IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES JOHNSON, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42181

FILED

SEP 28 2004

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is a proper person appeal from an order of the district court denying appellant James Johnson III's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On July 23, 2002, the district court convicted Johnson, pursuant to an Alford[1] plea, of two counts of attempted sexual assault of a minor under 14 years of age. The district court sentenced Johnson to two concurrent terms of 96 to 120 months in the Nevada State Prison. No direct appeal was taken.

On July 15, 2003, Johnson 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 district court declined to appoint counsel to represent Johnson or to conduct an evidentiary hearing. On October 21, 2003, the district court denied Johnson's petition. This appeal followed.

In his petition, Johnson raised several claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel

[1]North Carolina v. Alford, 400 U.S. 25 (1970).

04-17963

sufficient to invalidate a judgment of conviction based on a guilty plea, Johnson must demonstrate that his counsel's performance fell below an objective standard of reasonableness.[2] Further, Johnson must demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.[3] The district court may dispose of a claim if the petitioner makes an insufficient showing on either prong.[4]

First, Johnson asserted that his counsel was ineffective for not spending enough time with him prior to his preliminary hearing, thereby forcing Johnson to waive his right to a preliminary hearing. Johnson's assertion is belied by the record.[5] During a hearing before the district court, Johnson unconditionally waived his right to a preliminary hearing as part of a plea negotiation. The district court specifically asked Johnson if he understood that his unconditional waiver was permanent, and that it meant he was giving up his right to cross-examine witnesses, to subpoena witnesses, to testify on his own behalf and to challenge the State's case against him. Johnson responded that he understood. The district court also asked Johnson if he had discussed the plea negotiations with counsel and if he wished to follow his counsel's advice. Johnson responded affirmatively. We conclude Johnson has not demonstrated that his counsel's performance was deficient in this regard.

---

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

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

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

[5]Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Second, Johnson contended that his counsel was ineffective for failing to adequately investigate and prepare for Johnson's case. Johnson also argued that counsel failed to adequately consult with him concerning discovery and the progress of his case. The plea agreement belies Johnson's assertion.[6] In his plea agreement, Johnson acknowledged that he discussed "any possible defenses, defense strategies and circumstances which might be in [his] favor." Johnson further acknowledged that counsel had thoroughly explained to him the elements of the charged offenses, the consequences of his plea, his rights and waiver of those rights. Moreover, Johnson did not identify any information additional investigation would have uncovered. We conclude that Johnson has not demonstrated that counsel was ineffective on this issue.

Third, Johnson asserted that his counsel's failure to file a motion to suppress at his request constituted ineffective assistance of counsel. To demonstrate that counsel was ineffective for failing to file a motion to suppress, Johnson must demonstrate that the motion would have been meritorious, and that there was a reasonable likelihood that the exclusion of the evidence would have changed the result of the proceeding.[7] In his petition, Johnson alleged that the police violated his Fifth and Sixth Amendment rights and that transcripts of his interview will support his claim. However, he failed to identify any evidence whatsoever that his counsel should have sought to suppress.[8] We conclude Johnson's claim is without merit.

---

[6]Id.

[7]See Kirksey, 112 Nev. at 990, 923 P.2d at 1109.

[8]See Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001) (stating that "[a] defendant seeking post-conviction relief cannot rely on

continued on next page . . .

Fourth, Johnson argued that his counsel was ineffective for not cross-examining the State's witnesses during sentencing. The record shows that Johnson's two teenage victims and their parents testified under oath as victim-witnesses. The witnesses testified about the offenses, how they felt about Johnson and the effect Johnson's actions had on their lives.[9] When victim impact statements are limited in scope to the facts of the crime, the impact on the victim, and the need for restitution, the victim must be sworn before testifying.[10] However, allowing a defendant the opportunity to cross-examine such statements normally is not required.[11] We conclude Johnson has not demonstrated that this counsel was ineffective in this regard.

Fifth, Johnson contended that his counsel was ineffective for not contacting and calling his list of witnesses to testify on his behalf at sentencing. In his petition, Johnson stated that his father, his father's nurse and his sister would have testified during sentencing that Johnson was at home at the time one of the alleged sexual assault incidents occurred. Johnson further stated that his sister would have testified that there was "bad blood" between her and one of the victims, thereby challenging the credibility of the victim. However, as Johnson pleaded guilty to the offenses charged, such testimony challenging his guilt would not have influenced the district court in determining Johnson's sentence.

. . . continued
conclusory claims for relief but must support any claims with specific factual allegations that if true would entitle him or her to relief").

[9]See NRS 176.015(3).

[10]See Buschauer v. State, 106 Nev. 890, 893, 804 P.2d 1046, 1048 (1990).

[11]Id. at 893-94, P.2d at 1048.

