

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL E. HART,
Appellant,
vs.
DIRECTOR, NEVADA DEPARTMENT
OF PRISONS, JACKIE CRAWFORD,
Respondent.

No. 40797

FILED

FEB 11 2004

ORDER OF AFFIRMANCE

JANETTE N. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
DEPUTY CLERK

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 November 18, 1998, the district court convicted appellant, pursuant to a guilty plea, of two counts of sexual assault on a child, one count of unlawful use of a minor in the production of pornography and one count of unlawful possession of child pornography.¹ The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole and a consecutive term of twenty months to seventy-eight months. A third term of life in the Nevada State Prison with the possibility of parole was imposed to run concurrently. No direct appeal was taken.

On November 16, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent appellant in the post-conviction proceedings, and counsel filed a supplement to the petition.

¹On December 4, 1998, the district court entered a corrected judgment of conviction.

The State opposed the petition. On December 19, 2002, after conducting an evidentiary hearing on the petition, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised a number of claims alleging that trial counsel was ineffective in relation to the guilty plea. 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. Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.² The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.³ "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."⁴ Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal.⁵ Based upon our review of the record on appeal, we conclude that the district court's factual findings regarding the claims presented at the evidentiary hearing are supported by substantial evidence and are not clearly wrong.

First, appellant claimed that trial counsel failed to advise him about the elements of the offenses and the State's burden of proof.

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

³Strickland v. Washington, 466 U.S. 668, 697 (1984).

⁴Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

⁵Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel testified that it is his habit to discuss the elements of the charged offenses, the facts of the case and discovery. Further, the district court conducted a thorough plea canvass of appellant and specifically set forth the elements of the offenses and the State's burden of proof. Appellant affirmatively indicated that he understood the elements. The written guilty plea agreement further informed appellant of the elements of the offenses and the State's burden of proof. Therefore, we conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Second, appellant claimed that trial counsel failed to accurately advise him of the availability of a consent defense to the offense of sexual assault. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. NRS 200.366 defines sexual assault as a sexual penetration against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is incapable of resisting or understanding the nature of the sexual conduct. When evaluating whether a sexual penetration is against the will of the victim several factors may be considered, including but not limited to, the relationship between the victim and the perpetrator and the victim's age and maturity level.⁶ Appellant's trial counsel testified that he discussed the defense of consent with appellant, but in his opinion a consent defense would likely not have succeeded at trial. The victim of the sexual assault was appellant's thirteen-year-old foster child. Appellant's trial counsel testified that he believed consent was not

⁶Shannon v. State, 105 Nev. 782, 790, 783 P.2d 942, 947 (1989).

voluntary in this case because appellant provided the victim with alcohol and committed emotional blackmail—appellant told the victim that he loved her and wanted to be with her and provided her with gifts. Thus, trial counsel's advice was not unreasonable. Further, appellant avoided going to trial and being convicted of an extraordinary number of sexually based offenses. Therefore, we conclude that appellant failed to demonstrate that his counsel was ineffective in this regard.

Third, appellant claimed that trial counsel misinformed him about the consequences of his guilty plea. Specifically, he claimed that his trial counsel informed him that his sentence could be reduced by meritorious credits earned or that his sentence could be reduced by the fact that he had cooperated with the police. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel testified that appellant knew, despite some confusion in the written guilty plea agreement that was clarified by the district court during the plea canvass, that sexual assault against a child under the age of fourteen carried a mandatory minimum term of twenty years. Appellant's trial counsel testified that he did not inform appellant that the mandatory minimum term could be reduced by meritorious credits or cooperation with the police. Appellant's trial counsel testified that he did not promise his client any particular sentence. Appellant's mere subjective belief as to a potential sentence is insufficient to invalidate his guilty plea as involuntary and unknowing.⁷ Therefore, we conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

⁷See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975).

