

IN THE SUPREME COURT OF THE STATE OF NEVADA

RYAN FOWLER,
Appellant,
vs.
WARDEN, LOVELOCK
CORRECTIONAL CENTER, CRAIG
FARWELL, AND THE STATE OF
NEVADA, OFFICE OF THE ATTORNEY
GENERAL,
Respondents.

No. 43639

FILED

FEB 15 2005

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Ryan Fowler's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

On July 3, 2002, Fowler was convicted, pursuant to a guilty plea, of two counts of child abuse and/or neglect causing substantial bodily harm.¹ The district court sentenced Fowler to serve two concurrent prison terms of 60-240 months and ordered him to pay \$4,990.00 in restitution jointly and severally with his codefendant. This court affirmed Fowler's

¹Fowler and his codefendant, Lauren Ann Miller, were originally charged with three counts of child abuse and/or neglect causing substantial bodily harm and four counts of willfully endangering a child as the result of child abuse and/or neglect; the victim was Miller's 2-year-old daughter.

conviction and sentence on direct appeal.² The remittitur was issued on December 3, 2002.

On May 15, 2003, Fowler filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Fowler, and counsel filed a supplemental petition. The State opposed Fowler's petition. The district court conducted an evidentiary hearing, and on July 16, 2004, entered an order denying Fowler's petition. This timely appeal followed.

Fowler's sole contention on appeal is that the district court erred in finding that he did not receive ineffective assistance of counsel at sentencing. More specifically, Fowler argues that counsel was ineffective for failing to present the testimony of the doctor who performed Fowler's risk assessment report. Fowler also argues that counsel was ineffective for not commenting about the report during the sentencing hearing. The doctor's report stated that, under the appropriate conditions, Fowler did not present a high risk to reoffend. The report was, as Fowler concedes, submitted to the district court prior to the sentencing hearing. We conclude that Fowler is not entitled to any relief.

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 counsel's performance fell below an objective standard of reasonableness, and that: (1) counsel's errors were so severe that there was a reasonable probability that the outcome would have been

²Fowler v. State, Docket No. 39988 (Order of Affirmance, November 5, 2002).

different,³ or (2) but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial.⁴ A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.⁵

We conclude that the district court did not err in denying Fowler's petition. At the evidentiary hearing on the petition, Fowler's trial counsel testified that although the doctor's report certified Fowler as not being a high risk to reoffend, and thus, made him eligible for probation, counsel did not comment about the report or present the doctor in mitigation because of the significant negative content in the report. Counsel stated, "The only thing I wanted to put in front of the Court was that [Fowler] was eligible for probation and that's it." Counsel did, in fact, argue for probation at Fowler's sentencing hearing. And as noted above, the district court did receive and consider the risk assessment prior to the sentencing hearing. We further note that Fowler did not call the doctor to testify at the evidentiary hearing.

In denying Fowler's petition, the district court stated, "[T]here's been no evidence presented in this record indicating to the Court that there would have been anything different that would have occurred at sentencing had the expert . . . testified." In the order denying

³See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).


⁴Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).


⁵Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).


Fowler's petition, the district court stated that trial counsel's decision not to comment about the report because of its "negative elements" was "reasonable under prevailing professional norms." We agree and conclude that: (1) Fowler failed to demonstrate that he was prejudiced in any way by the alleged ineffective assistance of counsel, and (2) substantial evidence supports the district court's denial of Fowler's petition.

Therefore, having considered Fowler's contention and concluded that it is without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Becker


_____, J.
Rose


_____, J.
Gibbons

cc: Hon. James W. Hardesty, District Judge
Hardy & Associates
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk