

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL DONALD BIRON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43077

FILED

FEB 03 2005

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court denying appellant Michael Donald Biron's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On July 25, 2002, Biron was convicted, pursuant to a guilty plea, of four counts of possession of visual presentation depicting sexual conduct of a person under 16 years of age. The district court sentenced Biron to serve four consecutive prison terms of 12-45 months and ordered him to pay \$430.00 in restitution. Biron did not pursue a direct appeal from the judgment of conviction and sentence.

On July 25, 2003, with the assistance of counsel, Biron filed a post-conviction petition for a writ of habeas corpus in the district court. In the petition, Biron claimed, among other things, that defense counsel was ineffective for failing to inform the sentencing court of potentially mitigating circumstances, specifically: (1) the 6-year-old victim of the dismissed sexual assault and lewdness counts was a "serial accuser"; and (2) the existence of a diary which might have explained the young girl's

"misguided and even demented motives" for falsely accusing Biron. The State opposed the petition and Biron subsequently filed a reply to the State's opposition. On October 9, 2003, Biron filed in the district court, intended as a supplement to the habeas petition, a "motion for an in camera review of claimed Brady materials (a 'Roberts hearing')." The State opposed the motion. The district court conducted a hearing on Biron's motion and on November 13, 2003, entered an order denying the motion. The district court conducted an evidentiary hearing on Biron's habeas petition, and on February 24, 2004, entered an order denying the petition. This timely appeal followed.

First, Biron contends that his due process rights were violated at sentencing because, although the district court reviewed the psychiatric safety and psychosexual evaluations prior to the sentencing hearing, the reports were not included in the presentence investigation report. We conclude that this issue is not appropriately raised in a post-conviction habeas petition, and thus, will not be addressed. This court has stated repeatedly that "claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings."¹ Accordingly, we conclude that Biron waived his right to raise this issue by failing to pursue the matter in a direct appeal.

¹See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); see also NRS 34.810(1)(a).

Second, Biron contends that the State violated Brady v. Maryland² by not providing the defense with information pertaining to the dismissed counts of sexual assault of a minor under the age of 14 years (3 counts) and lewdness with a minor under the age of 14 years (2 counts). Biron argues that the State's failure to provide discovery "seriously contaminated" the sentencing hearing because without the allegedly exculpatory information, the district court's sentencing determination was prejudicially affected.

The district court considered and addressed the merits of Biron's claim, and found that: (1) Biron's argument was "remote"; (2) the requested information was not relevant to Biron's sentencing hearing; (3) the State did not withhold any information in violation of Brady; and finally, (4) the district court did not consider any information pertaining to the dismissed charges in making its sentencing determination. We agree and conclude that the district court properly rejected Biron's claim.

Finally, Biron contends that he received ineffective assistance of counsel at sentencing because counsel failed to attack the credibility of the 6-year-old victim of the dismissed charges. The district court found that counsel was not ineffective. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.³ Biron has not demonstrated that the

²373 U.S. 83 (1963).

³See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, Biron has not demonstrated that the district court erred as a matter of law.

Therefore, having considered Biron's contentions and concluded that they are either not appropriately raised in a post-conviction petition or without merit, we

ORDER the judgment of the district court AFFIRMED.

Becker, C.J.
Becker

Rose, J.
Rose

Hardesty, J.
Hardesty

cc: Hon. Donald M. Mosley, District Judge
Markoff & Boyers
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk