IN THE SUPREME COURT OF THE STATE OF NEVADA

KIMBERLY MINETTE KAUTZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44251

FILED

JUN 0 1 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing appellant's post-conviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; Archie E. Blake, Judge.

The charges in this case arose from an incident in which appellant Kimberly Minette Kautz was driving her pickup truck while under the influence of alcohol and with measurable amounts of THC in her blood. Kautz swerved and rolled the pickup. At the time of the accident, there were seven children riding in the bed of the pickup truck and two other children riding without seatbelts in the cab. Two of the children were killed and several others were seriously injured. Kautz was originally charged with two counts of DUI causing the death of another and six counts of DUI causing substantial bodily harm. On October 21, 2002, Kautz entered a guilty plea to two counts of DUI causing death and, in exchange for the plea, the State dropped the remaining charges. The district court sentenced Kautz to serve two consecutive prison terms of 96

to 240 months. Kautz appealed, and this court affirmed the judgment of conviction.[1] The remittitur issued on November 12, 2003.

On January 27, 2004, Kautz filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel, and counsel supplemented the petition. The State opposed the petition. After conducting an evidentiary hearing, the district court denied the petition. Kautz filed this timely appeal.

Kautz contends that the district court abused its discretion in dismissing her petition because her trial counsel, Lane Mills, was ineffective. In particular, Kautz contends that she pleaded guilty based on Mills' off-the-record promise that she would receive a sentence of two concurrent prison terms of 2 to 6 years and would probably serve no more than 4 years in prison. We conclude that the district court did not abuse its discretion in rejecting Kautz's claim.

In order 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.[2] A petitioner must also demonstrate "a reasonable probability that, but for counsel's errors, [s]he would not have pleaded guilty and would have insisted on going to trial."[3]

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[1]Kautz v. State, Docket No. 41021 (Order of Affirmance, October 16, 2003).

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

[3]Hill, 474 U.S. at 59.

In this case, the district court found that "Mills made no specific promise to [Kautz] regarding the sentence that would be imposed under the plea bargain." The district court's finding is supported by substantial evidence.[4] In particular, Mills testified at the post-conviction hearing that he reviewed with Kautz "almost every conceivable sentence that the judge could do . . . including the possibility of the maximum sentence concurrent or consecutive."[5] Mills also testified that he never told Kautz that the district attorney agreed to recommend a sentence of 2 to 8 years and, likewise, did not promise her a sentence of no more than 4 years. Although Kautz, her husband, and father all testified that Mills assured Kautz that if she accepted the guilty plea she would serve no more than 4 years, the district court found that Mills' testimony was more credible. "The district court's factual finding, adjudging the credibility of the witnesses and the evidence, is entitled to deference on appeal and will not be overturned by this court if supported by substantial evidence."[6] Accordingly, we conclude that the district court did not err in rejecting Kautz's claim.

Kautz also contends that the district court erred in rejecting her motion to admit the testimony of two inmates to establish, pursuant to NRS 48.059, that Mills had a habit or practice of making promises about the potential sentence to criminal defendants he represented in order to

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[4]See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[5]We note that Kautz was also advised in the plea agreement and during the plea canvass that the district court had discretion to impose maximum, consecutive sentences.

[6]See Little v. Warden, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001) (citing Riley, 110 Nev. at 647, 878 P.2d at 278).

induce them to plead guilty. The district court refused to admit the testimony at the post-conviction hearing, ruling that similar allegations made by two convicted felons were insufficient to establish a habit or practice. We conclude that the district court did not abuse its discretion in denying Kautz's motion.

A district court's decision to admit or exclude evidence will not be disturbed absent an abuse of discretion.[7] NRS 48.059(1) states that evidence of a person's habit "whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity" therewith. Habit "may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine."[8]

At the post-conviction hearing, the State made an offer of proof based on statistics compiled by the county manager that Mills had handled 164 felony cases. In denying Kautz's motion to admit the testimony to establish habit, the district court found that "two instances [of misrepresentations made about the potential sentence], out of the over one hundred felony cases handled by Mills, are [not] sufficient in number to warrant a finding that the habit existed or that the practice was routine as required by NRS 48.059." We conclude that the district court did not err in so ruling because the number of similar allegations made against

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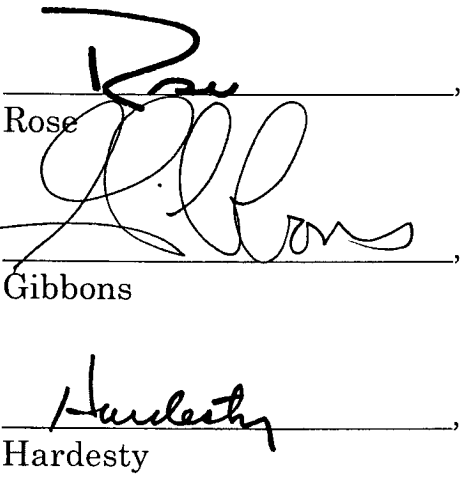
[7]Honeycutt v. State, 118 Nev. 660, 669 n.17, 56 P.3d 362, 368 n.17 (2002).

[8]NRS 48.059(2).

Mills was insufficient to establish habit.[9] Accordingly, Kautz has failed to show that the district court erred in denying her motion.

Having considered Kautz's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Archie E. Blake, District Judge
Law Offices of Robert Witek
Attorney General Brian Sandoval/Carson City
Lyon County District Attorney
Lyon County Clerk

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[9]See generally Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 511-12 (4th Cir. 1977) (in a civil case, three alleged instances of similar conduct were insufficient to show that behavior was sufficiently regular to establish habit under the Federal Rules of Evidence).