

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE SAMPSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48868

FILED

OCT 31 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is a proper person 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; Michelle Leavitt, Judge.

On June 16, 2003, the district court convicted appellant, pursuant to a jury verdict, of first-degree kidnapping; two counts of lewdness with a minor under the age of fourteen; attempted sexual assault of a minor under the age of fourteen; and sexual assault of a minor under the age of fourteen. In addition, the district court also convicted appellant, pursuant to a guilty plea, of possession of a firearm by an ex-felon. The district court sentenced appellant to an aggregate term of life in the Nevada State Prison with the opportunity for parole after twenty-one years. The remaining terms were imposed to run concurrent with those terms. This court affirmed appellant's conviction and sentence on appeal.¹ The remittitur issued on December 27, 2005.

¹Sampson v. State, 121 Nev. 820, 122 P.3d 1255 (2005).

On October 11, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On January 8, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of 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 in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³

Appellant claimed that his trial counsel was ineffective for: (1) failing to impeach the victim's mother's testimony; (2) failing to sufficiently cross-examine the victim's testimony; (3) failing to sufficiently cross-examine the State's expert witness; and (4) failing to present impeachment evidence. However, these claims were only terse statements that were not supported by specific facts which, if true, would have

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

³Strickland, 466 U.S. at 697.

entitled appellant to relief.⁴ Accordingly, the district court did not err in denying the claims.

Next, appellant claimed that his trial counsel was ineffective for failing to object to the prosecution's invitation to comment on appellant's refusal to consent to a search of his home. In affirming appellant's conviction, this court recognized that a district court commits error when it permits the State to comment on a defendant's invocation of his Fourth Amendment rights.⁵ However, this court held that the error did not affect appellant's substantial rights and thus did not have a prejudicial impact on the verdict.⁶ Because this court already determined that appellant was not prejudiced by the State's comments, appellant necessarily failed to demonstrate that he was prejudiced by counsel's failure to object. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that his trial counsel was ineffective for failing to conduct an adequate investigation. Specifically, appellant

⁴See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that a motion consisting of "'bare' or 'naked' claims for relief, unsupported by an specific factual allegations that would, if true, have entitled" appellant to relief does not entitle appellant to an evidentiary hearing).

⁵Sampson, 121 at 829, 122 P.3d at 1261; see also United States v. Taxe, 540 F.2d 961, 969 (9th Cir. 1976) (holding that the prosecutor's comments on the Taxe's refusal to consent to the search of their trucks was misconduct).

⁶Sampson, 121 Nev. at 830, 122 P.3d at 1261-62; see also Miller v. State, 121 Nev. 92, 110 P.3d (2005) (holding that substantial rights are affected by an error if it has a prejudicial impact on the verdict).

asserted that a more thorough investigation would have revealed that the victim was being treated by Dr. Racoma for Oppositional Defiant Disorder ("ODD").⁷ This court's preliminary review revealed that the district court may have erred in denying this claim without conducting an evidentiary hearing. Therefore, on July 27, 2007, this court ordered the State to show cause why this claim should not be remanded to the district court for an evidentiary hearing. In its response, the State opposed such a remand arguing that appellant's trial counsel effectively exposed inconsistencies within the victim's testimony and the jury was properly instructed on how to weigh the credibility of the witnesses. These inconsistencies in the victim's testimony concerned the acts performed on the victim and the acts the victim was forced to perform.

Based upon our review of the record on appeal and argument from the State, we conclude that the district court erred in denying this claim without conducting an evidentiary hearing.

"An attorney must make reasonable investigations or a reasonable decision that particular investigations are unnecessary."⁸ A petitioner asserting that his counsel did not conduct a sufficient

⁷We note that appellant argued on direct appeal that the district court erred in excluding Dr. Racoma's testimony. His current claim is not barred by the law of the case as this court held that the district court did not abuse its discretion in excluding the late addition to the appellant's witness list as it would have been unfair to the State. See Sampson, 121 Nev. at 828, 122 P.3d at 1260. This court did not address whether appellant's trial counsel was ineffective for his failure seek to add Dr. Racoma as a witness sooner. See id.

⁸State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006) (citing Strickland, 466 U.S. at 691).

investigation bears the burden of showing that he would have benefited from a more thorough investigation.⁹

Appellant's trial counsel was deficient for failing to include Dr. Racoma as an expert witness to testify about ODD. At trial, appellant's counsel stated that he could not locate Dr. Racoma prior to trial because the records upon which he relied to find Dr. Racoma had indicated her name was "Dr. Raconia." Appellant's counsel's failure to discover this witness due to a typographical error was unreasonable. This court noted as much when it affirmed appellant's conviction.¹⁰

Counsel's failure to locate Dr. Racoma could have resulted in prejudice so severe as to render the jury's verdict unreliable. On direct appeal, this court noted that ODD was an illness that may be characterized by lying,¹¹ and appellant's conviction rested heavily on the victim's testimony. The medical examination did not reveal the presence of appellant's DNA on the victim. There were no other witnesses to the events other than the victim and appellant, and both testified at trial. Both the victim and appellant's testimony contained inconsistencies with prior statements and other testimony. Thus, any evidence that tended to show the victim was untruthful may have been favorable to the defense.

⁹See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

¹⁰See Sampson, 121 Nev. at 828, 122 P.3d at 1260 (noting that the fault concerning the timely presentation of the witness lay with Sampson's counsel, "who inexplicably failed to present the evidence contained in the school records or timely pursue testimony from Dr. Racoma").

¹¹Id. at 826, 122 P.3d at 1259.

Although the State presented testimony that confirmed that ODD could affect a child's ability to tell the truth, it was not apparent whether this testimony was based on specialized experience with the disorder. Further, the State's evidence did not offer the level of insight into the disorder that specific testimony concerning the disorder could have provided. Thus, while the jury was instructed that it could consider the victim's motives in evaluating his credibility, the jury also received an incomplete picture of what might motivate the victim to lie. Therefore, we remand this matter to the district court for an evidentiary hearing to determine whether trial counsel's failure to include expert testimony on ODD from Dr. Racoma prejudiced appellant. Specifically, the testimony elicited during the evidentiary hearing should include, but not be limited to, the basis of Dr. Racoma's diagnosis, a description of the characteristics of ODD, and Dr. Racoma's potential trial testimony. The district court should make a specific finding regarding the impact of Dr. Racoma's potential testimony if it was presented at trial. Given the factual complexities, the district court should consider appointing counsel to represent appellant in this matter.¹²

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is only entitled to relief granted and that briefing and oral argument are unwarranted.¹³ Accordingly, we

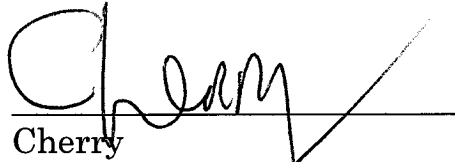
¹²NRS 34.750.

¹³See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

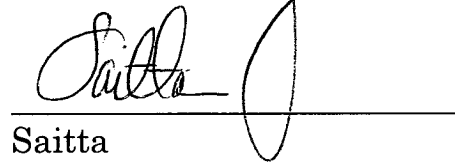
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹⁴

 J.

Gibbons

 J.

Cherry

 J.

Saitta

cc: Hon. Michelle Leavitt, District Judge
Willie Sampson
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹⁴We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeals shall be docketed as a new matter.