

IN THE SUPREME COURT OF THE STATE OF NEVADA

DUANE TIPTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41838

FILED

APR 23 2004

ORDER OF AFFIRMANCE

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

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

On August 8, 2001, the district court convicted appellant, pursuant to a guilty plea, of one count of lewdness with a child under the age of fourteen years. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole in ten years. No direct appeal was taken.

On February 25, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus and a supplement in the district court. The State opposed the petition. The district court appointed counsel, and counsel filed a supplement to the petition and supplement. On September 9, 2003, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

Appellant raised several claims of ineffective assistance of counsel. 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.¹ Appellant carries the burden of demonstrating that his guilty plea was not entered knowingly and voluntarily.²

First, appellant claimed that his trial counsel was ineffective for a number of reasons relating to the lack of a psychosexual evaluation. Appellant claimed that his trial counsel failed to ensure that he received a psychosexual evaluation and that his trial counsel should have objected to the district court sentencing him without the psychosexual evaluation because it divested the district court of discretion to grant probation.³ Appellant noted that he received a positive psychiatric report prior to sentencing, and he opined that this indicates that he may have been granted probation if he had received a psychosexual evaluation. Appellant argued that this may have changed the results of the proceedings.

We conclude that appellant failed to demonstrate that he was prejudiced by trial counsel's failure to ensure that appellant received a psychosexual evaluation. Appellant stipulated that he would not receive probation in the instant case, and he affirmatively indicated during the plea canvass that this was his understanding of the plea negotiations. Appellant's trial counsel testified at the evidentiary hearing that she discussed the psychosexual evaluation with appellant. One psychiatrist

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

²See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

³2001 Nev. Stat., ch. 560, § 14, at 2792 (NRS 176A.110).

examined appellant, and the report of that psychiatrist was presented to the district court for consideration at sentencing. Because appellant received the sentence that he bargained for, he cannot demonstrate that his plea was entered unknowingly or involuntarily and that he was prejudiced by his trial counsel's failure to object to the lack of a psychosexual evaluation. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for advising him to accept the plea negotiations setting forth a term of life with the possibility of parole after ten years had been served. Appellant claimed that he was presented with a better offer and that he should have been advised to accept the better offer. Specifically, he asserted that he was offered a plea agreement in which he would plead guilty to one count of sexual assault on a minor under the age of fourteen years and one count of attempted lewdness with a minor under the age of fourteen years in exchange for a stipulated sentence of five to twenty years for sexual assault and a consecutive term of at least two to twenty years for attempted lewdness. Appellant claimed that this offer was better because if he received the minimum term for attempted lewdness he would only have to serve seven years before being considered eligible for parole to the streets. Because the offer that he accepted contained a ten year minimum term before he was eligible for parole, he argued that this was not the best offer to accept.

We conclude that appellant failed to demonstrate that his trial counsel's performance was deficient. Trial counsel testified that she discussed both offers with appellant. Trial counsel acknowledged that the minimum terms set forth in the offer that appellant did not accept would

have been more beneficial in terms of the minimum parole eligibility date. However, appellant was not guaranteed to receive a minimum term on the attempted lewdness count and the State could have argued for a minimum term of eight years—a circumstance that would have increased the time that appellant would have to spend in prison to thirteen years before he was eligible for parole to the streets.⁴ Trial counsel further testified that appellant did not want to enter a guilty plea to sexual assault. Trial counsel testified that she presented appellant with the facts, and appellant made the decision about which offer to accept. Appellant was thoroughly canvassed about the plea negotiations that he accepted. Therefore, we conclude that the district court did not err in denying this claim.


Finally, appellant raised two claims in his proper person petition and supplement that were not addressed during the evidentiary hearing: (1) his plea was unknowing because he was not informed that he would have to be certified by a psychiatric panel in order to be eligible for parole; and (2) his trial counsel failed to file an appeal when counsel knew or should have known that appellant would want to pursue an appeal to raise the issue of the lack of a psychosexual evaluation. Appellant failed to present any testimony or arguments in support of these claims during the evidentiary hearing, and this failure alone would be sufficient reason to deny relief. Appellant failed to demonstrate on the face of the claims


⁴Trial counsel further testified that she called the prison to determine which of the two sentence structures would have resulted in less time being served for parole eligibility. She testified that the prison informed her that appellant would probably serve less time with the life sentence because "[w]hen there are two sentences running consecutive, they were not always paroling [prisoners] to the second case."

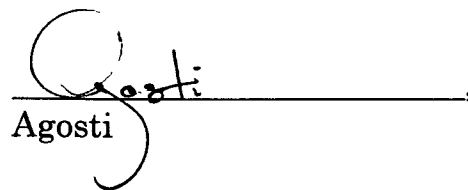
that his trial counsel was ineffective for either of these alleged errors. Appellant was not required to be informed of the parole consequences of his guilty plea.⁵ Appellant failed to demonstrate that his psychosexual evaluation claim was a claim that trial counsel knew or should have known had a reasonable probability of success on appeal for the reasons discussed previously.⁶ Therefore, we conclude that the district court did not err in denying these claims.

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.⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 C.J.
Shearing

 J.
Becker

 J.
Agosti

⁵Anushevitz v. Warden, 86 Nev. 191, 467 P.2d 115 (1970).

⁶See Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

⁷See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Nancy M. Saitta, District Judge
Duane Charles Tipton
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk