

IN THE UTAH COURT OF APPEALS

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Boyd Earl Peterson,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Petitioner and Appellant,	)	
	)	Case No. 20080275-CA
v.	)	
	)	F I L E D
State of Utah,	)	(September 17, 2009)
	)	
Respondent and Appellee.	)	<span style="border: 1px solid black; padding: 2px;">2009 UT App 260</span>

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Second District, Ogden Department, 060906594  
The Honorable Pamela G. Heffernan

Attorneys: Kimberly J. Trupiano, Salt Lake City, for Appellant  
Mark L. Shurtleff and Christopher D. Ballard, Salt  
Lake City, for Appellee

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Before Judges Bench, Orme, and Davis.

BENCH, Judge:

Petitioner Boyd Earl Peterson appeals the district court's denial of his petition for postconviction relief, alleging that one of the attorneys who represented him at his plea hearing (Attorney) was ineffective due to a conflict of interest and that the district court failed to strictly comply with rule 11 of the Utah Rules of Criminal Procedure when entering Peterson's no contest plea. We affirm.<sup>1</sup>

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<sup>1</sup>We will attempt to address Peterson's substantive issues despite the inadequate brief submitted on his behalf. See generally Utah R. App. P. 24(a)(9) ("A party challenging a fact finding must first marshal all record evidence that supports the challenged finding."); Allen v. Friel, 2008 UT 56, ¶ 14, 194 P.3d 903 (requiring defendants seeking appellate review to "allege the lower court committed an error that the appellate court should correct"); West Jordan City v. Goodman, 2006 UT 27, ¶ 29, 135 P.3d 874 ("This court is not a depository in which the appealing party may dump the burden of argument and research." (internal quotation marks omitted)).

Peterson claims that Attorney was ineffective due to a conflict of interest. Before being engaged to represent Peterson,<sup>2</sup> Attorney had successfully represented a woman charged with the homicide of Peterson's infant son. Peterson alleges that Attorney purposefully resisted taking certain defenses to trial concerning Peterson's emotional response to his son's death--despite what Peterson characterizes as a "good chance of acquittal"--because the defenses were in opposition to Attorney's personal belief in his former client's innocence. Peterson contends that presenting these defenses would have been embarrassing to Attorney's professional reputation.

We conclude that Attorney did not have an actual conflict of interest. See State v. Taylor, 947 P.2d 681, 686 (Utah 1997) (establishing an ineffective assistance of counsel claim due to a conflict of interest requires "an actual conflict"). Peterson's proposed defenses concerning his emotional response to his son's death are unrelated to the actual guilt or innocence of Attorney's former client. Attorney could have presented those defenses without compromising his alleged belief in his former client's innocence; thus, Attorney did not advance his own interest to Peterson's detriment. See id. (stating that an actual conflict of interest exists when defense attorney advances his own interests to his client's detriment).

Even assuming that Attorney felt some conflict, Peterson has not demonstrated that the alleged conflict adversely affected Attorney's performance. See id. (requiring that a conflict of interest adversely affect defense attorney's performance). Attorney negotiated an extremely advantageous plea agreement on Peterson's behalf.<sup>3</sup> The defenses now proposed by Peterson would

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<sup>2</sup>Attorney was brought in as advisory co-counsel by Peterson's hired counsel. Although Attorney acted as Peterson's primary advocate during the plea hearing, both attorneys participated in Peterson's defense.

<sup>3</sup>Peterson was charged with aggravated sexual abuse of a child for separate incidents in Davis County and Weber County. Aggravated sexual abuse of a child is a first degree felony with a possible sentence of life in prison. See Utah Code Ann. § 76-5-404.1(5) (2003). Peterson's attorneys negotiated several advantageous plea agreements, resolving both cases.

In the Weber County case, the case at issue here, the plea agreement stipulated that Peterson would plead no contest to a reduced charge of sexual abuse of a child, a second degree felony. See id. § 76-5-404.1(2)-(3). The agreement also required Weber County to affirmatively recommend that Peterson

(continued...)

have likely been to his detriment--allowing the admission of damaging character evidence or requiring that Peterson admit to having performed a sexual act, which he has consistently denied. Given the likely detrimental effect of these defenses, Peterson's assertion that there was a "good chance of acquittal" had he gone to trial is without merit.

Peterson also claims that his no contest plea was unknowing and involuntary because, in accepting his plea, the district court failed to strictly comply with rule 11. In so arguing, Peterson erroneously cites to cases involving motions to withdraw pleas rather than to cases like this one, which is a petition for postconviction relief. In his petition for postconviction relief, Peterson must show a violation of his constitutional rights. See Utah Code Ann. § 78B-9-104(1)(a) (2008). Failure to strictly comply with rule 11 does not, in itself, amount to a constitutional violation. See Bluemel v. State, 2007 UT 90, ¶ 16, 173 P.3d 842; Salazar v. Utah State Prison, 852 P.2d 988, 991-92 (Utah 1993). Rather, Peterson "must show that [his] . . . plea was in fact not knowing and voluntary." See Bluemel, 2007 UT 90, ¶ 18 (internal quotation marks omitted).

Peterson entered his no contest plea knowingly and voluntarily. See Nicholls v. State, 2009 UT 12, ¶ 20, 203 P.3d 976 ("A knowing and voluntary plea is one that has a factual basis . . . and ensures that the defendant understands and waives his constitutional right against self-incrimination, the right to a jury trial, and the right to confront witnesses."). At the plea hearing, the district court conducted a verbal colloquy, informing Peterson of his relevant constitutional rights, and accepted from the State the factual basis for the no contest plea.<sup>4</sup> The district court also properly incorporated into the

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<sup>3</sup>(...continued)

receive probation rather than prison and not to object to work release if Peterson received jail time as a probation condition. The district court sentenced Peterson to one to fifteen years in prison but suspended the prison sentence, placing him on probation for thirty-six months, including one year in jail with work release. Peterson subsequently violated his probation, which was revoked, and his prison sentence was reinstated. Only after his probation was revoked did Peterson challenge the validity of his plea.

<sup>4</sup>Peterson argues that the factual basis for his plea was insufficient because it lacked facts supporting the requisite sexual intent. See Utah Code Ann. § 76-5-404.1(2) (2003). Intent, however, may be inferred or proven by circumstantial evidence. See State v. Emmett, 839 P.2d 781, 784 (Utah 1992).

record a written plea affidavit, signed by Peterson. The plea affidavit provided a factual basis for the plea and explained all relevant constitutional rights and the effect of their waiver. Attorney informed the court that he had read and explained the affidavit to Peterson and represented that he believed Peterson understood its contents. The crucial portions of the colloquy were then conducted directly with Peterson. The district court inquired of Peterson whether Attorney had read and explained the affidavit to him and whether he understood the affidavit's contents; Peterson answered affirmatively. When asked if he wanted the court to review the affidavit in full, Peterson answered negatively and again represented that he understood the affidavit's contents, his constitutional rights, and the effect of their waiver.

Accordingly, we affirm.

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Russell W. Bench, Judge

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WE CONCUR:

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Gregory K. Orme, Judge

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James Z. Davis, Judge