

IN THE SUPREME COURT OF THE STATE OF NEVADA

BILLY SCOTT USHER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 46470

**FILED**

MAY 23 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY J. Alvarado  
DEPUTY CLERK

This is an appeal from an order of the district court denying appellant Billy Scott Usher's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Usher contends that the district court erred in determining that he did not receive ineffective assistance of counsel at sentencing. Specifically, Usher argues that counsel was ineffective by failing to investigate and present "compelling" evidence in mitigation at the sentencing hearing. Usher also argues that the district court erred during the post-conviction proceedings by denying his application for funds to secure an expert witness to conduct a mental health evaluation. We disagree.

The district court found that Usher's counsel was not ineffective. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>1</sup> Usher has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong.

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<sup>1</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Moreover, Usher has not demonstrated that the district court erred as a matter of law. Therefore, we conclude that the district court did not err in denying Usher's petition.

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

ORDER the judgment of the district court AFFIRMED.

Douglas, J.  
Douglas

Becker, J.  
Becker

Parraguirre, J.  
Parraguirre

cc: Hon. Janet J. Berry, District Judge  
Nathalie Huynh  
Attorney General George Chanos/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

FILED

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ROBERT L. SIGTIN, JR.  
BY: [Signature] DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE

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BILLY SCOTT USHER,

Petitioner,

v.

Case No. CR03P0067

THE STATE OF NEVADA,

Dept. No. 1

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND JUDGMENT

On August 29, 2005, the parties, by and through their respective counsel, Joseph R. Plater, for the State of Nevada, and Nathalie Huynh, for petitioner Usher, appeared before the court for an evidentiary hearing on Usher's petition for writ of habeas corpus (post-conviction). After having heard and considered the evidence and testimony and the parties' respective arguments, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On October 10, 2002, petitioner was arrested in this case. Six days after his arrest, petitioner was released on bail from the Washoe County Detention Facility. Petitioner was arrested again on November 30, 2002, in an unrelated case for destruction of property and possession of a dangerous weapon; on December 23, 2002, petitioner pleaded guilty to both of those charges.

1 2. By way of information, filed on January 10, 2003, the State charged petitioner in the present case  
2 with two counts of causing substantial bodily harm to another by driving under the influence of alcohol,  
3 a violation of NRS 484.3795. The Washoe County Public Defender's Office was appointed to represent  
4 petitioner.

5 3. Pursuant to negotiations, petitioner agreed to plead guilty to both counts in the information, and the  
6 State agreed not to object to concurrent sentences. The State also agreed to dismiss the misdemeanor  
7 charges in the Reno Justice Court arising from this case--failure to drive within a marked lane, and  
8 driving without a valid license--and the gross misdemeanor, possession of an automobile without the  
9 owner's consent. The State further agreed not to file additional charges resulting from the arrest in this  
10 case.

11 4. At the sentencing hearing, counsel for petitioner referred to petitioner's mental health issues as  
12 reported in the Presentence Report. The Presentence Report notes that petitioner told the Department of  
13 Probation and Parole "that at the age of eight he and his older sister were sexually molested during a  
14 three year period by the defendant's uncle. The defendant reported that he had never disclosed this  
15 information to anyone until recently, and has never sought counseling for this abuse." The Presentence  
16 Report also notes petitioner's substantial drug addiction and alcoholism.

17 5. Prior to sentencing, petitioner's mother sent this court and petitioner's counsel a letter in which she  
18 noted the sexual abuse of petitioner when he was younger. In the letter to petitioner's counsel,  
19 petitioner's mother told counsel not to divulge the abuse of petitioner in open court.

20 6. Petitioner's sister also gave a statement at sentencing in which she referred to petitioner's alcoholism.

21 7. The court further noted at the sentencing hearing it had received a letter from petitioner's aunt in  
22 which the aunt references "a predatory offender who has affected the lives of many of the family  
23 members in the Usher family."

24 8. The court sentenced petitioner to two concurrent 8 to 20 year sentences in the Nevada State Prison.

25 9. After the Nevada Supreme Court affirmed petitioner's conviction and sentence, petitioner filed a  
26 post-conviction petition for writ of habeas corpus. Petitioner claims his counsel was ineffective by

1 failing to present evidence at the sentencing hearing of petitioner's sexual abuse as a child. Petitioner  
2 claims his counsel failed to obtain a mental health evaluation of petitioner which would have revealed  
3 that the abuse of petitioner led to petitioner's drug abuse and alcoholism. Petitioner further contends  
4 that his counsel should have presented witnesses at the sentencing hearing to testify as to petitioner's  
5 good character. Petitioner contends the foregoing information was of such a mitigating character that the  
6 court would have given petitioner a lesser sentence had it known of the information.

7 10. The court denies this claim. While the court finds that counsel should have spent more than five  
8 minutes with petitioner before the sentencing hearing, petitioner has not proved that this court would  
9 have issued a different sentence had it been informed of all the details petitioner presented at the habeas  
10 hearing.

11 11. The court was well aware of petitioner's sexual abuse as a child at the time of the sentencing  
12 hearing. The court was also aware of petitioner's drug addiction and alcoholism and that petitioner's  
13 abuse as a child was a driving force behind his addictions. The court gave petitioner's addictions  
14 substantial consideration when it sentenced him by ordering the two convictions to run concurrently.  
15 Accordingly, the court rejects petitioner's argument that the court did not give him a lesser sentence by  
16 not considering his sexual abuse as a child.

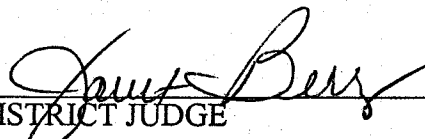
17 12. Likewise, the court rejects petitioner's argument that it would have reduced petitioner's sentence  
18 even further had counsel presented more detailed information about the prior abuse and its effects on  
19 petitioner. The court sentenced petitioner based on the catastrophic and life-threatening injuries  
20 petitioner caused the victims in this case, which are referenced in the sentencing transcript and the  
21 presentence report. At the sentencing hearing, the court believed then and believes now that petitioner's  
22 crimes were horrendous, and that petitioner made a conscious decision to drink and drive, knowing that  
23 he had a severe drinking problem and knew that it was against the law to drink and drive while  
24 intoxicated. Thus, the court sentenced petitioner in order to protect the public from petitioner's  
25 alcoholism, to deter others from similar unlawful conduct, and to punish petitioner for his conduct.

26 13. The court rejects petitioner's claim that additional character witnesses would have resulted in a

1 lesser sentence in this case. The court was aware, at the time of the sentencing hearing, of the  
2 information and opinions of the witnesses who testified at the habeas hearing. In addition, as expressed  
3 above, given the significant injuries petitioner caused in this case, the court felt compelled to punish  
4 petitioner as it did. For the same reasons, the court does not find that Mr. Filippi's testimony at the  
5 habeas hearing would have made a difference in petitioner's sentence. Mr. Filippi could not state that  
6 petitioner was presently amenable to treatment. To the contrary, Mr. Filippi confirmed that petitioner  
7 had voluntarily walked away two previous times from the Step 1 program when attempting to obtain  
8 drug rehabilitation.

9 14. For the foregoing reasons, the court finds that petitioner received the effective assistance of counsel  
10 as set forth in Strickland v. Washington, 466 U.S. 668 (1984), and hereby denies the relief requested.

11 DATED this 9<sup>th</sup> day of ~~September~~  
November, 2005.

12  
13   
14 DISTRICT JUDGE

1 CERTIFICATE OF MAILING

2  
3 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County  
4 District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail Service at  
5 Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

6 Nathalie Huynh, Esq.  
7 555 South Center Street, Suite 100  
8 Reno, NV 89501

9 Billy Scott Usher #76080  
10 Wells Conservation Camp  
11 HC-67-50  
12 Wells, NV 89835

13 DATED: November 14, 2005.

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