Fourth, appellant claimed that his trial counsel failed to perform proper pretrial investigation and spend enough time with appellant. Appellant claimed that his trial counsel should have investigated the victim's character and past and investigated facts relating to appellant's good character. Appellant failed to demonstrate that he would have insisted on going to trial absent trial counsel's allegedly deficient performance. Appellant's trial counsel testified that he spent a couple of hours with appellant prior to appellant accepting the plea agreement and that he was aware of the evidence against appellant when the plea was negotiated. The potential evidence against appellant was substantial. Appellant confessed to the police that he had engaged in sexual relations with his foster child. A videotape, made by appellant, showed appellant, his wife and the victim engaged in sexual relations. This videotape and other photographs of the victim taken by appellant were found in appellant's home. As discussed above, appellant's trial counsel believed that the defense of consent would not be successful in the instant case. Further, appellant received a substantial benefit in his plea. The record indicates that appellant faced an extraordinary number of sexually motivated offenses. Appellant's guilty plea substantially limited the amount of time that appellant potentially faced. Given that appellant's attitude, as expressed during the evidentiary hearing, was to "get it over with," appellant failed to demonstrate what further investigation should have been conducted by trial counsel such that appellant would have insisted on going to trial. Therefore, we conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Fifth, appellant claimed that his trial counsel was ineffective because he did not attempt to bargain for a better deal. Appellant claimed that he did not receive any benefit because as a result of his plea he received several life sentences. Appellant further argued that because the State retained the right to argue that he received no benefit. Appellant failed to demonstrate that he was prejudiced. In order to demonstrate prejudice, appellant was required to demonstrate that absent trial counsel's deficient performance that he would have insisted on going to trial, not that trial counsel failed to pursue a better plea bargain. The availability of a better deal is purely speculation.⁸ The fact that the State retained the right to argue does not render trial counsel's advice to accept the plea agreement invalid given the potential evidence against appellant and the benefit he received by accepting this plea agreement.⁹ Therefore, we conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Sixth, appellant claimed that his trial counsel failed to move to recuse the district court judge because she winced during arraignment at the mention of the fact that the victim was appellant's thirteen-year-old foster child. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. NRS 1.230 provides, "A judge shall not act as such in an action or proceeding when he entertains actual bias or prejudice for or against one of the parties to the

⁸In fact, trial counsel testified that he always tried to get the best deal for his client.

⁹We further conclude that the phrase "free to argue," contrary to appellant's argument, is not vague.

action." Trial counsel testified that he did not believe that the district court was biased. Trial counsel's decision not to pursue a motion to recuse the district court judge was not objectively unreasonable.¹⁰ Further, appellant failed to demonstrate that the failure of his trial counsel to file a motion to recuse the district court affected his decision to enter his guilty plea. Therefore, we conclude that appellant failed to demonstrate that his trial counsel was ineffective.

Seventh, appellant claimed that his trial counsel was ineffective for advising appellant to plead guilty to using a child in producing child pornography because appellant was not part of a child pornography ring. Appellant testified that the videotape depicting the victim and appellant and his wife engaging in sexual relations was not for profit or public viewing. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. NRS 200.710 provides that "[a] person who knowingly, uses, encourages, entices or permits a minor to simulate or engage in or assist others to simulate or engage in sexual conduct to produce a performance is guilty of a category A felony." A performance is defined as "any play, film, photograph, computer-generated image, electronic representation, dance or other visual presentation."¹¹ The record indicates that appellant made a videotape showing himself, his wife and the victim, his minor foster child, engaged in sexual relations. Appellant also admitted at the evidentiary hearing that he took photographs of the victim in lingerie. Appellant was not required to be a member of a for-profit child pornography ring to be

¹⁰See Cameron v. State, 114 Nev. 1281, 968 P.2d 1169 (1998).

¹¹NRS 200.700.

prosecuted and convicted for unlawfully using a minor in the production of child pornography. Thus, appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Eighth, appellant claimed that his trial counsel failed to inform him of other potential defenses and lesser offenses. Appellant failed to demonstrate his trial counsel's performance was deficient or that he was prejudiced. Other than the potential defenses discussed previously, appellant failed to indicate what other defenses should have been discussed with him such that he would have not entered a guilty plea and insisted on going to trial. Similarly, appellant failed to demonstrate that information about the possibility of lesser offenses, such as lewdness or statutory sexual seduction, would have changed the outcome of the proceedings. Therefore, we conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Next, appellant claimed that his trial counsel was ineffective at sentencing. In order to prevail on a claim that trial counsel was ineffective at sentencing, appellant must demonstrate that his trial counsel's performance fell below an objective standard of reasonableness and that absent the deficient performance there is a reasonable probability that the outcome of the proceedings would have been different.¹² Again, the court need not consider both prongs if the petitioner makes an insufficient showing on either prong.¹³

¹²See Strickland, 466 U.S. 668; Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

¹³See Strickland, 466 U.S. at 697.

Appellant claimed that his trial counsel failed to present available mitigating evidence at sentencing. Appellant claimed that his trial counsel should have presented evidence that: (1) the victim was highly sexualized and appellant and his wife were not given any training on how to handle the placement of this child in their home;¹⁴ (2) appellant and his wife had twenty-six children successfully placed in their home as foster children; (3) appellant was in the military for a number of years and employed as a recruiter at the time of the crime; and (4) appellant had no criminal history and cooperated fully with the police. Appellant further claimed that his trial counsel should have presented testimony from his co-workers and family to show appellant's good character. Finally, appellant claimed that his trial counsel should have presented the report and live testimony from Dr. Robert Hiller, who concluded that appellant was not a pedophile.

