

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARL ALVIN EMERICH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 46131

**FILED**

**APR 10 2006**

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court denying appellant Carl Alvin Emerich's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On June 6, 2002, Emerich pleaded guilty to one count of obtaining or using the personal identifying information of another. The district court sentenced Emerich to serve a prison term of 96-240 months and ordered him to pay \$13,872.59 in restitution. Emerich appealed, and this court remanded for a new sentencing hearing before a different district court judge, concluding that Emerich was improperly punished for additional uncharged crimes that were not proved at sentencing.<sup>1</sup> At the new sentencing hearing, after hearing arguments from counsel, the district court resentenced Emerich to serve a prison term of 72-240 months and ordered him to pay the same amount of restitution. This court affirmed the judgment of conviction and sentence on appeal.<sup>2</sup>

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<sup>1</sup>See Emerich v. State, Docket No. 39903 (Order of Reversal and Remand, October 15, 2002).

<sup>2</sup>See Emerich v. State, Docket No. 41106 (Order of Affirmance, September 19, 2003).

Emerich filed a timely proper person post-conviction petition and amended petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Emerich, and counsel filed a supplement to the petition. The State filed a motion for partial dismissal of Emerich's petition. On November 22, 2004, the district court entered an order granting the State's motion, thereby dismissing several of Emerich's claims while also granting him a hearing on the surviving claims. The district court subsequently conducted an evidentiary hearing, and on September 15, 2005, entered an order denying Emerich's petition. This timely appeal followed.

Emerich contends that he received ineffective assistance of counsel at sentencing. Specifically, Emerich claims that he received a harsher sentence due to counsel's failure to adequately (1) prepare, and review the presentence investigation report with him prior to both sentencing hearings, and (2) present mitigating evidence, at the second sentencing hearing, "in the form of live testimony from the retained drug rehabilitation expert." We disagree.

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 different,<sup>3</sup> or (2) but for counsel's errors, the petitioner would not have

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

pleaded guilty and would have insisted on going to trial.<sup>4</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>5</sup> A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.<sup>6</sup> 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.<sup>7</sup>

We conclude that the district court did not err in denying Emerich's petition. At the evidentiary hearing, the district court found that errors in the presentence investigation report were not prejudicial, and had they been rectified prior to sentencing, would not have resulted in a different sentence. Additionally, Emerich's former counsel testified that it was a strategic decision not to present the live testimony of the retained drug rehabilitation expert at the sentencing hearing. Counsel believed that had the expert testified, information about Emerich previously absconding from a Salvation Army drug treatment program would jeopardize his chances for entry into another program. Counsel stated he was hoping to "gloss over" that fact. The district court found that counsel was not ineffective,<sup>8</sup> and that Emerich's sentence would not have been any different with "more specific information about petitioner's addiction."

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

<sup>5</sup>Strickland, 466 U.S. at 697.

<sup>6</sup>Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).


<sup>7</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

<sup>8</sup>See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).


Finally, in the order denying Emerich's petition, the district court noted that Emerich had an extensive criminal history and that he was sentenced "to protect society and to hold petitioner accountable for his actions." We also note that Emerich received a lesser minimum sentence at his second sentencing hearing. Therefore, based on all of the above, we conclude that (1) Emerich 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 Emerich's petition.

Having considered Emerich's contentions and concluded that they are without merit, we

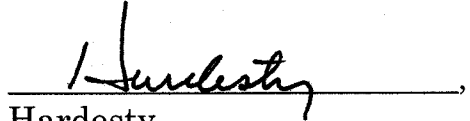
ORDER the judgment of the district court AFFIRMED.<sup>9</sup>

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

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<sup>9</sup>Because Emerich is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, the clerk of this court shall return to Emerich unfiled all proper person documents he has submitted to this court in this matter.

cc: Hon. Jerome Polaha, District Judge  
Kay Ellen Armstrong  
Carl Alvin Emerich  
Attorney General George Chanos/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk