IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 40274

FILED

SEP 23 2003

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

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying appellant Randall Beringer's post-conviction petition for a writ of habeas corpus.

On July 5, 2001, the district court convicted Beringer, pursuant to an Alford plea,[1] of two counts of attempted lewdness on a child under the age of fourteen (counts I and II), and two counts of possession of a visual presentation depicting sexual conduct of a person under the age of sixteen (counts III and IV). The district court sentenced Beringer to serve two terms of 240 months in the Nevada State Prison with the possibility of parole in 60 months for counts I and II. The district court also sentenced Beringer to serve two terms of 60 months in the Nevada State Prison with the possibility of parole in 12 months for counts III and IV. Counts I through IV were imposed to run concurrent to each other, and concurrent with a sentence imposed in district court case

[1]See North Carolina v. Alford, 400 U.S. 25 (1970). Under Nevada law, "whenever a defendant maintains his or her innocence but pleads guilty pursuant to Alford, the plea constitutes one of nolo contendre." State v. Gomes, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996).

number C155609. This court affirmed Beringer's conviction on direct appeal.[2] The remittitur issued on November 7, 2001.

On April 29, 2002, Beringer 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 34.770, the district court declined to appoint counsel to represent Beringer or to conduct an evidentiary hearing. On September 5, 2002, the district court denied Beringer's petition. This appeal followed.

Beringer raised a number of issues in his petition. First, Beringer contended that he was constructively denied his constitutional right to the effective assistance of appellate counsel on direct appeal when his claim of ineffective assistance of trial counsel was denied by this court as being improperly raised on direct appeal.

When a judgment of conviction is entered pursuant to a plea, NRS 34.810(1)(a) provides that a post-conviction petition for a writ of habeas corpus may only allege that the plea was involuntary or unknowingly entered, or was entered without the effective assistance of counsel. Here, Beringer's claim constituted a legal challenge unrelated to his plea or his counsel's performance. We conclude, therefore, that his claim was outside the scope of permissible claims.

Moreover, we have held that claims of ineffective assistance of counsel are properly raised in the first instance in a post-conviction petition for a writ of habeas corpus,[3] and that there is no constitutional or

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[2]Beringer v. State, Docket No. 38147 (Order of Affirmance, October 12, 2001).

[3]See Pellegrini v. State, 117 Nev. 860, ___, 34 P.3d 519, 534-35 (2001).

statutory right to the appointment of counsel in a post-conviction proceeding.[4] We are unpersuaded by Beringer's argument to depart from these well-settled laws. Therefore, we conclude that Beringer's claim was properly denied by the district court.

Second, Beringer contended that his appellate counsel was ineffective for failing to phrase his direct appeal claims as violations of his rights under the United States Constitution. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test" set forth in Strickland v. Washington.[5] Appellate counsel is not required to raise every non-frivolous argument on direct appeal.[6] Rather, appellate counsel will be most effective when every conceivable issue is not raised on direct appeal.[7] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[8]

On direct appeal, Beringer's sole contention was that his plea was unknowing and involuntarily entered because he misunderstood the sentencing consequences of the plea. Beringer failed to demonstrate that

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[4]See NRS 34.750(1); McKague v. State, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996); see also Loveland v. Hatcher, 231 F.3d 640, 644 n.4 (9th Cir. 2000).

[5]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996) (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)).

[6]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[7]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

[8]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

his direct appeal issue would have had a reasonable probability of success on appeal even if his counsel had raised his claim as a violation of his rights under the United States Constitution. Therefore, we conclude that Beringer failed to demonstrate that his appellate counsel was ineffective.

Third, Beringer contended that his trial counsel erroneously informed him that he would automatically become eligible for parole without having to undergo a sexual offender 'psych panel' and, therefore, his plea was unknowingly and involuntarily entered.

To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction based on a plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness.[9] A petitioner must also demonstrate a reasonable probability that, but for his trial counsel's errors, he would not have pleaded and would have insisted on going to trial.[10]

Our review of the record reveals no indication that the district court or the State promised or implied to Beringer that the sex offender psychological evaluation would be waived as a condition of Beringer's plea. Moreover, the written plea agreement signed by Beringer expressly informed him that, before becoming eligible for parole, a board, which includes a licensed psychologist, must certify that he is not "a menace to the health, safety or morals of others." During Beringer's plea canvass before the district court, he acknowledged that he had read and

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[9]See Hill v. Lockhart, 474 U.S. 52, 57 (1985); Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

[10]See Hill, 474 U.S. at 59; Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

understood his plea agreement. Beringer's claim is belied by the record.[11] Beringer's subjective belief about his sentence is also an insufficient basis by itself to invalidate his plea.[12] Moreover, as Beringer has not even become eligible for parole, he cannot show any prejudice.[13] Therefore, we conclude that the district court properly denied Beringer's claim.

Finally, Beringer contended that his trial counsel was ineffective for coercing him into entering his plea by promising him a sentencing range of between 2 to 5 years when the plea agreement specified that he faced a sentencing range of between 5 to 20 years. Beringer also contended that he did not have an opportunity to fully review the plea agreement before signing it.

Our review of the record reveals that Beringer's written plea agreement expressly stated that he faced the possibility of a 5 to 20 year sentencing range on each of the two counts of attempted lewdness on a child under the age of fourteen, and a 1 to 5 year sentencing range on each of the two counts of possession of a visual presentation depicting sexual conduct of a person under the age of sixteen. Before the district court accepted Beringer's plea, the district court also stated that Beringer faced the possibility of a 5 to 20 year sentence for each of his two counts for attempted lewdness on a child under the age of fourteen. Thereafter, during the plea canvass, Beringer affirmatively indicated to the district court that he read and understood the plea agreement, and that his plea

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[11]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

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

[13]See Kirksey, 112 Nev. at 998, 923 P.2d at 1113; Strickland, 466 U.S. at 687.

was being freely and voluntarily entered. The record belies Beringer's claim.[14] Additionally, as we have already stated, any subjective belief held by Beringer about the terms of his sentence is an insufficient basis by itself to invalidate his plea.[15] Therefore, we conclude that the district court properly denied Beringer's claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Beringer was not entitled to relief and that briefing and oral argument are unwarranted.[16] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[17]

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

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[14]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

[15]See Rouse, 91 Nev. at 679, 541 P.2d at 644.

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

[17]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
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Randall A. Beringer
Clark County Clerk