

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS D. SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42596

FILED

JUN 25 2004

ORDER OF AFFIRMANCE

J. Battello
DEPUTY CLERK

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

On December 27, 2002, the district court convicted Smith, pursuant to a guilty plea, of one count of sexual assault on a minor under sixteen years of age, and one count of lewdness on a minor under fourteen years of age. The district court sentenced Smith to serve a term of five to twenty years in the Nevada State Prison for the sexual assault conviction, and a term of life with the possibility of parole after ten years for the lewdness conviction. The sentences were imposed to run consecutively. Smith did not file a direct appeal.

On September 23, 2003, Smith 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 Smith or to conduct an evidentiary hearing. On January 9, 2004, the district court denied Smith's petition. This appeal followed.

In his petition, Smith first raised several claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a guilty plea, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.¹ 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."² The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.³

First, Smith contended that his trial counsel was ineffective for failing to advise him of his right to appeal. "[T]here is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal" unless the defendant inquires about a direct appeal or there exists a direct appeal

¹See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

²Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

³Strickland, 466 U.S. at 697.

claim that has a reasonable likelihood of success.⁴ The burden is on the defendant to indicate to his attorney that he wishes to pursue an appeal.⁵ In the instant petition, Smith did not allege that he asked his trial counsel to file an appeal on his behalf. Further, Smith did not demonstrate the existence of an issue that would have had a reasonable probability of success on appeal. As such, he failed to establish that his trial counsel was ineffective in failing to inform him of his right to appeal, and the district court did not err in denying this claim.

Second, Smith claimed that his trial counsel was ineffective for advising him to enter into a plea agreement whereby Smith would receive a life sentence.⁶ A review of the record on appeal reveals that Smith was indicted on thirty-four counts of sexual abuse involving his minor nephews. Smith pleaded guilty to one count of sexual assault on a minor under the age of sixteen, and one count of lewdness on a minor under the age of fourteen. Smith failed to demonstrate that his trial

⁴Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

⁵Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

⁶Smith additionally alleged that his guilty plea was not entered knowingly and intelligently because he did not receive a "bargain" in exchange for his guilty plea. For the reasons discussed below, we conclude that Smith failed to demonstrate that under the totality of the circumstances, his guilty plea was invalid. See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000).

counsel acted unreasonably in advising him to enter into the plea agreement rather than proceed to trial and risk the possibility of a much harsher sentence. Consequently, we affirm the order of the district court with respect to this claim.

Third, Smith alleged that his trial counsel was ineffective for failing to ensure that Smith reviewed his pre-sentence investigation report (PSI) prior to sentencing. Smith claimed that there might have been errors in his PSI of which he was unaware. We conclude that this claim is without merit. The signed guilty plea agreement stipulated that Smith would receive a sentence of five to twenty years for the sexual assault conviction, and a consecutive sentence of life with the possibility of parole after ten years for the lewdness conviction. The district court sentenced Smith pursuant to the guilty plea agreement, and made no mention of Smith's PSI prior to sentencing. Smith failed to establish that the results of his sentencing hearing would have been different if he had been allowed to review his PSI. Further, Smith does nothing more than speculate concerning possible errors in his PSI. For these reasons, Smith 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, Smith contended that his trial counsel was ineffective for failing to inform him of the results of the grand jury proceeding prior to the entry of his guilty plea. A review of the record reveals that a grand jury proceeding was held on September 12, 2002, and the grand jury

returned a thirty-four count indictment against Smith the following day. Prior to the entry of Smith's guilty plea on September 30, 2002, his trial counsel stated in open court that Smith had been indicted on more than thirty counts. Further, at the conclusion of the plea canvass, the State once again informed the district court of the multiple-count indictment against Smith. Thus, Smith's allegation that he was unaware of the results of the grand jury proceeding prior to the entry of his guilty plea is belied by the record.⁷ Moreover, Smith failed to articulate how knowledge that a grand jury indicted him on thirty-four counts of sexual abuse would have caused him to insist on going to trial rather than enter a guilty plea to two counts. Accordingly, Smith did not establish that his trial counsel was ineffective on this issue, and the district court did not err in denying the claim.

