

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
NICOLAS ALAN TOLOTTI,
Respondent.

No. 43951

FILED

MAY 26 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 granting respondent Nicolas Tolotti's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

On July 30, 1998, the district court convicted Tolotti, pursuant to a plea of no contest, of lewdness with a child under the age of fourteen. The district court sentenced Tolotti to a term of life imprisonment with the possibility of parole after ten years. We dismissed Tolotti's direct appeal and denied his petitions for rehearing and en banc reconsideration.¹

On February 20, 2001, Tolotti filed a post-conviction petition for a writ of habeas corpus with the district court. The district court

¹Tolotti v. State, Docket No. 32899 (Order Dismissing Appeal, March 29, 2000); Tolotti v. State, Docket No. 32899 (Order Denying Rehearing, July 31, 2000); Tolotti v. State, Docket No. 32899 (Order Denying En Banc Reconsideration, October 17, 2000).

dismissed some of Tolotti's claims and held an evidentiary hearing on the remaining claims.

On August 12, 2004, the district court entered its findings of fact, conclusions of law, and judgment. It rejected Tolotti's claims that the sentencing judge was biased and that his plea was involuntary because he was not informed of the lifetime supervision requirement. However, it concluded that Tolotti was denied effective assistance of counsel and therefore his plea was not entered voluntarily, knowingly, and intelligently. Accordingly, the district court ordered that Tolotti's plea of no contest be set aside. This appeal follows.

The State claims that the district court erred in finding that Tolotti could not qualify for a diversion program and did not meet the requirements for probation. It contends that the district court relied upon this erroneous finding to conclude that Tolotti "gained absolutely nothing under the guilty plea negotiated between trial counsel and the State, and knowing this, [Tolotti] would have gone to trial."

A district court's factual findings are entitled to deference if they are supported by substantial evidence and are not clearly wrong.² Substantial evidence supports the district court's finding that Tolotti could not qualify for a diversion program and did not meet the requirements for probation. In her psychosexual evaluation, Nevada Division of Parole and Probation Psychologist Sally Skewis determined that Tolotti was a moderate risk for violence and sexual reoffending due to his substance

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

abuse. She judged Tolotti's amenability to treatment to be good, as he had indicated that he would like to stop drinking. However, she concluded that Tolotti's treatment prognosis was poor because he had not continued his substance abuse treatment. In his evaluation, Psychologist Robert Hiller concluded that Tolotti was an alcoholic and had other underlying problems. He further stated:

If the Court grants this man the privilege of probation, I would strongly recommend that continued participation in AA as well as regular psychotherapy, both individual and marital (assuming his relationship endures), be part of the conditions of such a disposition. Of course, I would also recommend that Mr. Tolotti not be in the presence of such children unsupervised until these problems are resolved. Under these conditions, Mr. Tolotti, who appears to be a good candidate for probation, would not seem to represent a danger to the health, safety, or morals of this community.

The sentencing judge testified at the evidentiary hearing that neither Dr. Skewis's nor Dr. Hiller's evaluation satisfied the requirement that a psychologist certify that Tolotti was not a danger to society. She noted that both evaluations had exceptions or conditions to Tolotti not being a danger. At his sentencing, she did not address Tolotti's application for a diversion program. However, on appeal we concluded among other things "that the evidence presented to the district court was sufficient to support a finding that Tolotti 'is not likely to be rehabilitated through treatment or

is otherwise not a good candidate for treatment."³ The State takes issue with the district court's finding, but we conclude that it was a reasonable assessment of Tolotti's practical chances of qualifying for either a diversion program or probation.

Moreover, the district court found that defense counsel was ineffective. To establish ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense.⁴ A petitioner who has entered a guilty plea must demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."⁵

The district court found that defense counsel's pretrial investigation was inadequate. Counsel did not attempt to interview the victim, the investigating police officers, and other witnesses who possessed evidence regarding possible defenses, and therefore unreasonably concluded that Tolotti did not have a viable defense. Counsel advised Tolotti to forgo trial and plead no contest without first obtaining a psychosexual evaluation and investigating and informing Tolotti of his

³Tolotti, Docket No. 32899 (Order Dismissing Appeal) (quoting NRS 458.320(2)).


⁴Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).


⁵Id. at 988, 923 P.2d at 1107 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).


practical chances of qualifying for a diversion program or receiving probation. The district court further found that Tolotti could not qualify for a diversion program or probation, and therefore he did not receive any benefit from the plea agreement and was prejudiced when he forfeited his right to trial by pleading no contest. As the district court's findings are supported by substantial evidence and are not clearly wrong, we conclude that the district court did not err in setting aside Tolotti's no contest plea.

Because we affirm the district court's order, we need not consider the respondent's other contentions. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Becker


_____, J.
Rose


_____, J.
Gibbons

cc: Second Judicial District Court Dept. 9, District Judge
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Richard F. Cornell
Washoe District Court Clerk