Johnson also stated that his father would have testified that Johnson was taking care of him and that Johnson was the family wage earner. Johnson's counsel submitted a sentencing memorandum in which counsel noted that Johnson took care of his disabled father "who is wheelchair bound, having suffered through four (4) back and knee surgeries." Counsel further noted that Johnson also cared for his teenage sister "who was treading down the wrong path."

We conclude Johnson has not demonstrated that his counsel's failure to produce his list of witnesses during sentencing constituted ineffective assistance of counsel. Additionally, Johnson has not shown that the lack of live testimony prejudiced him.

Sixth, Johnson contended that his counsel was ineffective for failing to schedule Johnson for a psychosexual evaluation, which would have mitigated his sentence. However, Johnson failed to demonstrate that such an evaluation would have produced results favorable to the defense.[12] Therefore, we conclude Johnson suffered no prejudice from the absence of a psychosexual evaluation.

Seventh, Johnson asserted that his counsel was ineffective for failing to explain the conditions of lifetime supervision. Johnson's plea agreement clearly stated that he would be subject to lifetime supervision "after any period of probation or any term of imprisonment and period of release upon parole." The agreement also provided that lifetime supervision must begin upon release from incarceration. Moreover, during the plea canvass, the district court specifically asked Johnson if he read and understood the plea agreement and if he understood that he would be subject to lifetime supervision. Johnson responded that he understood.

---

[12]See Evans, 117 Nev. at 621, 28 P.3d at 507.

We conclude that Johnson has not demonstrated that his counsel's performance was deficient.

Eighth, Johnson asserted that his counsel was ineffective for failing to respond to the district attorney's statements made during sentencing. However, Johnson does not identify the statements with which he takes issue.[13] Consequently, we conclude Johnson's claim is without merit.

Ninth, Johnson argued that his counsel was ineffective for failing to advise him about changing his guilty plea to an Alford[14] plea and thus, his plea was involuntary. During the plea canvass, Johnson stated that he "engaged in consensual sexual conduct with minors." The district attorney responded that because Johnson stated the sexual conduct was consensual, the plea must be rejected or Johnson could enter an Alford plea. The district court stated, "Let's go Alford as to the consent issue." Johnson's counsel informed the court that he did not object to an Alford plea. The court then determined that Johnson's Alford plea was "freely and voluntarily made." It appears from his petition that Johnson claimed that changing his plea to an Alford plea affected the possible range of his sentence, and thus, his plea was involuntary. He complained that he was unaware that he could be sentenced to a twenty-year prison term. However, his plea agreement clearly stated that the maximum term for each count of attempted sexual assault was twenty years. In addition, during the plea canvass, the district court specifically advised Johnson that he could be sentenced to a twenty-year term for each count. Changing Johnson's guilty plea to an Alford plea did not affect the possible

---

[13]Id.

[14]Alford, 400 U.S. at 25.

range of punishment in his case. We conclude Johnson has not demonstrated that his counsel's performance was deficient or that but for his counsel's actions he would not have pleaded guilty and would have insisted on going to trial.

Finally, Johnson contended that his counsel was ineffective for not filing a direct appeal despite Johnson's request that he do so. In Lozada v. State, this court stated that counsel has a duty to perfect an appeal when a defendant expresses a desire to appeal or manifests dissatisfaction with his conviction.[15] Furthermore, "prejudice may be presumed for purposes of establishing the ineffective assistance of counsel when counsel's conduct completely denies a convicted defendant an appeal."[16] Because it appeared that the district court may have erred in denying this claim without an evidentiary hearing, this court ordered the State to show cause why this claim should not be remanded. Having considered the State's response, we conclude this case should be remanded for the sole purpose of determining whether Johnson requested his counsel to perfect an appeal.[17]

---

[15]110 Nev. 349, 354, 871 P.2d 944, 947 (1994).

[16]Id. at 357, 871 P.2d 949.

[17]In his petition, Johnson also claimed that: he was denied due process because he was deprived of the right to respond to the State's opposition to his motion to withdraw his guilty plea; that his sentence constituted cruel and unusual punishment; and that three defense witnesses were "locked out" of the courtroom and prohibited from testifying during sentencing. In light of our order, we decline to consider these claims. The district court shall resolve these claims in any final order resolving the Lozada claim.

Having reviewed the record on appeal, we conclude that briefing and oral argument are unwarranted.[18] Accordingly, we

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.[19]

_____, J.
Rose

_____, J.
Maupin

_____, J.
Douglas

cc: Hon. John S. McGroarty, District Judge
James Johnson III
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

---

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

[19]We have reviewed all documents that Johnson has submitted in proper person to the clerk of this court in this matter, and we conclude that no further relief is warranted. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.