Fifth, Smith claimed that his trial counsel was ineffective for: (1) failing to protect his rights at the grand jury proceeding, (2) failing to defend him, (3) failing to advise him of possible defenses, (4) advising him to plead guilty prior to the receipt of discovery, and (5) failing to investigate. Smith did not provide specific facts to support these claims, however, or articulate how he was prejudiced by his counsel's allegedly

⁷See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

deficient performance in these areas.⁸ Therefore, the district court did not err in denying the claims.

Smith next claimed that his guilty plea was not entered knowingly and voluntarily. A guilty plea is presumptively valid, and Smith carries the burden of establishing that his plea was not entered knowingly and intelligently.⁹ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.¹⁰ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.¹¹

First, Smith alleged that his guilty plea was not knowing or voluntary because he did not provide a factual basis for his guilty plea.¹² The record reveals that during the entry of Smith's guilty plea, the prosecutor provided specific facts that would support Smith's guilty plea to

⁸Id. at 502, 686 P.2d at 225.

⁹See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

¹⁰Freese, 116 Nev. 1097, 13 P.3d 442; Bryant, 102 Nev. 268, 721 P.2d 364.

¹¹Hubbard, 110 Nev. at 675, 877 P.2d at 521.

¹²Smith additionally alleged that his trial counsel was ineffective for allowing him to plead guilty without a factual basis for the plea. For the reasons discussed below, we conclude that Smith did not establish that his trial counsel was ineffective on this issue. See Strickland, 466 U.S. 668.

one count of sexual assault on a minor, and one count of lewdness on a minor. The district court then asked Smith if the factual statement provided by the prosecutor was accurate; Smith acknowledged that it was correct. Therefore, Smith's claim that there was no factual basis for his guilty plea is belied by the record,¹³ and we affirm the order of the district court with respect to this claim.

Second, Smith contended that his guilty plea was not knowing or voluntary because he was not informed of the direct consequence of lifetime supervision prior to the entry of his guilty plea. The record reveals that the guilty plea agreement, which Smith acknowledged that he read, signed, and understood, provided that the district court would impose a sentence of "lifetime supervision commencing after any period of probation or any term of imprisonment and period of release upon parole." Further, during the plea canvass, the district court informed Smith that he would receive lifetime supervision. Because this claim is belied by the record,¹⁴ the district court did not err in denying relief.

Third, Smith claimed that his guilty plea was not knowingly entered because—in contrast to the terms of the guilty plea agreement—he was not able to read and comment on his PSI prior to the imposition of

¹³See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

¹⁴See id.

his sentence. As Smith stipulated to the sentence he would receive as part of the plea agreement, he failed to establish that his guilty plea was invalid because he was unable to read and comment on his PSI prior to sentencing. Thus, we affirm the order of the district court with respect to this claim.


Finally, Smith contended that his guilty plea was not entered knowingly and voluntarily because: (1) he was not informed of the results of the grand jury proceeding, (2) he was not aware of the charges against him, and (3) he had not received discovery. We conclude that Smith failed to demonstrate that under the totality of the circumstances, his guilty plea was not entered voluntarily and knowingly. As discussed previously, prior to the entry of his guilty plea, Smith was informed in open court that the grand jury had returned a thirty-four-count indictment against him. Further, an amended indictment containing a description of the charges to which Smith was pleading guilty was attached to the guilty plea agreement. Smith acknowledged during the plea canvass that he read, understood, and signed the guilty plea agreement. Lastly, Smith failed to provide specific facts to support his claim that his guilty plea was not knowing or voluntary because he did not receive discovery from the State prior to entering his plea.¹⁵ Thus, Smith failed to demonstrate that his


¹⁵See *id.* at 502, 686 P.2d at 225.

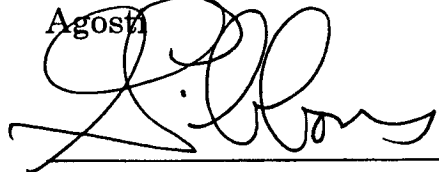
guilty plea was not entered knowingly and voluntarily, and the district court did not err in denying these claims.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Smith is not entitled to relief and that briefing and oral argument are unwarranted.¹⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁷


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

¹⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁷We have reviewed all documents that Smith 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 Smith 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. John S. McGroarty, District Judge
Thomas D. Smith
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk