IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM HENRY BICKOM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48564

FILED

OCT 18 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

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

On September 25, 2004, the district court convicted Bickom, pursuant to a jury verdict, of one count of trafficking in a controlled substance and one count of manufacturing or compounding a controlled substance. The district court sentenced Bickom to serve a prison term of 10 to 25 years for trafficking and a concurrent prison term of 3 to 15 years for manufacturing a controlled substance. We affirmed the judgment of conviction on direct appeal.[1]

Bickom filed a timely proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent Bickom, and counsel supplemented Bickom's petition. The State responded to the petition, Bickom replied to the State's response, and the

[1]Bickom v. State, Docket No. 44016 (Order of Affirmance, January 11, 2006).

district court denied the petition without the benefit of an evidentiary hearing. This appeal follows.

Bickom raises five claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient, and that the petitioner was prejudiced by counsel's performance.[2] To demonstrate prejudice, "the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different."[3] The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong.[4]

First, Bickom contends that trial counsel was ineffective for failing to object to the State's amended indictment. Bickom claims that "the State constructively amended the indictment to exclude an alternate theory on which the grand jury likely returned its true bill, based upon the lack of evidence." And Bickom suggests that the indictment was faulty because it cannot be said with absolute certainty that the grand jury's return was not based solely on the excluded theory of criminal liability.[5]

---

[2]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1987)).

[3]Id. at 988, 923 P.2d at 1107 (citing Strickland, 466 U.S. at 694); see also Riley v. State, 110 Nev. 638, 648, 878 P.2d 272, 279 (1994) ("Prejudice in an ineffective assistance of counsel claim is shown when the reliability of the jury's verdict is in doubt.").

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

[5]Bickom cites to Griffin v. United States, 502 U.S. 46, 53 (1991); Sandstrom v. Montana, 442 U.S. 510, 526 (1979); Stromberg v. California,

continued on next page . . .

"After an indictment has been returned and criminal proceedings are underway, the indictment's charges may not be broadened by amendment, either literal or constructive, except by the grand jury itself."[6] "A constructive amendment exists if there is a complex of facts presented at trial distinctly different from those set forth in the indictment, or if the crime charged in the indictment was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved."[7] "The efficacy of an indictment can be sustained upon 'the slightest sufficient legal evidence.'"[8]

Here, the original indictment stated that Bickom did "feloniously manufacture or compound, or offer or attempt to manufacture or compound, a controlled substance, to-wit: Methamphetamine, or did possess a majority of the ingredients required to manufacture or compound said controlled substance" (emphasis added). However, as a result of our decision in Sheriff v. Burdg, the State filed an amended indictment, which eliminated the possession of a majority of the

---

. . . *continued*

283 U.S. 359 (1931); Bolden v. State, 121 Nev. 908, 124 P.3d 191 (2005), all of which address general verdict convictions.

[6]U.S. v. Adamson, 291 F.3d 606, 614 (2002).

[7]U.S. v. Bhagat, 436 F.3d 1140, 1145 (2006) (internal quotation marks and citations omitted).

[8]Echavarria v. State, 108 Nev. 734, 745, 839 P.2d 589, 596 (1992) (quoting Franklin v. State, 89 Nev. 382, 387, 513 P.2d 1252, 1256 (1973)).

ingredients required to manufacture a controlled substance as a theory of criminal liability.[9]

Bickom has not demonstrated that "the complex of facts" presented at trial was distinctly different from those set forth in the indictment, the crime charged in the indictment was altered, or the evidence presented to the grand jury was insufficient to sustain the indictment on the theory that he manufactured methamphetamine. Moreover, Bickom was tried under this theory and he was found guilty under a much higher burden of proof.[10] Under these circumstances, Bickom has not shown that he was prejudiced by trial counsel's performance.

Second, Bickom contends that trial counsel was ineffective for failing to adequately prepare him for the witness stand. Bickom claims that on the second day of trial, during a lunch break, counsel spoke to him for the first time about testifying in his defense. Bickom argues that due to his unpreparedness, he testified harmfully that codefendant Lisa Gill was his girlfriend, they had been living together forever, and they were living together in 1999. Bickom also argues that his testimony, which he alleges was elicited by counsel's ineffective questioning, gave rise to an impression that he was hiding the true nature of his prior conviction.

We note that the district court informed Bickom of his right not to testify and warned him that if he did testify he would subject to

---

[9]118 Nev. 853, 59 P.3d 484 (2002) (holding that the statute criminalizing possession of a majority of the ingredients required to manufacture a controlled substance was unconstitutional).

[10]See id.

cross-examination and he could be asked whether he had been convicted of a felony, the nature of the felony, and when the felony occurred. Bickom chose to testify and swore to tell the truth before testifying. Moreover, Bickom failed to articulate with specificity how counsel should have prepared him for the witness stand. Under these circumstances, we conclude that Bickom has not shown that he was prejudiced by trial counsel's performance.

Third, Bickom contends that trial counsel was ineffective for eliciting testimony that was harmful to his client. Bickom specifically claims that counsel's cross-examination of Las Vegas Metropolitan Police Sergeant John Faulis educed damaging evidence that Bickom said that money found at the Castleberry residence was derived from the sale of narcotics and that Bickom had previously participated in a large narcotics transaction. Bickom asserts that counsel's elicitation of this harmful testimony was purportedly to introduce evidence that Bickom was beaten by the investigating officers. And Bickom argues that such evidence did not provide a viable defense, it was contrary to his defense of innocence, and it was part of an unreasonable strategy that caused him irreparable harm.

The record on appeal indicates that Bickom's theory of defense was that he was a low-level methamphetamine user that the police hoped would cooperate, the police roughed Bickom up to obtain his cooperation, and the police falsified reports when Bickom refused to cooperate. Counsel's decision to question Sergeant Faulis regarding circumstances that supported this theory of defense was tactical in nature. "Tactical

decisions are virtually unchallengeable absent extraordinary circumstances."[11] Because Bickom has not presented any extraordinary circumstances, he has failed to demonstrate that counsel was ineffective on this issue.

Fourth, Bickom contends that trial counsel was ineffective for failing to understand the State's evidence before trial. Bickom specifically refers to evidence of his fingerprint, which was allegedly found on a 1000 milliliter flask used to manufacture methamphetamine. In pretrial reports, the State mistakenly listed the flask as evidence recovered from an East Bonanza storage shed. On the first day of trial, the State provided trial counsel with corrected reports that listed the flask as evidence recovered from the Castleberry residence; counsel moved for a continuance, claiming that he was surprised by the new evidence; and the district court denied the motion, noting that other documents made it clear that this was not new evidence. Bickom argues that had counsel understood the evidence, he could have negotiated a more favorable outcome instead of proceeding to trial with the faulty assumption that the State had little or no evidence.

In a related argument, Bickom contends that trial counsel was ineffective for failing to explain the terms of the State's plea offer to him. Bickom claims that if counsel had fully discussed the State's offer, explained that his fingerprint on the 1000 milliliter flask was compelling evidence that made a guilty verdict more likely, and compared the State's

---

[11]Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated in part on other grounds as recognized by Harte v. State, 116 Nev. 1054, 1072, n.6, 13 P.3d 420, 432 n.6 (2000).

offer of a 30- to 96-month sentence with the possible life sentence he faced by continuing with the trial, "there is a likelihood that [he] would have accepted the offer." Bickom concedes that counsel handed him the plea offer, but maintains that he did not understand its terms.[12]

Bickom is entitled to an evidentiary hearing if he raised claims that, if true, would have entitled him to relief and if his claims are not belied by the record.[13] Bickom's claims that counsel did not understand the nature of the State's evidence and failed to explain the terms of the State's plea offer are not belied by the record, and may, if true, entitle him to relief. Accordingly, the district court erred by failing to conduct an evidentiary hearing on this issue, and we conclude that the district court's denial of this claim must be reversed and the matter remanded for an evidentiary hearing.

Bickom also raises three claims of ineffective assistance of appellate counsel. To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that petitioner was prejudiced by the deficient performance.[14] Appellate

---

[12]Bickom cites to U.S. v. Leonti, 326 F.3d 1111, 1117 (9th Cir. 2003) (holding that the plea proceeding is a critical stage of the prosecution and, therefore, a defendant is entitled to effective assistance of counsel when deciding whether to plead guilty); U.S. v. Rivera-Sanchez, 222 F.3d 1057, 1060-61 (9th Cir. 2000) (holding that counsel is required to communicate the terms of a plea offer to a defendant, and to ensure that the defendant understands the terms of the offer and its significance).

[13]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

[14]Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

counsel is not required to raise every nonfrivolous issue on appeal in order to be effective.[15] To show prejudice, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.[16]

First, Bickom contends that appellate counsel was ineffective for failing to challenge the State's amended indictment on direct appeal. For the reasons discussed above, Bickom has not demonstrated that this issue would have had a reasonable probability of success on appeal. Accordingly, Bickom has not shown that he was prejudiced by appellate counsel's performance.

Second, Bickom contends that appellate counsel was ineffective for failing to file a petition for rehearing. Bickom asserts that this court "overlooked or misapprehended a material fact in the record" when we stated in our order of affirmance that Bickom "testified that he lived with his girlfriend and codefendant Gill forever, including in 1999." However, because our statement accurately reflects Bickom's trial testimony, Bickom has not demonstrated that a petition for rehearing would have had a reasonable probability of success,[17] and he has not shown that he was prejudiced by appellate counsel's performance.

Third, Bickom contends that appellate counsel was ineffective for failing to "federalize" several claims in the direct appeal. Bickom has failed to demonstrate that the results of his direct appeal would have been

---

[15]Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

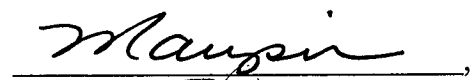
[16]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[17]See NRAP 40(c).

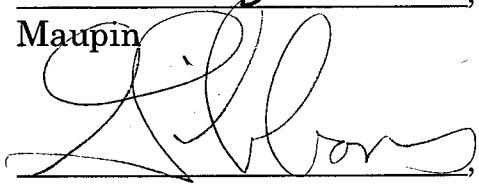
different if counsel had "federalized" the claims; therefore, he has not shown that he was prejudiced by appellate counsel's performance.

Having considered Bickom's contentions and for the reasons discussed above, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, C.J.
Maupin



_____, J.
Gibbons

_____, J.
Saitta

cc: Hon. Valerie Adair, District Judge
Megan C. Hoffman
JoNell Thomas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk