

IN THE SUPREME COURT OF THE STATE OF NEVADA

LOUIS EUGENE THOMAS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41688

**FILED**

FEB 18 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOW,  
CLERK OF SUPREME COURT  
BY *J. R. [Signature]*  
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying appellant Louis Eugene Thomas's post-conviction petition for a writ of habeas corpus.

On October 4, 2001, Thomas was convicted, pursuant to a nolo contendere plea, of one count of battery with a deadly weapon for fracturing his then live-in girlfriend's arm with a baseball bat. The district court sentenced Thomas to serve a prison term of 24 to 96 months. Thomas did not file a direct appeal.

On July 30, 2002, Thomas filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district court appointed counsel to represent Thomas, and counsel supplemented the petition. After conducting an evidentiary hearing, the district court denied the petition. This appeal followed.

In order to state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty or nolo contendere plea, a petitioner must demonstrate that his counsel's

performance fell below an objective standard of reasonableness.<sup>1</sup> Also, a petitioner must demonstrate “a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial.”<sup>2</sup>

Thomas first contends that his trial counsel was ineffective and his nolo contendere plea was involuntary because he was coerced into entering a plea. In particular, Thomas alleges that he entered a plea on the day of trial because his trial counsel threatened him with the habitual criminal statute, misinformed him about the potential sentence, told him that the jury would believe the victim, and told him that he had never won a case before the trial judge. Thomas also argues that he believed, if he entered a nolo contendere plea, that he could receive probation or a lesser sentence, and that if he proceeded to trial he faced a life prison term without the possibility of parole. After conducting an evidentiary hearing, the district court rejected Thomas's claim, ruling that his guilty plea was knowing and voluntary and that his trial counsel was not ineffective with regard to the plea. We conclude that the district court's finding is supported by substantial evidence.<sup>3</sup>

The record reveals that Thomas entered his nolo contendere plea with full knowledge of the sentencing consequences of the charged

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<sup>1</sup>Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); accord Hill v. Lockhart, 474 U.S. 52 (1985).

<sup>2</sup>Hill, 474 U.S. at 59.

<sup>3</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

crime. Thomas was thoroughly canvassed and informed by the district court and in the plea agreement that the State was stipulating to a sentencing recommendation of 2 to 8 years, and that the possible penalty the court could impose was 2 to 10 years. Additionally, at the plea canvass and in the plea agreement, Thomas stated that no one had threatened him or made any promises in order to get him to plead guilty. Finally, at the post-conviction evidentiary hearing, defense counsel Kevin Van Ry testified that although he advised Thomas that he qualified for habitual criminal treatment and went over the possible statutory penalties with him, he did not coerce or threaten Thomas to enter a plea and never promised him probation or a sentence less than the stipulated recommendation of 2 to 8 years. Accordingly, Thomas has failed to show that the district court's findings involving the entry of his nolo contendere plea are not supported by substantial evidence or are clearly wrong.

Second, Thomas contends that his trial counsel was ineffective in failing to investigate to uncover evidence to impugn the credibility of the victim,<sup>4</sup> evidence that the victim sustained her injuries in a fall, and evidence in support of a voluntary intoxication defense.<sup>5</sup> The district court

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<sup>4</sup>In particular, Thomas alleges that Van Ry could have impeached the victim at trial by showing that she previously had committed perjury at the preliminary hearing when she testified that she was a nursing student because the victim, in fact, had dropped out of nursing school and was working as a prostitute.

<sup>5</sup>We note that post-conviction counsel raised the issue of the voluntary intoxication defense for the first time at the evidentiary  
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rejected Thomas's claim, ruling that Thomas could not show he was prejudiced by trial counsel's alleged deficient investigation. We conclude the district court did not err in rejecting Thomas's contention.

Preliminarily, we note that Thomas's claim that he would not have pleaded *nolo contendere* if Van Ry had conducted further investigation is belied by the record. During the plea canvass and in the signed plea agreement, Thomas stated that he had discussed the facts of the charged offense and all possible defense strategies with his counsel. Moreover, Thomas has failed to show that he would have proceeded to trial but for his trial counsel's deficient investigation. Prior to the entry of his plea, Thomas and Van Ry had discussed the fact that the victim had worked as a prostitute and, also, that Thomas was so intoxicated on the night in question that he did not remember what happened. Additionally, Van Ry testified that, prior to Thomas's decision to enter a plea, he reviewed the discovery in the case, including the police reports, photographs, and the preliminary hearing transcript. Van Ry believed the plea negotiations were in Thomas's best interest because the victim's testimony was fairly credible, and Thomas could not testify about the purported battery in light of the fact that he could not remember what happened. Also, Van Ry did not believe Thomas would make a good witness in light of his prior criminal history, which included three felony

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*... continued*

hearing. We conclude that the district court did not err in ruling that Thomas failed to show that he would not have proceeded to trial if his counsel had discussed the defense of voluntary intoxication.

and four misdemeanor convictions. Accordingly, Thomas has failed to show that the district court's finding that trial counsel was not ineffective in investigating his case was not supported by substantial evidence or was clearly wrong.

Finally, Thomas contends that his trial counsel was ineffective for failing to present mitigating evidence at sentencing. Specifically, Thomas contends that his trial counsel should have presented a drug and alcohol evaluation and numerous character witnesses to testify that Thomas was non-violent and a great worker and father. At the post-conviction hearing, Van Ry testified that he did not believe it was necessary to present mitigating evidence at sentencing because the plea negotiations provided for a stipulated sentence recommendation of 2 to 8 years. Moreover, Van Ry believed that Thomas would not receive probation or entry into a diversion program, and that the stipulated sentence was the best sentence Thomas was going to get in light of his violent criminal history.

After considering the mitigating evidence and entertaining arguments from post-conviction counsel, the district court found that the additional evidence would not have affected the court's sentencing decision. In particular, the district court noted that the alcohol evaluation presented by Thomas "offered no prognosis for success" and that Thomas had not been forthright with the evaluator about his alcohol and drug use or his criminal history. Additionally, the district court found that the additional character witness testimony would not have affected its sentencing decision because the sentence was based on Thomas's "criminal history and the nature of the crime." Thomas has failed to show that the

district court's finding that he was not prejudiced by trial counsel's failure to present mitigating evidence at sentencing was not supported by substantial evidence or was clearly wrong.

Having considered Thomas's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.  
Becker

Agosti, J.  
Agosti

Gibbons, J.  
Gibbons

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