

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL HAYS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48158

FILED

FEB 08 2008

TRACEE K. LINDENAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On June 17, 1999, appellant Michael Hays was convicted, pursuant to a guilty plea, of child abuse and neglect with substantial mental injury. The district court sentenced Hays to serve a prison term of 43 to 192 months, suspended execution of his sentence, and placed him on probation for a period not to exceed five years. Hays did not file a direct appeal.

On February 24, 2004, the Division of Parole and Probation filed a notice of intent to revoke Hays' probation. After conducting a hearing, the district court revoked Hays' probation and imposed the original sentence. This court affirmed the order revoking probation.¹

On February 3, 2006, Hays filed a post-conviction petition for a writ of habeas corpus in the district court challenging counsel's performance at the probation revocation hearing. The State opposed the

¹Hays v. State, Docket No. 43669 (Order of Affirmance, February 3, 2005).

petition. Pursuant to NRS 34.750, the district court appointed counsel, but declined to conduct an evidentiary hearing. On November 14, 2006, after hearing argument from counsel, the district court denied Hays' petition. This appeal follows.

Hays claims that the district court erred by rejecting his claims of ineffective assistance of counsel without conducting an evidentiary hearing. Specifically, Hays contends that counsel was ineffective at the probation revocation hearing for failing to adequately cross-examine the victim and a police detective.² Hays contends that if counsel had adequately cross-examined and pointed out prior inconsistent statements of these witnesses, it would have been apparent that they were biased and motivated to lie because of an ongoing child custody case in the family court.

Here, the district court found that counsel was not ineffective pursuant to the standard set forth in Strickland v. Washington.³ In particular, the district court found that Hays was not prejudiced by any deficient performance because "the standard is incredibly low as to whether [Hays was] following the terms and conditions of his probation"


²This 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 Hays 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).

³466 U.S. 668 (1984).


and there was not "anything that would . . . by way of evidentiary hearing, change [its] determination that [Hays] violated his probation."⁴ Having reviewed the record, we conclude that Hays has failed to show that he was prejudiced by the allegedly deficient cross-examination.⁵

Accordingly, we


ORDER the judgment of the district court AFFIRMED.

 _____, J.

Maupin

 _____, J.

Cherry

 _____, J.

Saitta

⁴See Lewis v. State, 90 Nev. 436, 529 P.2d 796 (1974) (noting that the evidence must merely be sufficient to determine that a defendant's conduct was not as good as required by the conditions of probation).

⁵See Riley v. State, 110 Nev. 638, 648-49, 878 P.2d 272, 278-79 (1994). Hays notes that, in reviewing his claims of ineffective assistance of counsel, the district court erred in failing to apply the preponderance of the evidence standard set forth in Means v. State, 120 Nev. 1001, 1013, 103 P.3d 25, 33 (2004). We conclude that the district court's error in applying the clear and convincing standard was harmless beyond a reasonable doubt. See id. at 1014, 103 P.3d at 34.

cc: Hon. Jackie Glass, District Judge
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