

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY W. SCHWIETER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48097

GARY W. SCHWIETER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48098

FILED

JAN 24 2007

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

ORDER OF AFFIRMANCE

These are consolidated appeals from an order of the district court denying appellant Gary W. Schwieter's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

In District Court Case No. CR03-0170, Schwieter was convicted, pursuant to a guilty plea, of three counts of burglary and sentenced to serve three consecutive prison terms of 48-120 months and ordered to pay \$6,417.21 in restitution. In District Court Case No. CR03-0270, Schwieter was convicted, pursuant to a guilty plea, of one count of possession of stolen property and sentenced to serve a concurrent prison

term of 12-48 months. This court affirmed Schwieter's judgments of conviction on direct appeal.¹

On June 3, 2004, Schwieter filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Schwieter, and counsel filed a supplement to the petition. On September 9, 2005, the district court entered an order denying Schwieter's petition, but soon after reconsidered and requested additional briefing. Schwieter then filed an amended supplemental petition. In the amended supplemental petition, Schwieter claimed, among other things, that counsel was ineffective for failing to present sufficient mitigating evidence at sentencing. The State opposed Schwieter's petition and filed a motion to dismiss; Schwieter opposed the motion to dismiss his petition. The district court conducted an evidentiary hearing, and on July 26, 2006, entered an order denying Schwieter's petition. These timely consolidated appeals followed.

Schwieter contends that the district court erred by finding that he did not receive ineffective assistance of counsel at sentencing. Specifically, Schwieter argues that counsel was ineffective by providing, at the sentencing hearing for both cases, documentary evidence in mitigation rather than the live testimony of Schwieter's therapist. Schwieter claims the district court's factual findings are not supported by the record and that he is entitled to "a more lenient sentence." We disagree.

¹Schwieter v. State, Docket Nos. 41552/41553 (Order of Affirmance, March 11, 2004).

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

At the evidentiary hearing on his petition, Schwieter presented the testimony of his therapist, Tom Lavin. At the conclusion of the hearing, the district court found that had Lavin testified at

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

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

⁴Strickland, 466 U.S. at 697.

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


⁶Riley 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).

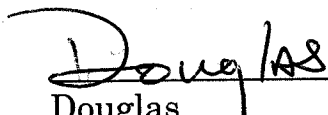
Schwieter's sentencing hearing, the information would have been cumulative. The district court noted that, prior to sentencing, it had reviewed letters Lavin wrote to defense counsel, and that the court was made aware of Schwieter's treatment through statements made by both counsel and Schwieter at the hearing. The district court also noted that Lavin's testimony about Schwieter's long-term drug addiction would have been prejudicial to Schwieter if it had been presented at the sentencing hearing because "it demonstrates very strongly that he would be unlikely to benefit from further treatment or from a lenient sentence." As a result, the district court found that counsel was not ineffective for making the tactical decision not to present Lavin as a witness at the sentencing hearing.

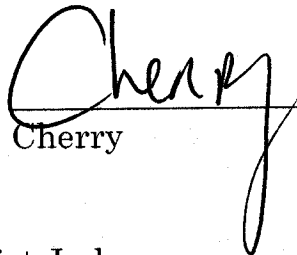
In its order denying Schwieter's petition, the district court pointed out that it based its sentencing determination on the nature of the crimes and Schwieter's extensive criminal history. We note that at the time of sentencing, Schwieter's criminal history included seven prior felony convictions, approximately fourteen misdemeanor convictions, numerous arrests not prosecuted and without dispositions, a probation revocation, and multiple dishonorable discharges from parole. The district court also stated that it was "not persuaded" that Schwieter's sentence would have been different had the evidence presented at the evidentiary hearing been presented at the sentencing hearing. We agree. Our review of record reveals that Schwieter has failed to demonstrate that the district court's findings are not supported by substantial evidence or are clearly wrong. Accordingly, we conclude that the district court did not err in denying Schwieter's petition.

Therefore, having considered Schwieter's contention and concluded that it is without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Brent T. Adams, District Judge
Eric W. Lerude
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk