

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARCUS D. YOUNG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57670

FILED

JUN 14 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's October 14, 2009, post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Appellant claims that the district court erred by denying his claims of ineffective assistance of counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). To prove prejudice sufficient to invalidate a guilty plea, a petitioner must demonstrate that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown, Strickland, 466 U.S. at

697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings regarding ineffective assistance of counsel but review the court's application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant claims that counsel was ineffective for failing to file a motion to suppress his confession. Appellant claims that he was not given his Miranda v. Arizona, 384 U.S. 436 (1966), warnings until partway through his interview with police. Appellant claims that this violated Missouri v. Seibert, 542 U.S. 600 (2004), because the police officers employed an improper two-step interrogation scheme to get him to confess. Appellant fails to demonstrate that counsel was deficient. First, appellant failed to demonstrate that he was in custody for his pre-warned statement such that Miranda would apply because he drove himself to the police station, he was told he was not under arrest at the beginning of the interview, his movement was not restricted, he voluntarily answered questions, and only one police officer at a time was present during questioning. State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998). Because appellant was not in custody, the police officer was not required to give the Miranda warnings at this point of the interview.

Second, unlike in Seibert, appellant did not confess prior to being given his Miranda warnings. In fact, appellant was adamant that he had done nothing wrong. Therefore, the concerns that existed in Seibert did not exist in this case. Accordingly, counsel was not deficient for failing to file a motion to suppress as that motion would have been

futile, Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), and the district court did not err in denying this claim.

Next, appellant claims that counsel was ineffective for failing to more strenuously request a continuance at sentencing. Prior to the sentencing hearing, the parties learned that the district court judge who had accepted the guilty plea was unable to preside over sentencing, and the case was reassigned. Appellant claims that counsel should have done more than just request a continuance at the beginning of the hearing.

Appellant fails to demonstrate that counsel was deficient or that he was prejudiced. Counsel did request a continuance and appellant fails to demonstrate that counsel requesting one more strenuously, or prior to sentencing, would have resulted in a different outcome. Further, absent an express agreement, there is no absolute right to be sentenced by the same judge who took the plea. Dieudonne v. State, 127 Nev. ___, ___, 245 P.3d 1202, 1206-07 (2011). Therefore, the district court did not err in denying this claim.

Next, appellant claims that counsel was ineffective for failing to object to bias by the sentencing judge. Specifically, appellant claims that the judge was biased because he thanked the victim for coming and mentioned that he was a parent and that she should use her judgment in seeking counseling. Appellant fails to demonstrate that counsel was deficient or that he was prejudiced. These statements do not indicate that the district court was biased, especially since the district court was similarly polite to the people who wrote letters on behalf of appellant. Further, appellant fails to demonstrate a reasonable probability of a different outcome had counsel objected. Therefore, the district court did not err in denying this claim.

Next, appellant claims that counsel was ineffective for failing to file an appeal when requested to do so. Appellant claims that he requested counsel to file an appeal after sentencing but she told him that he could not appeal because he pleaded guilty. He also claims that he sent her a letter during the appeal period requesting her to file an appeal. Appellant fails to demonstrate that counsel was deficient. Counsel testified at the evidentiary hearing that appellant did not ask her to file an appeal at the end of sentencing and denied that she told him that he could not appeal. Further, she admitted that she received a letter from appellant dated during the appeal filing period, but that it was postmarked nearly seven months after the date it was written.¹ The district court found counsel credible. Based on that testimony, substantial evidence supports the decision of the district court that appellant was not deprived of his right to appeal due to ineffective assistance of counsel.

Next, appellant claims that the district court erred in denying his claim that his plea was involuntary and unknowing. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). In determining the validity of a guilty plea, this court looks to the totality of the circumstances. State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367.

¹Appellant did not produce any evidence at the evidentiary hearing that there was any official interference at the prison that prevented the letter from being timely mailed.


First, appellant claims that his plea was involuntary and unknowing because counsel did not inform appellant that the CARES exam was negative. Appellant fails to demonstrate his plea was invalid. At the evidentiary hearing, counsel testified that she did go over the CARES exam prior to appellant signing the plea agreement. She explained to him that the physical findings of the exam were negative but that the nurse still believed that the victim had been assaulted based on the statements and behavior of the victim. The district court found counsel to be credible. Based on that testimony, substantial evidence supports the decision of the district court.


Second, appellant claims that his plea was involuntary and unknowing because he was not informed of the specific terms of his lifetime supervision. Appellant fails to demonstrate that his plea was invalid because the particular conditions of lifetime supervision are tailored to each individual case and are not determined until after a hearing is conducted just prior to the expiration of the sex offender's completion of a term of parole or probation, or release from custody. See NRS 213.1243(1); NAC 213.290. All that is required is that a defendant was aware that he would be subject to lifetime supervision and not the precise conditions of lifetime supervision. Palmer v. State, 118 Nev. 823, 831, 59 P.3d 1192, 1197 (2002). Here, appellant was informed in the written guilty plea agreement and during the guilty plea canvass that he was subject to the special sentence of lifetime supervision. Therefore, the district court did not err in denying this claim.

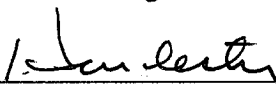
Finally, appellant claims that cumulative error warrants reversal. Because appellant failed to demonstrate any error, he

necessarily failed to demonstrate there was cumulative error. The district court did not err in denying appellant's petition, and we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

cc: Chief Judge, Second Judicial District Court
Sally S. deSoto
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk