern Lucas
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk