IN THE SUPREME COURT OF THE STATE OF NEVADA

DERWIN D. EVANS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41503

FILED

MAR 0 5 2004

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 appellant Derwin Evans' post-conviction petition for a writ of habeas corpus.

On March 21, 2002, the district court convicted Evans, pursuant to a guilty plea, of attempted lewdness with a child under fourteen years of age. The district court sentenced Evans to serve a term of 48 to 120 months in the Nevada State Prison. The sentence was suspended, and Evans was placed on probation. On September 13, 2002, the district court entered an amended judgment of conviction, reinstating Evans' probation. On November 18, 2002, the district court entered an order revoking Evan's probation due to his violation of probation conditions.

On February 13, 2003, Evans 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 Evans or to conduct

an evidentiary hearing. On May 15, 2003, the district court denied Evans' petition. This appeal followed.

In his petition, Evans made several allegations of ineffective assistance of trial 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.[1] Further, a petitioner must demonstrate "a reasonable probability that, but for counsel's errors, he 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 one.[3]

First, Evans claimed that his trial counsel was ineffective for failing to inform him that because it was his first sexual offense, he should be charged with a violation of NRS 201.210(1)(a), rather than NRS 201.230. Our review of the record reveals that this contention is without merit. Evans was charged with lewdness with a child under fourteen years old, and pleaded guilty to inappropriately fondling a thirteen-year old girl. NRS 201.230 is the correct statute when the lewd conduct

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[1]Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

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

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

involves a child. Thus, Evans did not demonstrate that his trial counsel was ineffective for failing to inform him of NRS 201.210(1)(a).

Second, Evans alleged that his trial counsel was ineffective for misinforming him about the plea agreement. Evans claimed that he should not have been allowed to plead guilty to attempted lewdness with a child under fourteen, because he did not cause bodily harm to the victim. Bodily harm is not a necessary element of attempted lewdness with a child.[4] Therefore, Evans failed to establish that his trial counsel was ineffective in this regard.

Third, Evans claimed that his trial counsel was ineffective for failing to inform him that he would be subject to lifetime supervision. We conclude that Evans failed to demonstrate that he was prejudiced by the alleged failure of counsel to inform him of lifetime supervision. The written guilty plea agreement, which Evans signed, stated that he would be subject to lifetime supervision. Additionally, during the plea canvass, Evans answered affirmatively when asked by the district court if he read the plea agreement and understood its terms. Therefore, Evans did not establish that his trial counsel was ineffective on this issue.

Fourth, Evans contended that his trial counsel was ineffective for failing to correct an error in his pre-sentence investigation report (PSI). Our review of the record on appeal, however, reveals that Evans' trial counsel informed the district court of an error in his PSI. Therefore,

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[4]See NRS 193.330(1)(a)(1); NRS 201.230.

Evans' claim is belied by the record,[5] and he failed to demonstrate that his counsel was ineffective in this regard.

Fifth, Evans claimed that his trial counsel was ineffective for allowing him to plead guilty to a category B felony that carries a sentence of two to twenty years. Evans argued that he should have pleaded guilty to a category B felony that carries a sentence of one to ten years. Evans pleaded guilty to attempted lewdness with a child under fourteen years of age. Lewdness with a child under fourteen is a category A felony.[6] An attempt to commit a category A felony is itself a category B felony, punishable by imprisonment for a term of two to twenty years.[7] Because Evans attempted to commit a category A felony, rather than a category B felony, he did not establish that his trial counsel was ineffective on this claim.

Sixth, Evans alleged that his trial counsel was ineffective for misinforming him that the crime of lewdness with a child under fourteen years of age carried a sentence of life imprisonment. Lewdness with a child under fourteen is a category A felony, for which a sentence of life imprisonment may be imposed.[8] Thus, Evans failed to demonstrate that his counsel was ineffective on this issue.

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

[6]NRS 201.230.

[7]NRS 193.330(1)(a)(1).

[8]NRS 193.130(2)(a); NRS 201.230.

Seventh, Evans claimed that his trial counsel was ineffective for failing to investigate his case. Evans failed to include specific facts concerning this claim, or articulate how his counsel was ineffective in this regard.[9] Therefore, he failed to establish that his counsel was ineffective for failing to investigate his case.

Finally, Evans alleged that his trial counsel was ineffective for failing to inform him of his right to a direct appeal. "[T]here is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal" unless the defendant inquires about a direct appeal or there exists a direct appeal claim that has a reasonable likelihood of success.[10] The burden is on the defendant to indicate to his attorney that he wishes to pursue a direct appeal.[11] Evans failed to demonstrate that he inquired about an appeal or had a direct appeal claim that had a reasonable likelihood of success. Further, Evans' was informed of his limited right to appeal in his guilty plea agreement. Consequently, Evans did not establish that his counsel was ineffective in this regard.

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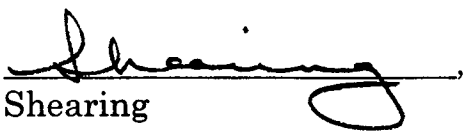
[9]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[10]Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

[11]Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Evans is not entitled to relief and that briefing and oral argument are unwarranted.[12] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[13]



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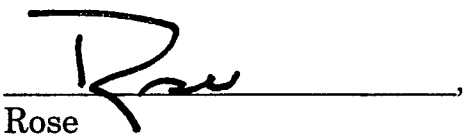

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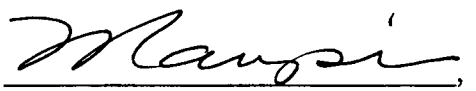

_____, J.
Maupin

cc: Hon. Donald M. Mosley, District Judge
Derwin D. Evans
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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

[13]We have reviewed all documents that Evans has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Evans has attempted to present claims or facts in those submissions that were not previously presented in the proceedings below, we have declined to consider them in the first instance.