The district court found that appellant failed to demonstrate that the results of sentencing would have been different if trial counsel had presented all of the mitigating evidence suggested by appellant. This finding is supported by the record and is not clearly wrong. Trial counsel testified that he felt that there was no value in shifting the blame to the victim. This was a reasonable tactical decision. Likewise, it was a reasonable tactical decision not to argue that appellant needed particular training to avoid having sexual relations with his foster child. The district

¹⁴Appellant claimed that trial counsel should have called other foster parents who had cared for the victim to show the victim's character. Appellant failed to demonstrate that his trial counsel was ineffective. One set of foster parents who cared for the victim testified at the evidentiary hearing. The testimony of these foster parents did not support appellant's position that the victim was highly sexualized.

court was aware of appellant's military service, employment and successful foster care placements. Trial counsel specifically informed the district court that appellant had no prior criminal history. Trial counsel further argued that appellant had cooperated with the police and took full responsibility for the incidents. Appellant failed to provide testimonial evidence from family and co-workers such that the results of the proceedings would have been different. Finally, trial counsel testified that he felt that Dr. Hiller's report was only neutral. Trial counsel informed the district court during sentencing that a psychosexual evaluation, performed by Dr. Sally Skewis, indicated that appellant posed a low-level risk of reoffending. Trial counsel vigorously argued for a lenient sentence for appellant. We conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Second, appellant claimed that his trial counsel was ineffective for failing to object to the district court's viewing of a videotape before sentencing showing appellant, his wife and the victim engaging in sexual relations.¹⁵ Appellant claimed that trial counsel should have objected to the videotape's being viewed because the district court stated that the only purpose in the State presenting the videotape was to prejudice the district court at sentencing. Appellant's attorney objected to the presentation of the videotape. Appellant failed to demonstrate that this videotape contained any palpable or highly suspect evidence.¹⁶

¹⁵Appellant also appeared to claim that trial counsel should have filed a motion to recuse the district court on this basis. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced.

¹⁶See Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976).

Thus, we conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Third, appellant claimed that his trial counsel was ineffective because the district court improperly prevented trial counsel from seeking a motion for psychiatric examination of the victim prior to sentencing. Appellant failed to indicate what action should have been taken by trial counsel. We note that appellant failed to provide any authority that a motion for a psychiatric examination of the victim is permissible for sentencing purposes. Therefore, we conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Next, appellant claimed that his plea was invalid because he waived the right to appeal. In the instant case, the plea agreement stated that appellant, by entering a guilty plea, waived the right to appeal any pretrial motions and substantive or procedural issues that could have been raised at trial, absent consent from the State and district court.¹⁷ Appellant failed to demonstrate that this language invalidated his plea.¹⁸ "A knowing and voluntary waiver of the right to appeal made pursuant to a plea bargain is valid and enforceable."¹⁹ The record reveals that appellant knowingly waived the right to appeal from any pretrial motions. Moreover, appellant's trial counsel testified that he informed appellant

¹⁷We note that this language did not constitute a waiver of the right to file a direct appeal from the judgment of conviction.

¹⁸See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

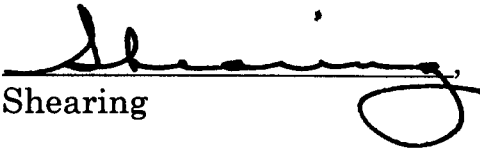
¹⁹Cruzado v. State, 110 Nev. 745, 747, 879 P.2d 1195, 1195 (1994) overruled on other grounds by Lee v. State, 115 Nev. 207, 985 P.2d 164 (1999).


that he had a right to appeal from the judgment of conviction. Appellant's trial counsel further testified that it was his habit to tell his clients that a notice of appeal had to be filed within thirty days and that if the client wished to appeal the client should contact the Public Defender's Office. Therefore, we conclude that appellant failed to demonstrate that this waiver invalidated his guilty plea.


Finally, we note that appellant raised a number of allegations in his petition and in the supplement to his petition. Many of these allegations were not pursued during the evidentiary hearing, and thus, we conclude that the district court did not err in determining that appellant abandoned these allegations.

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

ORDER the judgment of the district court AFFIRMED.


Shearing, C.J.


Rose, J.


Maupin, J.

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

cc: Hon. Jerome Polaha, District Judge
Michael E. Hart
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk