

IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE J. MEAD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58378

FILED

APR 11 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Angers
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; David B. Barker, Judge.

In his petition filed on November 30, 2010, appellant raised six claims of ineffective assistance of trial counsel. To prove 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 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, 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 v. Washington, 466 U.S. 668, 697 (1984), and the petitioner

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

must demonstrate the underlying facts by a preponderance of the evidence, Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

First, appellant claimed that trial counsel was ineffective for coercing him into pleading guilty because counsel told him he would not be re-released on bail unless he pleaded guilty. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Trial counsel testified at the evidentiary hearing that he did not recall making this statement to appellant. Further, appellant failed to demonstrate that he was coerced. Appellant acknowledged in the guilty plea agreement and at the change of plea hearing that he was not coerced or made any promises that were not on the face of the guilty plea agreement. Moreover, appellant failed to demonstrate a reasonable probability of a different outcome had trial counsel not made the alleged statement. Appellant received a tremendous benefit by pleading guilty. He was originally charged with six counts of lewdness with a minor under the age of fourteen, with each count carrying a sentence of ten years to life in prison. NRS 201.230. Instead, he pleaded guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to coercion (sexually motivated), and received a sentence of 28 to 72 months in prison. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to inform appellant of the right to challenge the district court's decision to deny bail. Appellant failed to demonstrate the underlying facts of this claim by a preponderance of the evidence because appellant failed to question counsel at the evidentiary hearing regarding this issue. Moreover, appellant failed to demonstrate prejudice. He failed to demonstrate that there was a reasonable probability that he would not

have pleaded guilty had counsel informed appellant of the right to challenge the denial of bail. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for misinforming appellant about the likely outcome of the psychosexual evaluation. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Counsel testified at the evidentiary hearing that he told appellant that based on his experience he believed that appellant would not be determined to be a high risk to reoffend. But, he also explained to appellant that if he was found to be a high risk to reoffend, he would not be eligible for probation. Candid advice based on experience is not evidence of deficient performance, especially when counsel informs appellant regarding the potential consequences. Further, appellant failed to demonstrate a reasonable probability of a different outcome had counsel's advice been different. As stated above, appellant was originally facing six counts of lewdness with a minor under the age of fourteen, and received a tremendous benefit by entering an Alford plea. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective because it was a conflict for trial counsel to represent him during his motion to withdraw the guilty plea. The underlying claim was raised and rejected on appeal. See Mead v. State, Docket No. 54144 (Order of Affirmance, February 3, 2010). Because this court already concluded that appellant's underlying claim lacked merit, appellant necessarily failed to demonstrate prejudice. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to discuss the psychosexual evaluation or PSI with appellant prior to sentencing. This claim is not supported by the record and the testimony given at the evidentiary hearing. Appellant's first sentencing hearing was postponed for a week so that he could discuss the psychosexual evaluation and the PSI with counsel. Counsel and appellant both testified that they discussed the evaluation and the PSI prior to the sentencing hearing. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to challenge the conviction because it was based on evidence that was known to be false. Appellant failed to demonstrate the underlying facts of this claim by a preponderance of the evidence because appellant failed to question counsel at the evidentiary hearing regarding this issue. Moreover, appellant failed to demonstrate prejudice. He failed to demonstrate that there was a reasonable probability that he would have decided not to plead guilty had counsel challenged the evidence. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that appellate counsel was ineffective. To prove ineffective assistance of appellate 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 the omitted issue would have a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105

Nev. 850, 853, 784 P.2d 951, 953 (1989). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

Appellant claims that appellate counsel was ineffective for failing to consult with appellant about his direct appeal. Appellant claims that had appellate counsel consulted with him, he would have raised a claim regarding being wrongfully denied bail, that he was convicted based on facts that were known to be false, and about alleged errors in the psychosexual evaluation. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate a reasonable probability of a different outcome on appeal had appellate counsel consulted with him and raised these issues on appeal. First, appellant failed to demonstrate that he was wrongfully denied bailed. Appellant was remanded for a competency hearing and was released on his own recognizance after being found competent and entering his plea. Second, as stated above, appellant failed to demonstrate he was convicted based on facts that were known to be false. Finally, the evaluation correctly states that appellant was previously convicted of two crimes. Therefore, the district court did not err in denying these claims.

Next, appellant claimed that his plea was involuntary because the district court remanded him without bail even after the district court accepted the plea agreement. This claim is without merit. The district court's actions after the plea had been accepted could not have affected the voluntariness of the plea. Further this claim is belied by the record because the district court did not remand appellant without bail after the plea was accepted, instead he was released on his own recognizance. Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that he was sentenced based on materially untrue facts about his criminal history. This claim is outside the scope of a post-conviction petition challenging a judgment of conviction based upon plea of guilty, NRS 34.810(1)(a), and therefore, the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. David B. Barker, District Judge
George J. Mead
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We have reviewed all documents that appellant 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 appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.