

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY GENE WATTS A/K/A GARY  
EUGENE WATTS,  
Appellant,  
vs.  
WARDEN, LOVELOCK  
CORRECTIONAL CENTER, CRAIG  
FARWELL,  
Respondent.

No. 41762

FILED

MAY 28 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 Gary Watts' post-conviction petition for a writ of habeas corpus.

On August 10, 1998, the district court convicted Watts of two counts of sexual assault on a minor under the age of fourteen pursuant to a guilty plea, and a third count of sexual assault on a minor under the age of fourteen pursuant to an Alford plea.<sup>1</sup> The district court sentenced Watts to serve three consecutive terms of life in the Nevada State Prison with the possibility of parole after ten years. This court dismissed Watts' appeal from his judgment of conviction and sentence.<sup>2</sup> The remittitur issued on June 6, 2000.

On May 9, 2001, Watts, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus in the district court.

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<sup>1</sup>See North Carolina v. Alford, 400 U.S. 25 (1970).

<sup>2</sup>Watts v. State, Docket No. 32978 (Order Dismissing Appeal, May 10, 2000).

On December 1, 2001, Watts filed a brief in support of his petition. The State opposed the petition. On January 10, 2003, Watts filed a supplemental petition, and the State filed a reply. On February 18, 2003, the district court conducted an evidentiary hearing concerning Watts' petition. Both Watts and his trial counsel, Robert Witek, testified at the hearing. On June 5, 2003, the district court denied Watts' petition. This appeal followed.

In his petition, Watts first contended that his guilty plea was not entered knowingly or voluntarily. A guilty plea is presumptively valid, and Watts carries the burden of establishing that his plea was not entered knowingly and intelligently.<sup>3</sup> In determining the validity of a guilty plea, this court looks to the totality of the circumstances.<sup>4</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>5</sup>

Watts first contended that his guilty plea was not knowing or voluntary because the district court did not address the possibility of consecutive sentences during the plea canvass. We conclude that under the totality of the circumstances, Watts failed to demonstrate that his guilty plea was invalid. The guilty plea agreement, signed by Watts, provided that "if more than one sentence of imprisonment is imposed the sentencing judge has the discretion to order the sentences served

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<sup>3</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>4</sup>State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

<sup>5</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

concurrently or consecutively." Further, during the oral plea canvass, Watts acknowledged that he signed and discussed the terms of the guilty plea agreement with his attorney. Although the district court did not specifically advise Watts that his sentences could be imposed consecutively, "the failure to utter talismanic phrases will not invalidate a plea where a totality of the circumstances demonstrates that the plea was freely, knowingly and voluntarily made."<sup>6</sup> Because Watts was advised of the possibility of consecutive sentences through the guilty plea agreement, the district court did not err in denying this claim.

Watts next alleged that his guilty plea was not entered knowingly or voluntarily because he was not informed that probation was unavailable. We conclude that Watts' claim is without merit. Watts' signed guilty plea agreement stated, "I understand that I am not eligible for probation for the offenses to which I am pleading guilty." Further, although there was some initial confusion during the plea canvass concerning Watts' probation eligibility, the district court corrected the misunderstanding and stated that Watts would not be eligible for probation. Thus, Watts failed to demonstrate that under the totality of the circumstances, he was not aware that probation was unavailable, and we affirm the order of the district court with respect to this claim.

Next, Watts made several allegations of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of

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<sup>6</sup>Freese, 116 Nev. at 1104, 13 P.3d at 447.

reasonableness.<sup>7</sup> A petitioner must further establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."<sup>8</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>9</sup> The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>10</sup>

First, Watts contended that his trial counsel was ineffective for failing to inform him that the district court could impose his sentences to run consecutively. Watts admitted during the evidentiary hearing that his trial counsel, Witek, did not guarantee that his sentences would be run concurrently. Further, Witek testified that he advised Watts of the possibility of consecutive sentencing. Thus, based on the above testimony, the district court's factual determination that this claim lacked merit is supported by substantial evidence is not clearly wrong.<sup>11</sup> Consequently, we affirm the order of the district court with respect to this claim.

Second, Watts claimed that his trial counsel was ineffective for failing to have his competency evaluated. Watts contended that after he was arrested in Guam and awaiting extradition, he attempted suicide.

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<sup>7</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>8</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>9</sup>Strickland, 466 U.S. at 697.

<sup>10</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

<sup>11</sup>Id.

A defendant is competent to stand trial if he has adequate "present ability to consult with his lawyer with a reasonable degree of rational understanding" and if "he has a rational as well as factual understanding of the proceedings against him."<sup>12</sup> A hearing is constitutionally and statutorily required if reasonable doubt exists as to the defendant's competency.<sup>13</sup> In the instant case, Watts did not allege specific facts to support a conclusion that he was unable to consult with his attorney, or understand the proceedings against him. Rather, Watts claimed that he was despondent when faced with extradition to stand trial on multiple sexual assault charges. Further, Witek testified at the evidentiary hearing that he met with Watts three or four times prior to the entry of his guilty plea, and Witek felt that Watts "was not even approaching incompetency." Finally, Watts testified that he never informed Witek of his suicide attempt in Guam. Consequently, we conclude that Watts did not demonstrate that his counsel acted unreasonably in failing to have his competency evaluated, and the district court did not err in denying the claim.

Third, Watts alleged that his trial counsel was ineffective for failing to adequately investigate the victims. Watts claimed that with a proper investigation, he would not have pleaded guilty. Watts contended that a thorough investigation would have produced impeachment evidence, allowed counsel to attack the credibility of the victims, revealed the victims' motive to fabricate, and uncovered whether the victims were

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<sup>12</sup>Melchor-Gloria v. State, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983).

<sup>13</sup>See id. at 180, 660 P.2d at 113; NRS 178.400-440.

competent to stand trial. Watts did not support this claim with specific facts, however, and his claim is nothing more than speculation concerning evidence that may have been uncovered by additional investigation.<sup>14</sup> Thus, Watts did not demonstrate that his trial counsel was ineffective on this issue, and we affirm the order of the district court with respect to this claim.

Fourth, Watts claimed that his trial counsel was ineffective for failing to adequately investigate and inform Watts of the defense of consent. Watts contended that he would not have pleaded guilty to three counts of sexual assault on a minor under the age of fourteen if he was aware that consent was a defense. Watts further claimed that his counsel was ineffective in allowing him to plead guilty to sexual assault rather than statutory sexual seduction.

Witek testified at the evidentiary hearing that he did not believe consent was a viable defense based on the facts of Watts' case. Witek further testified that the State was unwilling to accept a plea to statutory sexual seduction rather than sexual assault. The record on appeal reveals that forty-two-year-old Watts allowed two runaway thirteen-year-old girls to stay at his home. Additionally, a thirteen-year-old neighbor frequently spent the night at Watts' residence. Watts provided the girls with marijuana and methamphetamine. He also showed them a pornographic video. When the girls were under the influence of drugs, Watts engaged in sexual activity with them. We conclude that Watts failed to establish that his trial counsel acted unreasonably on this issue. Watts did not demonstrate that the victims

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<sup>14</sup>See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

were mentally and physically capable of consenting to sexual activity with him, such that his trial counsel was ineffective in allowing him to plead guilty to sexual assault.<sup>15</sup> Consequently, the district court did not err in denying the claim.

Fifth, Watts contended that his trial counsel was ineffective because he had an actual conflict of interest. Specifically, Witek was employed by the district attorney's office when Watts was first charged with committing the instant offenses in 1995. Watts was arrested in Guam in 1997 and extradited to Nevada in April 1998. At that time, Witek was no longer working at the district attorney's office, and was appointed to represent Watts.

"The Sixth Amendment guarantees a criminal defendant the right to conflict-free representation."<sup>16</sup> In order to establish a violation of this right, a defendant must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance."<sup>17</sup> The existence of an actual conflict of interest must be established on the specific facts of

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<sup>15</sup>See NRS 200.366 (providing that a person is guilty of sexual assault if he "subjects another person to sexual penetration . . . against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct").

<sup>16</sup>Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993); see also Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992).

<sup>17</sup>Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); see also Clark, 108 Nev. 324, 831 P.2d 1374.

each case, but "[i]n general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties."<sup>18</sup>

In the instant case, Witek testified that he was not involved in Watts' case while he worked at the district attorney's office. Witek further stated that his familiarity with Watts' case consisted of nothing more than a general knowledge that an individual charged with sex offenses had fled the jurisdiction. Witek did not recognize Watts as this individual, however, when Watts was extradited to Nevada more than two years later and Witek was assigned to represent him. Based on the above testimony, the district court's determination that Witek did not actively represent conflicting interests is supported by substantial evidence.<sup>19</sup> Consequently, we affirm the order of the district court with respect to this claim.

Watts additionally claimed that an actual conflict of interest existed because Witek represented one of the victims prior to his representation of Watts.<sup>20</sup> Witek testified that he was asked to represent C.H., one of Watts' victims, in an unrelated juvenile hearing approximately two weeks before he was assigned to represent Watts. Witek stated that he met with C.H. for no more than ten or twelve minutes and appeared briefly with her in juvenile court. Witek further

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<sup>18</sup>Clark, 108 Nev. at 326, 831 P.2d at 1376 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

<sup>19</sup>See Riley, 110 Nev. at 647, 878 P.2d at 278.


<sup>20</sup>Watts additionally alleged that his appellate counsel was ineffective for failing to appeal this issue. Consistent with the reasoning discussed below, we conclude that Watts did not demonstrate that his appellate counsel was ineffective. See Kirksey, 112 Nev. 980, 923 P.2d 1102.




testified that he made no connection between his representation of C.H. and Watts' case until the instant petition was filed. We conclude that Watts failed to establish that an actual conflict of interest existed due to his trial counsel's prior representation of C.H., such that Watts was denied the effective assistance of counsel. Therefore, the district court did not err in denying the claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Watts is not entitled to relief and that briefing and oral argument are unwarranted.<sup>21</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>22</sup>

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

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

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

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<sup>21</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>22</sup>We have reviewed all documents that Watts 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 Watts 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.

cc: Hon. David A. Huff, District Judge  
Gary Gene Watts  
Attorney General Brian Sandoval/Carson City  
Lyon County District Attorney  
Lyon County Clerk