IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD J. GOHEEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41848

FILED

MAY 28 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On May 20, 2002, the district court convicted Goheen, pursuant to a guilty plea, of sexual assault (count I) and sexual assault on a minor under sixteen years of age (count II). The district court sentenced Goheen to serve a term of ten to twenty-five years in the Nevada State Prison for count I, and a consecutive term of five to twenty years for count II. Goheen was additionally required to submit to lifetime supervision. This court affirmed Goheen's judgment of conviction and sentence on appeal.[1] The remittitur issued on October 4, 2002.

On February 18, 2003, Goheen 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

[1]Goheen v. State, Docket No. 39647 (Order of Affirmance, September 9, 2002).

district court declined to appoint counsel to represent Goheen or to conduct an evidentiary hearing. On June 16, 2003, the district court denied Goheen's petition. This appeal followed.

In his petition, Goheen first contended that his guilty plea was not entered knowingly or voluntarily. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.[2] Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.[3] In determining the validity of a guilty plea, this court looks to the totality of the circumstances.[4]

Goheen claimed that his guilty plea was not knowingly and voluntarily entered because he was not advised of the sentence of lifetime supervision during the oral plea canvass.[5] Lifetime supervision is a direct consequence of a guilty plea, and therefore a defendant must be aware of the consequence of lifetime supervision prior to the entry of a guilty plea.[6]

We conclude that under the totality of the circumstances,

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[2]Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

[3]Hubbard, 110 Nev. at 675, 877 P.2d at 521.

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

[5]See NRS 176.0931.

[6]Palmer v. State, 118 Nev. 823, 830, 59 P.3d 1192, 1196-97 (2002).

Goheen failed to establish that he was not informed of the consequence of lifetime supervision prior to the entry of his guilty plea. The guilty plea agreement, which Goheen signed, provided that "the Court will include as part of my sentence, in addition to any other penalties provided by law, lifetime supervision commencing after any period of probation or any term of imprisonment." Further, during the oral plea canvass, Goheen acknowledged that he read, signed, and understood the guilty plea agreement. Although the district court did not specifically advise Goheen of lifetime supervision during the oral plea canvass, "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."[7] Because Goheen was made aware of the consequence of lifetime supervision in the guilty plea agreement, we conclude that the district court did not err in denying this claim.

Goheen next claimed that his guilty plea was not knowingly or voluntarily entered because the district court coerced Goheen into entering the plea. Specifically, Goheen contended that the district court was involved in the negotiations when it stated, "I know these fellas very well and they have great ability in the criminal justice system, and I trust them, and I think they've reached a good negotiation, so I'm not going to

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[7]Freese, 116 Nev. at 1104, 13 P.3d at 447.

interfere with this negotiation. I'm going to give you exactly what has been recommended by them."[8]

We conclude that under the totality of the circumstances, Goheen did not establish that judicial involvement rendered his guilty plea unknowing or involuntary. A review of the record reveals that the district court did not participate in the plea negotiations. Instead, the district court merely stated its intention to follow the sentence agreed upon by the parties in the plea agreement.[9] Additionally, during the oral plea canvass, the district court told Goheen, "It's up to you. You don't have to take the deal. We can go to trial on this matter." Because Goheen failed to demonstrate that the district court abandoned its role as "a neutral arbiter of the criminal prosecution,"[10] he did not establish that his plea was unknowing or involuntary, and the district court did not err in denying this claim.

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[8]Goheen additionally alleged that the district court coerced him into accepting the plea by making the following comment: "Now I can tell you that I'll go along with the negotiations in this matter, 'cause I'm not going to interfere with these fine lawyers' efforts in this matter."

[9]Cf. Standley v. Warden, 115 Nev. 333, 990 P.2d 783 (1999) (holding that the district court improperly coerced the defendant into accepting plea offer through lengthy exposition urging the defendant to accept the plea).

[10]Id. at 337, 990 P.2d at 785 (quoting United States v. Bruce, 976 F.2d 552, 557 (9th Cir. 1992)).

Goheen next raised a claim 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 reasonableness.[11] A petitioner must further establish that there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.[12] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[13]

Goheen alleged that his trial counsel was ineffective for failing to object to the district court's imposition of lifetime supervision. As previously stated, the signed written guilty plea agreement provided that Goheen would be subject to a special sentence of lifetime supervision. Further, the district court did not have discretion concerning the imposition of lifetime supervision; rather, lifetime supervision is mandatory for anyone convicted of a sexual offense.[14] For these reasons, we conclude that Goheen did not demonstrate that his trial counsel acted unreasonably in failing to object to the imposition of lifetime supervision, and we affirm the order of the district court with respect to this claim.

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

[12]Id.

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

[14]See NRS 176.0931(1).

Goheen lastly alleged that his appellate counsel was ineffective. To establish ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.[15] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[16] Appellate counsel is not required to raise every non-frivolous issue on appeal.[17]

Goheen contended that his appellate counsel was ineffective for failing to appeal the State's breach of the plea agreement.[18] Goheen specifically claimed that the State breached the plea agreement by including a sentence of lifetime supervision. We conclude that Goheen failed to demonstrate that the State breached the plea agreement, such that an appeal of this issue would have likely succeeded. The signed guilty plea agreement specifically provided that Goheen would be

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[15]See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

[16]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

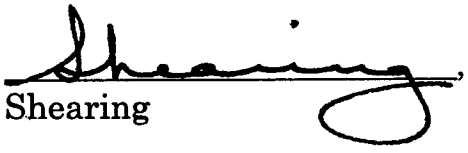
[17]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[18]Goheen additionally raised this claim independently from his ineffective assistance of counsel claim. Because this issue should have been raised on direct appeal, we conclude that it is waived. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

sentenced to lifetime supervision. Thus, Goheen did not establish that his appellate counsel was ineffective, and 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 Goheen is not entitled to relief and that briefing and oral argument are unwarranted.[19] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[20]



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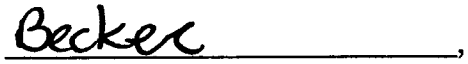
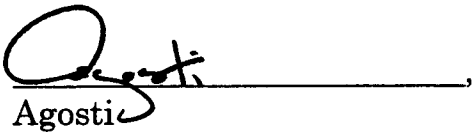
Shearing



_____, J.
Becker



_____, J.
Agosti

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

[20]We have reviewed all documents that Goheen 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 Goheen 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. Michael A. Cherry, District Judge
Richard J. Goheen
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk