

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES H. DIGIUSTO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40852

**FILED**

JAN 09 2004

ORDER OF AFFIRMANCE

JANET M. BLOOM  
CLERK OF SUPREME COURT  
DEPUTY CLERK

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

On July 19, 2002, the district court convicted DiGiusto, pursuant to a guilty plea, of use of a minor in producing pornography (count I), possession of visual presentation depicting sexual conduct of a person under sixteen years of age (count II), and failure to register as a sex offender (count III). The district court sentenced DiGiusto to serve a term of life with the possibility of parole in 60 months for count I, a term of 28 to 72 months for count II, and a term of 19 to 48 months for count III. All sentences were imposed to run consecutively. No direct appeal was taken.

On October 21, 2002, DiGiusto 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 DiGiusto or to conduct an evidentiary hearing. On January 7, 2003, the district court denied DiGiusto's petition. This appeal followed.

In his petition, DiGiusto contended that his guilty plea was not knowingly and intelligently entered. A guilty plea is presumptively valid, and DiGiusto carries the burden of establishing that the plea was not entered knowingly and intelligently.<sup>1</sup> Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.<sup>2</sup> In determining the validity of a guilty plea, this court looks to the totality of the circumstances.<sup>3</sup>

DiGiusto first contended that his plea was not knowingly entered because his attorneys did not let him read the guilty plea agreement prior to signing it or entering his plea. The totality of the circumstances reveals that DiGiusto was made aware of the consequences of his plea. During the plea canvass, DiGiusto answered affirmatively when the district court asked him if he read the plea agreement prior to signing it. He also responded affirmatively when asked if he understood the plea agreement and if he discussed the agreement with his attorney. The court asked DiGiusto if he had any questions, and he stated, "[n]o, I believe my attorney explained, thank you." Additionally, the signed guilty plea agreement stated that DiGiusto's attorney had answered all of his questions and he was satisfied with the services of his attorney. Thus, we conclude that the district court did not err in denying this claim.

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<sup>1</sup>See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

<sup>2</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

<sup>3</sup>State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

DiGiusto next alleged that his plea was not knowingly entered because his attorney deceived him about the possible sentence he would receive under the agreement. Based upon our review of the record on appeal, we conclude that DiGiusto failed to establish that his plea was not entered knowingly because he was deceived about his possible sentence. DiGiusto acknowledged in the plea agreement that he had not been promised any particular sentence and that the sentencing judge had the discretion to order multiple sentences served concurrently or consecutively. Further, during the plea canvass, the court detailed the possible sentences for each count under the plea agreement, and DiGiusto responded that he understood the range of sentences he would face. A defendant's mere subjective belief about a potential sentence is insufficient to invalidate a guilty plea.<sup>4</sup> Therefore, we conclude that the district court did not err in denying DiGiusto's claim that his plea was not entered knowingly.

DiGiusto next raised two claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.<sup>5</sup> Further, a petitioner must demonstrate "a reasonable probability that, but for

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<sup>4</sup>Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975).

<sup>5</sup>Strickland v. Washington, 468 U.S. 688 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."<sup>6</sup>

DiGiusto first contended that his trial counsel was ineffective for failing to request an evidentiary hearing concerning photographs found in his hotel room that were alleged to depict sexual conduct of a person under sixteen. DiGiusto claimed that although the pictures did not portray sexual conduct,<sup>7</sup> his trial counsel refused to request an evidentiary hearing because he did not believe DiGiusto would get a favorable ruling.

A review of the record reveals that DiGiusto did not demonstrate that trial counsel was ineffective for failing to request an evidentiary hearing concerning the photographs. Trial counsel's refusal to request an evidentiary hearing amounted to a tactical decision. A reasonable tactical choice is entitled to deference.<sup>8</sup> We conclude that DiGiusto failed to demonstrate that his trial counsel's actions fell below an objective standard of reasonableness and he did not demonstrate that counsel was ineffective in this regard.

DiGiusto next alleged that trial counsel was ineffective for failing to possess adequate knowledge of the facts of his case. However, DiGiusto failed to support this claim with specific facts and articulate how

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<sup>6</sup>Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).


<sup>7</sup>DiGiusto argued throughout his petition that the photographs did not depict "sexual conduct" as defined in NRS 200.700. To the extent that he alleged that possession of these photographs did not constitute a crime, this claim is outside the scope a post-conviction petition for a writ of habeas corpus when the conviction is based on a guilty plea. See NRS 34.810(1)(a).

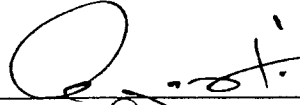
<sup>8</sup>See Riley v. State, 110 Nev. 638, 653, 878 P.2d 272, 281-82 (1994).

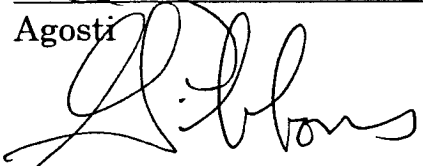
counsel's performance was deficient in this area.<sup>9</sup> Therefore, DiGiusto failed to establish that his trial counsel was ineffective on this issue.

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.<sup>10</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>11</sup>

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Kathy A. Hardcastle, District Judge  
James H. DiGiusto  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>9</sup>See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

<sup>10</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>11</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.