

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAJIED SHARRIEFF ALFORD A/K/A  
MAJIED ALFORD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44004

FILED

JAN 07 2005

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant Majied Alford's post-conviction petition for a writ of habeas corpus, "motion to discharge and dismiss petitioner," and "motion to grant proper relief under NRCP 60(b)." Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On March 6, 2001, the district court convicted Alford, pursuant to a guilty plea, of robbery. The district court sentenced Alford to serve a term of 36 to 156 months in the Nevada State Prison. The district court suspended Alford's sentence and placed him on probation for a period not to exceed three years. On August 28, 2001, the district court entered a written order revoking Alford's probation, causing the original sentence to be executed and amending the judgment of conviction to include jail time credit totaling 109 days. Alford did not file an appeal from the order revoking his probation.

On March 25, 2002, Alford filed a proper person post-conviction petition for a writ of habeas corpus in the district court. In his petition, Alford challenged the revocation of his probation. The State opposed the petition and argued that the petition was untimely filed. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Alford or to conduct an evidentiary hearing. On June

6, 2002, the district court denied Alford's petition. On appeal, this court concluded that the district court erred in determining that Alford's petition was procedurally barred, and we remanded the matter to the district court to consider the merits of Alford's claims.<sup>1</sup>

On remand, the district court denied Alford's petition without conducting an evidentiary hearing. Alford appealed, and this court determined that the district court erred in denying Alford's petition without first conducting an evidentiary hearing.<sup>2</sup> In response to this court's order, the State filed a motion for a new probation revocation hearing, conceding that an evidentiary hearing was unnecessary. The district court granted the State's motion and appointed counsel to represent Alford. Alford filed an opposition to the State's motion for a new probation revocation hearing, arguing that this court specifically remanded the matter for an evidentiary hearing. In response to Alford's opposition, the district court vacated the probation revocation hearing and scheduled an evidentiary hearing. On July 27, 2004, Alford filed a "motion to grant proper relief under NRCPC 60(b)," and on August 19, 2004, Alford filed a "motion to dismiss and discharge petitioner." In both of these motions, Alford objected to an evidentiary hearing or a new probation revocation hearing, and requested that his sentence be discharged.

On September 10, 2004, the district court conducted an evidentiary hearing on Alford's petition. At the outset of the hearing, the State again conceded that an evidentiary hearing was needless and stated that it did not oppose a new probation revocation hearing. Although the

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<sup>1</sup>Alford v. State, Docket No. 39753 (Order of Reversal and Remand, February 5, 2003).

<sup>2</sup>Alford v. State, Docket No. 41634 (Order of Reversal and Remand, May 6, 2004).

district court, the State, and Alford's stand-by counsel all agreed that a new probation revocation hearing was the most appropriate and efficient option, Alford vigorously objected to a new probation revocation hearing and insisted on an evidentiary hearing. Consequently, the district court conducted an evidentiary hearing, and subsequently denied Alford's petition and motions on September 22, 2004. This appeal followed.<sup>3</sup>

In his petition, Alford claimed that his counsel appointed to represent him at his probation revocation proceeding was ineffective.<sup>4</sup> To state a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.<sup>5</sup> A petitioner must further establish a reasonable probability that, in the absence of counsel's errors, the results of the proceedings would have been different.<sup>6</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>7</sup> The district

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<sup>3</sup>For the reasons discussed below, the district court did not err in denying Alford's "motion to discharge and dismiss petitioner," and "motion to grant proper relief under NRCP 60(b)."

<sup>4</sup>This court has recognized that an ineffective assistance of counsel claim will lie only where the defendant has a constitutional or statutory right to the appointment of counsel. See McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). Here, the district court conceded that Alford was entitled to the effective assistance of counsel because the district court reviewed his claims without any reference as to whether he was entitled to the effective assistance of counsel in his probation revocation proceeding. See Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973); Fairchild v. Warden, 89 Nev. 524, 516 P.2d 106 (1973).

<sup>5</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>6</sup>Id.

<sup>7</sup>Strickland, 466 U.S. at 697.

court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>8</sup>

First, Alford alleged that his counsel was ineffective for failing to file an appeal from the order revoking probation, despite Alford's request to do so. During the evidentiary hearing, Alford's trial counsel, Timothy O'Brien, testified that he did not recall that Alford ever asked him to file a direct appeal, but it was his usual practice to file a direct appeal if a client requested one. Although Alford argued that he asked O'Brien to file an appeal on his behalf, the district court concluded that O'Brien was the more credible witness. Because the district court's determination that this claim lacked merit was supported by substantial evidence and was not clearly wrong,<sup>9</sup> we affirm the district court's denial of this claim.

Second, Alford contended that his counsel was ineffective for failing to object to hearsay evidence presented at the probation revocation hearing. However, this claim is belied by the record.<sup>10</sup> Accordingly, the district court did not err in denying Alford relief.

Third, Alford alleged that his counsel was ineffective for failing to speak with him prior to the probation revocation hearing. O'Brien testified during the evidentiary hearing that he spoke with Alford on two occasions prior to the hearing regarding his probation revocation. We conclude that the district court's denial of this claim was supported by substantial evidence and we therefore affirm the order of the district court in this regard.

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

<sup>9</sup>Id.

<sup>10</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Fourth, Alford contended that his counsel was ineffective for failing to investigate his attendance at counseling sessions and his payment of fees. However, Alford failed to establish that he advised his counsel of any need to conduct investigation in these areas. Thus, Alford did not demonstrate that his counsel acted unreasonably, and the district court did not err in denying this claim.

Fifth, Alford claimed that his counsel was ineffective for soliciting unfavorable testimony from Alford's probation officer during the hearing. Specifically, O'Brien asked Alford's probation officer if alcohol had ever been discovered in Alford's home, and the probation officer responded affirmatively. However, this was the basis for a previous probation violation proceeding, and O'Brien testified that he asked this question in an attempt to demonstrate to the district court that alcohol had not recently been found in Alford's home. We conclude that this was a reasonable tactical choice and was entitled to deference.<sup>11</sup> Consequently, Alford failed to demonstrate that his counsel was ineffective in this respect.

Next, Alford argued that: (1) he was denied the right to confront his accusers; (2) he was denied the right to be notified of the alleged violations relied upon to revoke his probation; (3) false testimony was presented at the probation revocation proceeding; and (4) the district court was misled during the probation revocation proceeding. It appears that the district court failed to address the merits of these claims based on the erroneous conclusion that Alford was required to raise these claims on direct appeal. Despite this error, we conclude that Alford is not entitled to relief. Even if the district court had addressed the above claims and found

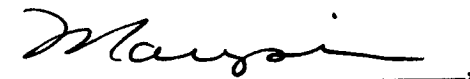
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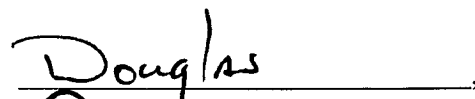
<sup>11</sup>See Riley, 110 Nev. at 653, 878 P.2d at 281-82.

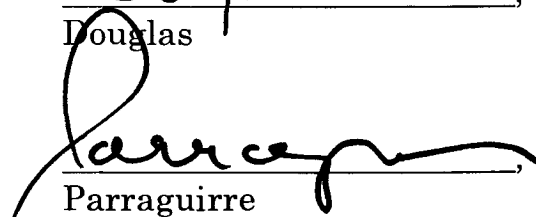
any of them to have merit, the proper remedy would have been to conduct a new probation revocation proceeding. However, Alford was previously presented with the option of a new probation revocation hearing, but strongly objected to a new hearing. Because the only remedy available to Alford is that which he has already vigorously refused, we conclude that he has waived these claims.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Alford is not entitled to relief and that briefing and oral argument are unwarranted.<sup>12</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Donald M. Mosley, District Judge  
Majied Sharrieff Alford  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>12</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).