

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ROLAND NOLETTE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44635

FILED

APR 26 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

Nolette was convicted, pursuant to a guilty plea, of two counts of battery with a deadly weapon, robbery with the use of a deadly weapon, and conspiracy to commit robbery. Nolette was also charged with attempted murder; however, a jury found him not guilty of this offense. The district court sentenced Nolette to three consecutive terms of 48 to 120 months in prison for battery with a deadly weapon (count 2) and robbery with the use of a deadly weapon (count 3). He was also sentenced to a consecutive term of 24 to 120 months for battery with a deadly weapon (count 4). Finally, the district court sentenced Nolette to 12 to 72 months for conspiracy to commit robbery (count 5) to be served concurrently with count 2. A direct appeal was not taken.

Nolette filed a timely post-conviction petition for a writ of habeas corpus. The State filed a motion for partial dismissal of the

petition. The district court granted the State's motion as to Nolette's claim that his counsel was ineffective for failing to seek exclusion of evidence acquired through an improperly obtained statement. After conducting an evidentiary hearing, the district court denied Nolette's petition. This appeal followed.

Nolette asserts several ineffective assistance of counsel claims. To establish ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.¹ To establish prejudice, a defendant must show that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different.² "Judicial review of a lawyer's representation is highly deferential, and a claimant must overcome the presumption that a challenged action might be considered sound strategy."³ An ineffective assistance of counsel claim presents a mixed question of law and fact, subject to this court's independent review.⁴ "However, a district court's

¹Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

²Id. at 694.

³Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004).

⁴See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

factual findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong."⁵

Nolette contends that his counsel was ineffective for advising him to refrain from withdrawing his guilty plea because counsel failed to challenge the admissibility of evidence discovered as a result of Nolette's illegally obtained confession. Specifically, he contends that counsel failed to research the rights of a juvenile to parental contact prior to interrogation. Had counsel done so, Nolette posits, his confession would have been ruled involuntary and the evidence secured from that confession would have been inadmissible. Having reviewed the record before us, even assuming counsel's performance was deficient, we conclude Nolette fails to demonstrate prejudice because the police discovered the evidence in question from an independent source. Consequently, we conclude that the district court did not err in dismissing this claim.

Nolette also contends that his counsel was ineffective for failing to challenge alleged constitutional infirmities to former NRS 62.040. We conclude that the statute was constitutional and that the district court retained jurisdiction despite Nolette's acquittal of attempted murder. Therefore, he fails to demonstrate that his counsel's performance in this regard was deficient or that he suffered prejudice. Therefore, we conclude that the district court did not err in denying this claim.

⁵Lader v. Warden, 121 Nev. ___, ___, 120 P.3d 1164, 1166 (2005).

Nolette next argues that his counsel was ineffective at the sentencing stage of his trial for failing to: object to evidence presented by the victim's family members and for not recommending an appeal on this matter; object to the prosecutor's argument that the defendants should be treated equally; emphasize the differences between Nolette and his codefendant; inform the district court of the conditions of his confinement; and object to the district court's failure to announce in open court a sentence on each count. We have carefully reviewed Nolette's allegations and conclude that the district court did not err in denying these claims.

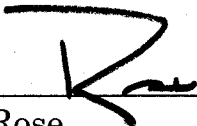
Nolette also contends that his counsel was ineffective for failing to inform him of his appellate rights and to perfect an appeal. After hearing testimony on this matter at the evidentiary hearing, the district court found that counsel testified credibly that he advised Nolette of his appellate rights and that Nolette elected not to pursue an appeal. The evidence presented at the hearing substantially supports the district court's finding in this regard and that finding is not clearly wrong. Therefore, we conclude that the district court did not err in denying this claim.

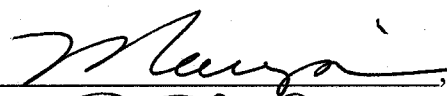
Finally, Nolette raises the following claims: Nevada's juvenile statutory scheme is unconstitutional; his sentence is cruel and unusual in light of his age at the time he committed his offenses; the district court's sentence constituted an abuse of discretion; and the district court erred in admitting evidence acquired as a result of an illegally obtained confession. However, these claims fall outside the scope of permissible claims that


may be raised in a post-conviction habeas petition based on a guilty plea.⁶ Therefore, we decline to consider them.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that the district court did not err in denying Nolette's petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

⁶See NRS 34.810(1)(a) (limiting claims in a post-conviction habeas petition to claims alleging that "the [guilty] plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel"); see also Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

cc: Second Judicial District Court Dept. 9, District Judge
Karla K. Butko
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk