IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID CLYDE THOMPSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40465

FILED

JUN 2 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On September 15, 2000, the district court convicted Thompson, pursuant to a guilty plea, of one count of lewdness with a child under the age of fourteen years. Thompson was sentenced to serve a term of life in prison with the possibility of parole in ten years. He did not file a direct appeal.

Thompson's proper person petition raised ten grounds for relief. The district court appointed counsel to represent Thompson and held a two-day evidentiary hearing. On October 7, 2002, the district court denied the petition. Thompson, represented by counsel, now raises two issues on appeal.

First, Thompson contends that the district court erred in finding that his guilty plea was valid. He contends that his plea was not voluntarily because of coercion by his former counsel, Thomas Mitchell. In addition to his own statements, to support his claim Thompson cites to the testimony of two doctors and a clinical social worker describing him as meek, manipulatable, and having an anxious mood.

A guilty plea is presumptively valid, and a petitioner carries the burden of demonstrating under a totality of the circumstances that it was not freely, knowingly, and voluntarily entered.[1]

Additionally, a claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.[2] To establish a claim of ineffective assistance of counsel sufficient to invalidate a guilty plea, a petitioner must satisfy a two-part test.[3] First, a petitioner must demonstrate that his counsel's performance was deficient and fell below an objective standard of reasonableness.[4] Second, a petitioner must demonstrate prejudice by showing "'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'"[5] Both parts of the test do not need to be considered if the petitioner makes an insufficient showing on either one.[6]

The record reveals that Thompson signed a written agreement pleading guilty to one count of lewdness with a child under the age of fourteen years. In exchange for entering his plea, the State agreed to dismiss other charges, including two counts of distributing pornography to

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[1]See Freese v. State, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000); Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

[2]See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

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

[4]See id.

[5]Kirksey, 112 Nev. at 988, 923 P.2d at 1107 (quoting Hill, 474 U.S. at 59).

[6]See Strickland v. Washington, 466 U.S. 668, 697 (1984).

minors in this case and an additional count of lewdness with a child under the age of fourteen years pending in Lyon County. By signing the agreement, Thompson acknowledged that he understood the nature of the charge to which he was pleading, he had considered and discussed all possible defenses with his counsel, and he was satisfied with the performance of his counsel. He further acknowledged that he was signing the agreement "voluntarily with advice of counsel, under no duress, coercion, or promises of leniency."

During his plea canvass before the district court, Thompson stated that he had reviewed the agreement "somewhat," but declined the court's invitation for more time to review the plea with his counsel. When asked by the district court whether he understood that he was waiving rights to a jury trial, to remain silent, and to confront accusers, Thompson replied, "Yes, sir." Thereafter, the State proffered that Thompson touched and/or rubbed the vaginal area on the outside of a fourteen-year-old girl's clothing with the intent of arousing, appealing to, or gratifying his lust, passions, or sexual desires. The district court then asked Thompson, "Did you commit that crime, sir?" He replied, "Yes, sir. It was on the outside of the clothing." The district court then asked Thompson if he knew the maximum possible sentence he faced. He replied, "Life."

After further canvassing by the district court, the following exchange occurred:

> THE COURT: Has anyone threatened you in order to get you to plead guilty?
>
> THE DEFENDANT [Thompson]: No, sir.
>
> THE COURT: Are you pleading guilty freely and voluntarily?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Are you sure?
>
> THE DEFENDANT: Yes, sir.

. . . .

THE COURT: Do you have any questions of me?

THE DEFENDANT: No, sir.

Thereafter, the district court accepted Thompson's plea.

That two doctors and a clinical social worker testified at the evidentiary hearing that Thompson had a meek and anxious personality that was prone to manipulation does not demonstrate that his plea was invalid in any way. Rather, Thompson's allegation that he was coerced by Mitchell to enter his plea was belied by his own representations to the district court,[7] and a totality of the circumstance from the record reveals that Thompson's plea was freely, knowingly, and voluntarily entered.

Moreover, during the evidentiary hearing on Thompson's petition, his counsel at his canvass, Thomas Mitchell, testified that he believed Thompson was competent to enter his plea and did so voluntarily. Mitchell also testified that he advised Thompson that he believed that the plea was in Thompson's best interest, but that he made no threats to Thompson to enter the plea and told Thompson that he would take the case to trial if Thompson wanted, even though the State had a strong case.

Thompson's testimony contradicted that of Mitchell. Specifically, Thompson testified that he argued with Mitchell over the language in the agreement. According to Thompson, during the canvass, Mitchell whispered in his ear words to the effect, "you fucking creep, you have no choice. You have to sign this. You are going away for a long time. You will be very, very, sorry if you don't sign this." Thompson testified further that Mitchell whispered answers to the district court's questions in his ear throughout the canvass and that he did not inform the court of

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

Mitchell's conduct because he was afraid. Thompson's testimony was supported by the testimony of Earl Elliot, a clinical social worker who spoke with Thompson after the canvass. Elliot testified that Thompson made similar statements to him regarding Mitchell's conduct.[8]

Other than his own statements, and those he made to Elliot, there was no independent evidence to support Thompson's allegation. The district court found Mitchell to be the more credible witness. We defer to the district court's factual finding.[9] For the reasons above, we conclude that the district court properly denied Thompson relief on this allegation.

Second, Thompson contends that the district court erred in finding that his counsel at sentencing, David Houston, acted reasonably during the sentencing hearing. Specifically, Thompson contends that he would have been sentenced to probation had Houston done the following: supplemented the written reports of two doctors that were submitted to the district court with the live testimony of these doctors, and presented the district court with three allegedly exculpatory letters.

By pleading guilty to one count of violating NRS 201.230, Thompson faced a sentence of life in prison with the possibility of parole in ten years. Suspension of the sentence and probation would only be considered by the district court if Thompson submitted a report from a licensed psychologist or psychiatrist, concluding that he was "not a menace to the health, safety or morals of others." Thompson was informed

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[8]An issue arose before the district court as to whether Elliot's testimony was inadmissible hearsay. Because Thompson's petition was denied despite the limited admission of this testimony and neither party raised this issue on appeal, we will not address this issue further.

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

at least twice of these possible sentencing options—once in his written plea agreement and once by the district court during his plea canvass.[10]

Prior to Thompson's sentencing hearing, the district court was presented with a presentence investigation report prepared by the Division of Parole and Probation (the Division), as well as three mental health professionals' reports concerning Thompson's fitness for probation. The presentence investigation report indicated that Thompson had a prior gross misdemeanor conviction in 1988 for one count of statutory sexual seduction that involved an act of fellatio with a sixteen-year-old male. Thompson was sentenced to probation for that offense, but was later rearrested for violating the terms of his probation. The Division recommended that Thompson serve his sentence and not receive probation for his current offense.

A report prepared by Dr. Sally Skewis, a psychologist who performed a psychosexual evaluation of Thompson, was also presented to the district court prior to sentencing. During an interview related to the evaluation, Thompson described to Dr. Skewis numerous instances of sexual contact with a seven-year-old girl. Dr. Skewis concluded in her report that Thompson was a poor candidate for treatment and a moderate risk for reoffending, with any male or female child from five to fifteen years old being at risk of harm.

Thompson's counsel, Houston, filed a presentence memorandum with the district court. Attached to the memorandum were reports prepared by Dr. Kenneth Clark and Dr. Herbert Schall that criticized and contradicted Dr. Skewis' report. Dr. Clark, a psychologist,

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[10]NRS 176A.100 has recently been amended and probation is no longer a sentencing option for this offense. See 2003 Nev. Stat., ch. 461 § 3, at 2827.

concluded that Thompson "does not pose a threat to the health, safety, and morals of the community as long as he receives treatment." Dr. Schall, a psychiatrist, concluded that Thompson "is neither a pedophile nor a sex abuser and is no danger to the public."

Houston argued at the sentencing hearing that Thompson was a nonviolent offender who should be placed on probation. Thereafter, the district court stated that it had reviewed Thompson's file, including all of the reports, and concluded that Thompson was not, "in the Court's view, someone who is likely to be rehabilitated." Thompson was sentenced to prison and did not receive probation.

During the evidentiary hearing, Houston testified that he did not call Dr. Clark and Dr. Schall to testify at the sentencing hearing to supplement their written reports because he believed that doing so would have allowed their credibility to be challenged, jeopardizing Thompson's chances of probation.

Houston also testified that he did not present the alleged exculpatory letters written by three of Thompson's victims because he believed that the letters were not credible. Houston gave three reasons supporting his belief. First, Houston obtained a letter written by Thompson to one of the victims that was both sexually suggestive and an apparent attempt by Thompson to coach the victim into lying on his behalf. Houston believed that Thompson's letter tainted the credibility of all three alleged exculpatory letters. Second, one of the alleged exculpatory letters was written by a victim who was being treated for mental disorders. Finally, Houston believed that the letters would hinder Thompson's chances for probation because they underscored an inability by Thompson to accept responsibility for his behavior.

After the evidentiary hearing, the district court concluded that "Houston provided appropriate and effective legal representation in this

case," and denied Thompson relief on his allegation. We conclude that Houston's decisions not to call Dr. Clark and Dr. Schall to testify and not to present the three letters represented tactical choices that Thompson failed to demonstrate were unreasonable.[11] We affirm the district court order denying Thompson's allegation on this basis alone.[12]

Thompson also failed to demonstrate prejudice.[13] Like the district court after considering the supplemental evidence, we are unconvinced that had the sentencing court been presented this evidence that it would have sentenced Thompson any differently.[14] In reaching this conclusion, we note that the testimony of both Dr. Clark and Dr. Schall added little to the conclusions of their reports. Moreover, evidence at the evidentiary hearing substantiated Houston's concerns that the weaknesses of the two doctors' opinions would have been exposed if they had testified during Thompson's sentencing hearing.

For example, Dr. Clark testified that he "chose to ignore" Thompson's 1988 conviction in assessing Thompson's potential for reoffending. Dr. Schall testified that his direct contact with Thompson consisted of only one interview that lasted about an hour and a half, during which he did not ask Thompson any questions regarding his criminal behavior. Dr. Clark's and Dr. Schall's testimony revealed deficiencies in their reports that outweighed any benefit their testimony would have likely provided Thompson at sentencing.

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[11]See Strickland, 466 U.S. at 687, 689.

[12]Id. at 697.

[13]Id. at 687.

[14]Id.

Although the victim of the 1988 conviction recanted his accusation against Thompson during his evidentiary hearing testimony, this recantation lacked credibility. And regardless of this recantation, Thompson's 1988 conviction was the result of a plea that remained valid. The district court's sentencing decision was also supported by Thompson's prior probation violation, the Division's recommendation, and the facts underlying the instant offense itself.[15] Thompson failed to demonstrate that he would have been sentenced to probation but for Houston's conduct. Given these considerations, we affirm the order of the district court denying Thompson relief on this allegation. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Douglas

cc: Hon. Janet J. Berry, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[15]See Cook v. State, 77 Nev. 83, 86, 359 P.2d 483, 484 (1961) (recognizing that district courts are generally afforded broad discretion in deciding whether or not to sentence a defendant to probation).