

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE COLEMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42051

FILED

JUN 04 2004

JANET M. GLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE IN PART AND REVERSAL AND REMAND

IN PART

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

On August 30, 2002, the district court convicted Coleman, pursuant to a guilty plea, of two counts of lewdness with a minor under fourteen years of age, and one count each of sexual assault on a minor under fourteen years of age and sexual assault on a minor under sixteen years of age. The district court sentenced Coleman to serve a period totaling life in the Nevada State Prison with the possibility of parole after thirty years. This court dismissed Coleman's untimely appeal from his judgment of conviction and sentence for lack of jurisdiction.¹

On October 29, 2002, Coleman filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel to represent Coleman, and Coleman filed a reply to the State's response.

¹Coleman v. State, Docket No. 39776 (Order Dismissing Appeal, July 25, 2002).

Pursuant to NRS 34.770, the district court declined to conduct an evidentiary hearing. On August 7, 2003, the district court denied Coleman's petition. This appeal followed.²

Coleman first contends that his guilty plea was not knowingly and voluntarily entered. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.³ This court looks to the totality of the circumstances in determining the validity of a guilty plea.⁴ Further, this court will not reverse a district court's determination concerning the validity of a guilty plea absent a clear abuse of discretion.⁵

Coleman argues that his guilty plea was not knowingly and voluntarily entered because he did not understand the elements of sexual assault. Specifically, the district court failed to address the issue of consent when conducting the plea canvass.

We conclude that under the totality of the circumstances, Coleman failed to establish that his guilty plea was unknowingly entered. The information attached to Coleman's guilty plea agreement contained a description of the elements of the crimes to which Coleman was pleading guilty. The two sexual assault counts provided that the sexual contact was "against [the victim's] will, or under conditions in which Defendant knew, or should have known, that the [victim] was mentally or physically

²We note that Coleman is represented by counsel in this appeal.

³Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

⁴State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000).

⁵Hubbard, 110 Nev. at 675, 877 P.2d at 521.

incapable of resisting or understanding the nature of Defendant's conduct." Further, during the oral plea canvass, Coleman acknowledged that he read, signed, and understood the guilty plea agreement. Although the district court did not specifically discuss the issue of consent during the 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."⁶ Because Coleman failed to demonstrate that he was unaware of the elements of sexual assault on a minor, we affirm the order of the district court with respect to this claim.

Coleman also argues that his guilty plea was not knowingly or voluntarily entered because he did not admit that the victim of one count of sexual assault was under the age of sixteen. A review of the record reveals that Coleman initially denied that the victim was under the age of sixteen; after further discussion, however, Coleman acknowledged that the victim was under sixteen:

THE COURT: Okay, yeah, this is between January '99 and November 2000, [the victim], and she was under sixteen, that you had sexual intercourse with her, is that true?

THE DEFENDANT: Yes, sir.

Consequently, Coleman failed to establish that he did not provide a factual basis for his guilty plea, and the district court did not err in denying the claim.

Coleman next raises several claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel

⁶Freese, 116 Nev. at 1104, 13 P.3d at 447.

sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.⁷ 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.⁸ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁹

First, Coleman claims that his trial counsel was ineffective for failing to argue that his sentences should be run concurrently, rather than consecutively. We conclude that this claim is without merit. The guilty plea agreement was conditional on Coleman receiving consecutive sentences. Further, during the entry of Coleman's guilty plea, the district court stated that it intended to sentence Coleman pursuant to the guilty plea negotiations. We therefore conclude that Coleman failed to demonstrate that the outcome of his sentencing hearing would have been different if his trial counsel had argued for concurrent sentences, and the district court did not err in denying this claim.

Coleman next alleges that his trial counsel was ineffective for failing to adequately investigate his case. Specifically, trial counsel should have investigated: (1) the victims' inconsistent statements, (2) Coleman's mental and physical state, and (3) the possible violation of Coleman's constitutional rights during a police interrogation. Coleman did not provide any specific facts to support these claims or articulate how his

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

⁸Id.

⁹Strickland, 466 U.S. at 697.

counsel's performance was defective in these areas.¹⁰ As such, Coleman failed to establish that his trial counsel was ineffective, and the district court did not err in denying these claims.

Lastly, Coleman contends that his trial counsel was ineffective for failing to file an appeal, despite a request that he do so. "[A]n attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction."¹¹ Prejudice is presumed if a petitioner demonstrates that counsel ignored his request for an appeal.¹²

Coleman is entitled to an evidentiary hearing if he raises a claim in his petition that, if true, would entitle him to relief, and if his claim is not belied by the record.¹³ Here, Coleman's claim that his counsel did not file a direct appeal after Coleman conveyed an interest in a direct appeal is not belied by the record and would, if true, entitle him to relief. Therefore, Coleman is entitled to an evidentiary hearing on this claim.¹⁴ We therefore reverse the district court's order in part and remand the matter for an evidentiary hearing on the sole issue of whether Coleman's trial counsel failed to file an appeal after Coleman expressed a desire to appeal.

Accordingly, we

¹⁰See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

¹¹Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994).


¹²See Hathaway v. State, 119 Nev. ___, ___, 71 P.3d 503, 507 (2003).

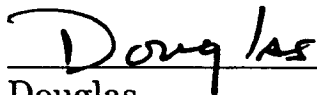
¹³See Hargrove, 100 Nev. 498, 686 P.2d 222.

¹⁴We note that the State concedes that an evidentiary hearing is warranted concerning Coleman's appeal deprivation claim.

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹⁵


_____, C.J.
Shearing


_____, J.
Rose


_____, J.
Douglas

cc: Hon. Michael A. Cherry, District Judge
Law Offices of Amy Chelini
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁵This order constitutes our final disposition of this appeal. Any subsequent appeal from an order of the district court denying Coleman's appeal deprivation claim shall be docketed as a new matter. We have received Coleman's May 24, 2004 motion submitted in proper person. Because Coleman is represented by counsel, we decline to grant him permission to proceed in proper person in this matter.