IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON EVAN WILCOX,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47351

FILED

NOV 13 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Jason Evan Wilcox's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On November 3, 2005, Wilcox was convicted, pursuant to a guilty plea, of two counts of attempted lewdness with a child under the age of 14 years.[1] The district court sentenced Wilcox to serve two consecutive prison terms of 36-96 months. Wilcox did not pursue a direct appeal from the judgment of conviction and sentence.

On November 7, 2005, with the assistance of new counsel, Wilcox filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition and filed a motion to dismiss. After additional briefing, the district court heard arguments from counsel and denied Wilcox's petition. This timely appeal followed.

[1]Wilcox was initially charged by way of a criminal information with three counts of lewdness with a child under the age of 14 years for behavior directed towards two female victims.

Wilcox contends that the district court erred by determining that he did not receive ineffective assistance of counsel at sentencing. 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,[2] or (2) but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial.[3] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[4] A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.[5] 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.[6]

First, Wilcox contends that counsel rendered ineffective assistance at the sentencing hearing by failing to present mitigating character evidence. As a result of counsel's failure, Wilcox claims that it

---

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

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

[4]Strickland, 466 U.S. at 697.

[5]Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

[6]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994); see also Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004).

was "a foregone conclusion that the District Court would not seriously consider probation." We disagree.

On appeal, Wilcox does not state with any specificity what mitigating and character evidence counsel failed to present to the district court that may have affected his sentence.[7] Additionally, at the post-conviction hearing, the district court found that all of the mitigating evidence that counsel argued should have been presented to the court at sentencing was, in fact, included in the presentence investigation report prepared by the Division of Parole and Probation and considered by the court. And finally, at the sentencing hearing, defense counsel made several arguments in mitigation and asked the district court to follow the Division's recommendation of probation. Therefore, we conclude that the district court did not err in rejecting this claim.

Second, Wilcox contends that counsel rendered ineffective assistance by failing to challenge the use of private medical records in the preparation of the PSI. We disagree. Wilcox claims not to know how the author of his psychosexual evaluation report came into possession of his confidential counseling records. Regardless, Wilcox discussed his treatment during the sentencing hearing. The district court found it was "more likely than not" that Wilcox offered the information in order to show that he was voluntarily seeking sex offender treatment, and that such information might secure him a more favorable sentencing recommendation. At the hearing on the petition, the district court noted that much of the information was disclosed to the court during statements

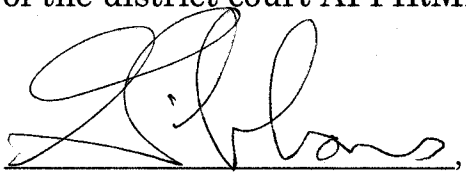
---

[7]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

made by parents of the victims. The district court also found that there was not a reasonable probability that Wilcox's sentence would have been different had counsel been able to keep information about his treatment from the court. We agree and conclude that the district court did not err in rejecting this claim.

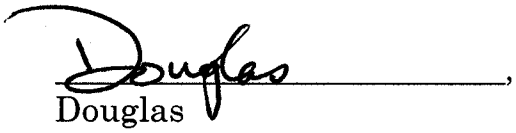
Therefore, having considered Wilcox's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons

_____, J.
Maupin



_____, J.
Douglas

cc: Hon. Michelle Leavitt, District Judge
Warhola & Brooks, LLP
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk