

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRIS JOSEPH DERRICOTT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43141

FILED

AUG 16 2005

JANET W. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Sixth Judicial District Court, Humboldt County; Richard Wagner, Judge.

Appellant Christopher Joseph Derricott argues on appeal that the district court erred in denying the following claims of ineffective assistance of counsel: (1) that his trial counsel failed to assure Derricott's competence to enter into the plea agreement; (2) that his trial counsel allowed Derricott to plead guilty to a charge of sexual assault without sufficient investigation concerning proof of penetration of the victim; (3) that his trial counsel allowed Derricott to plead guilty to a charge of first-degree kidnapping without sufficient proof that the kidnapping was more than incidental to the alleged sexual assault; (4) that he was deprived of his Sixth Amendment right to the effective assistance of counsel at sentencing; and (5) that his counsel in his direct appeal was ineffective for failing to challenge the district court's decision to substitute new defense counsel and to proceed with sentencing after only a brief continuance when his original counsel announced he was unable to proceed due to illness. For the reasons stated below, we conclude that the district court erred

in rejecting Derricott's claims regarding the incidental nature of the kidnapping count and the sentencing proceeding. We reject Derricott's remaining assignments of error.

FACTUAL AND PROCEDURAL HISTORY

In August of 1993, the State charged Derricott with one count of first-degree kidnapping, one count of first-degree kidnapping with use of a deadly weapon, and one count of sexual assault with use of a deadly weapon. The charges arose out of separate incidents that occurred on August 23, 1993, and August 24, 1993.

First, on August 23, 1993, Derricott accosted Rachel Rye inside her vehicle in Winnemucca, Nevada. He ordered her to drive away, threatened her life, and groped her inappropriately. After Rye began struggling with Derricott at a stoplight, he fled the scene.

Second, on August 24, 1993, Derricott accosted Sonja Martens in her apartment building. The record before this court is unclear as to precisely where Martens first encountered Derricott.¹ Derricott claims that he first encountered Martens inside her apartment and did not force her from the exterior of the apartment back into its interior, but that she ran to the living room couch. Testimony at the sentencing hearing of May 18, 1994, established that Martens and her neighbor had been eating dinner in Martens'

¹Understandably, because the case was resolved by way of a plea agreement, the evidence preserved in this record and available at the time of the plea agreement only marginally clarifies the facts underlying the charges that Derricott sexually assaulted and kidnapped Marten.

apartment when the neighbor asked Martens to get her a Pepsi from the neighbor's apartment directly across the hall. Martens explained:

So I headed out of the door to go get her a Pepsi and the guy approached me with the mask on his face and knife in his hand. . . . He told me to get back. He had a knife in his hand and told me to get back.

When asked if Derricott shut the door at that point, Martens responded, "No, he picked up a brass stand by my door and threw it and then he shut the door." Martens further explained that Derricott then directed her to the living room couch, where he threatened her with the knife, forced her to disrobe, penetrated her digitally, attempted to engage her in intercourse, and ended up masturbating upon her.

Pursuant to plea negotiations with the State, Derricott agreed to plead guilty to one count of first-degree kidnapping in connection with the Rye incident and to one count each of sexual assault with use of a deadly weapon and first degree kidnapping in connection with the Martens incident. In exchange, the State agreed not to pursue the deadly weapon enhancement on the kidnapping count involving Martens. The district court thoroughly canvassed Derricott, accepted Derricott's plea, and subsequently sentenced Derricott to serve four consecutive terms of life in the Nevada State Prison with the possibility of parole.

Derricott appealed from the judgment of conviction. His counsel filed a no merit appeal,² arguing that the four consecutive life

²The appeal was filed before this court decided Ramos v. State, 113 Nev. 1081, 1084-85, 944 P.2d 856, 858 (1997). In Ramos, this court held that attorneys would no longer be permitted to file no merit
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sentences were an abuse of discretion amounting to cruel and unusual punishment. This court rejected this contention and dismissed the appeal.³

On August 4, 1998, Derricott filed a proper person petition for a writ of habeas corpus. The district court appointed counsel to represent Derricott, and counsel filed a supplemental habeas petition on August 15, 2002. The district court conducted an evidentiary hearing on October 23, 2003. On February 3, 2004, the district court entered an order denying Derricott's post-conviction petition.⁴ Derricott appeals.

DISCUSSION

Standards of review

To state a claim of 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 fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, he would not have

. . . continued

appeals, but must argue for their clients without conceding the appeal is without merit or frivolous.

³Derricott v. State, Docket No. 26041 (Order Dismissing Appeal, December 17, 1997).

⁴Neither the record nor the briefs of the parties explain the extensive five and one-half year delay between the filing of the post-conviction petition below and the district court's final resolution of the petition.

pleaded guilty and would have insisted on going to trial.⁵ To establish prejudice based on the deficient assistance of appellate counsel, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.⁶ "A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review."⁷ A district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference if they are supported by substantial evidence and are not clearly wrong.⁸

Competence to enter pleas of guilty

Derricott first asserts that the district court erred in denying his claim that his counsel was ineffective for failing to request another psychiatric evaluation to ascertain whether Derricott was competent to enter into the plea agreement. Derricott insists that he was not competent to enter into the plea agreement and that his bizarre behavior while in jail should have alerted his counsel to his lack of understanding and ability to participate intelligently in the proceedings. The record belies this claim.

A defendant is competent to enter a plea if he has: (1) "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and (2) "a rational as well as

⁵See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁶Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

⁷Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001).

⁸Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

factual understanding of the proceedings against him."⁹ The district court found Derricott competent to stand trial after a thorough competency evaluation by trained psychiatric professionals. The two evaluators testified that Derricott displayed a rational and factual understanding of the charges and possessed sufficient ability to aid and assist in his defense. Moreover, the district court conducted a comprehensive canvass before accepting Derricott's guilty pleas. Based on this record, we conclude that Derricott failed establish that his attorney's failure to request another evaluation to determine Derricott's competence to enter the guilty pleas was objectively unreasonable.

The district court's finding of digital penetration based on admissions Derricott made during the competency evaluation

Derricott argues that the district court erred in the habeas proceeding by relying on Dr. Brandenburg's report, produced pursuant to the court-ordered competency evaluation, to determine that Derricott digitally penetrated Martens. Derricott asserts that the district court's reliance on the admissions he made to Dr. Brandenburg during this evaluation violated his Sixth Amendment rights, including the privilege against self-incrimination, the right to counsel, and right to confrontation. In support of this argument, Derricott relies on Estelle v. Smith.¹⁰

⁹Godinez v. Moran, 509 U.S. 389, 396 (1993) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)); see also NRS 178.400(2).

¹⁰451 U.S. 454 (1981).

Although the district court may well have erred to the extent that it based its findings on the admissions contained in this report, the record otherwise provides substantial support for the determination that Derricott digitally penetrated Martens. Specifically, Martens testified at the sentencing hearing that Derricott digitally penetrated her. In light of Martens' testimony, we conclude that Derricott failed to demonstrate that his trial counsel's performance respecting the penetration issue was objectively unreasonable or that there was a reasonable probability that, but for counsel's alleged errors in this respect, he would not have pleaded guilty and would have insisted on going to trial. Further, we conclude that any error by the district court in relying upon the admissions in the psychological evaluation was harmless beyond a reasonable doubt.¹¹

Ineffective assistance respecting the plea to the Martens' kidnapping

Derricott argues that his counsel was ineffective for advising and encouraging him to enter a guilty plea even though the evidence did not support the charge that he kidnapped Martens. Under Hutchins v. State,¹² and the limited facts disclosed on this

¹¹See Chapman v. California, 386 U.S. 18 (1967).

¹²110 Nev. 103, 108, 867 P.2d 1136, 1139-40 (1994) (an element of asportation is required where the restraint of the victim is inherent in an underlying offense; however, a kidnapping is not incidental to the underlying offense if the restraint of the victim increased the risk of harm or had an independent purpose and significance that was essential to the accomplishment of the underlying offense); see also Clem v. State, 104 Nev. 351, 354, 760 P.2d 103, 105 (1988), overruled on other grounds, Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990).

record, it appears that there was a reasonable probability that he would not have been found guilty of kidnapping if he accosted Martens inside, rather than outside, her apartment. In this, we conclude that the district court erroneously found based on the record before it that “[t]he evidence is clear that the Petitioner grabbed one victim outside the apartment, and through the use of a knife, brought her inside of the apartment where the other victim was seated.”

First, the presentence report suggests that Derricott accosted Martens inside her apartment. Second, Martens testified at the sentencing hearing that she was “headed out of the door” when Derricott physically engaged her and forced her to the living room couch. Martens' statement at sentencing is ambiguous as to whether Derricott first approached her inside or outside of the apartment, and the district court's finding that “the evidence is clear” that Derricott grabbed Martens outside the apartment is not supported by substantial evidence in the record.

Going further, given Martens' ambiguous testimony at sentencing and the other evidence before the district court respecting Derricott's claim that he first accosted Martens inside her apartment, we conclude that Derricott met his burden of establishing by a preponderance of the evidence the facts underlying his claim that his counsel's performance with respect to the guilty plea was objectively unreasonable. The only benefit provided to Derricott in the plea agreement was the State's agreement not to pursue a deadly weapon enhancement on the Martens kidnapping count. Thus, because the record before us establishes that a potentially meritorious argument could have been advanced at trial that the kidnapping itself was

merely incidental to the sexual assault, we conclude that counsel's advice with respect to the plea agreement was not only deficient, but there was a reasonable probability that, but for that deficiency, Derricott would not have entered his plea and would have insisted on going to trial. Accordingly, we reverse the district court on this issue and remand this matter for further proceedings. On remand, the district court must afford Derricott the option of withdrawing from the entire plea agreement and proceeding to trial on all original charges.¹³

Sentencing

Derricott contends that the district court erred in rejecting his claims: (1) that he was deprived of his Sixth Amendment right to the effective assistance of counsel at sentencing, and (2) that his appellate counsel was ineffective for failing to contest the district court's decision to proceed with sentencing after only a brief continuance and with replacement counsel representing Derricott when his original counsel was unable to proceed due to illness. For the reasons that follow, we conclude that Derricott was deprived of the meaningful assistance of counsel and is entitled to a new sentencing proceeding before a different district court judge in the event that he elects to not withdraw his plea.

¹³We conclude only that, based upon the record before us, Derricott should be afforded the opportunity to withdraw his plea. Should he elect to do so, the State may of course proceed to trial on the original charges. We express no view as to whether the State will be able to sustain its burden of proof at any trial on any of those charges, including the charge that Derricott kidnapped Martens with the use of a deadly weapon.

On the morning of the scheduled sentencing proceeding, Derricott's counsel advised the district court that he would be unable to proceed due to a severe arthritic condition that had "made it impossible" for him to spend the time he felt "appropriate to properly prepare for sentencing of this magnitude on a case of this severity." Counsel expressed concerns that there was substantial background information he considered important for the court to consider in imposing sentence, and that he was uncertain that his client appreciated the magnitude and extent of that information or the significance of not presenting it for the court's consideration. Therefore, counsel suggested that the court permit the victims who had traveled from out of town to present their statements and then continue the remainder of the sentencing proceeding to the next available date. Noting that Derricott was insistent on proceeding "against my better advice at this time," counsel requested the district court to question Derricott "as to the appropriateness of going forward completely with the sentencing today."

The district court questioned Derricott briefly as to his understanding of the situation and advised him of the court's concern that if it proceeded with sentencing under the circumstances it would create "built-in error." Derricott responded that he understood the situation but nonetheless wished to proceed. The district court then proposed substituting an associate of Derricott's counsel to represent Derricott at sentencing and continuing the proceeding for several hours to allow the associate to prepare. Although Derricott expressly agreed to the court's proposal, his original counsel advised the court that in his present condition, he did not feel he and his associate could

adequately prepare "in a couple of hours." Thereafter, the district court proceeded with sentencing as it had proposed with the associate attorney serving as Derricott's replacement counsel later that afternoon.

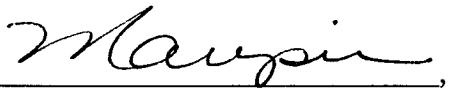
Despite Derricott's express agreement with the district court's proposal to proceed with sentencing, we conclude that the district court erred in rejecting Derricott's claim that his appellate counsel was ineffective for failing to challenge in the direct appeal the sentencing procedure employed below. Derricott, a young man in his late teens with a significant psychologically troubled history, was facing and in fact received four consecutive life sentences. Given the severity of the potential sentences, his original counsel's candid representations respecting Derricott's lack of appreciation of the significance and magnitude of the evidence that was available, and his counsel's additional representation that "a couple of hours" for substitute counsel to prepare would be insufficient, we conclude that Derricott's appellate counsel's failure to assert any issues on direct appeal respecting the sentencing procedures fell below an objective standard of reasonableness. In this, we view Derricott's responses to the district court's questions during the brief canvass as tending to reinforce, rather than alleviate, the concerns counsel expressed respecting his client's failure to appreciate the situation. Moreover, we conclude that the omitted assignments of error on direct appeal challenging the district court's decision to proceed with replacement counsel after only a brief continuance had a reasonable probability of success on appeal. Although a defendant will generally not be heard to complain of procedures to which he has expressly agreed after being


fully advised, we simply cannot conclude that Derricott was fully and accurately advised under the circumstances. We further conclude that that the procedure employed by the district court failed to provide Derricott with the effective, meaningful representation at sentencing to which he was entitled under the Sixth Amendment. Accordingly, in the event that Derricott elects to not withdraw his plea and proceed to trial, he will nonetheless be entitled to an entirely new sentencing proceeding before a different district court judge.

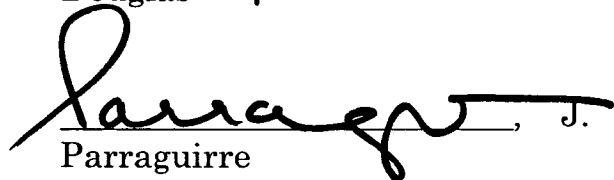
CONCLUSION

We conclude that the district court erred in rejecting Derricott's claims involving the sentencing proceeding and the incidental nature of the kidnapping count. We reject appellant's remaining contentions. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Richard Wagner, District Judge
Karla K. Butko
Attorney General Brian Sandoval/Carson City
Humboldt County District Attorney
Humboldt County Clerk