

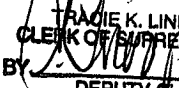
IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TODD BOTELHO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49586

FILED

MAY 16 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Michael Todd Botelho's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On April 7, 2004, the district court convicted Botelho, pursuant to a guilty plea, of first-degree kidnapping (Count I) and three counts of sexual assault on a child (Counts III, IV, and V). The district court sentenced Botelho to serve a term of life in prison with the possibility of parole for kidnapping and prison terms of life with the possibility of parole for each count of sexual assault. Count III was ordered to run consecutively to the kidnapping count. Counts III and IV were ordered to run concurrently. Finally, the district court ordered Count V to run consecutively to counts I and IV. This court affirmed

Botelho's judgment of conviction on appeal.¹ The remittitur issued on May 3, 2005.

Botelho filed a timely post-conviction petition for a writ of habeas corpus in the district court on March 6, 2006. After conducting an evidentiary hearing, the district court denied Botelho's petition on May 31, 2007. This appeal followed.

Botelho contends the district court erred in deciding that he did not receive ineffective assistance of counsel at sentencing. To establish ineffective assistance of counsel, a petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.² To prove prejudice, a petitioner must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different.³

Botelho contends that counsel was ineffective because counsel failed to obtain a psychosexual evaluation of him and that if testimony concerning such an evaluation had been presented, he would have received a reduced sentence. At an evidentiary hearing, Botelho called Dr. Martha Mahaffey to testify. Dr. Mahaffey testified that she evaluated

¹Botelho v. State, Docket No. 43247 (Order of Affirmance, April 4, 2005).

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

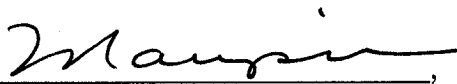
³See Strickland, 466 U.S. at 694.

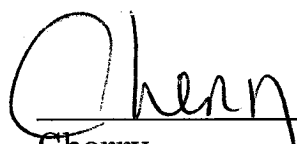
Botelho in preparation for the evidentiary hearing and found him to be a moderate to high risk sex offender. Dr. Mahaffey testified that in her opinion, Botelho should not be allowed near children. Dr. Mahaffey further testified that there was a possibility that Botelho could be rehabilitated sufficiently so that he could be allowed carefully supervised meetings with children in the future, but that his rehabilitation depended on many treatment factors. At the evidentiary hearing, Botelho did not present evidence concerning his trial counsel's investigation or tactical decisions concerning this type of evidence.


The district court denied Botelho's petition, specifically stating that the sentence imposed was based upon the facts of the crime and that Dr. Mahaffey's testimony would not have affected the sentence. Upon review of the record, we conclude that Botelho did not demonstrate that the testimony of Dr. Mahaffey would have changed the outcome of the sentencing proceeding. The evidence presented at the hearing shows that Dr. Mahaffey formed the opinion that Botelho was at risk to reoffend and that he should never be allowed unsupervised contact with young children. As such, Botelho has not demonstrated a reasonable probability that the outcome of his sentencing hearing would have been different had the testimony of Dr. Mahaffey been presented. Therefore, the district court did not err in rejecting Botelho's claim.

Accordingly, having considered Botelho's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, J.
Maupin


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. Jerome Polaha, District Judge
Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁴To the extent that Botelho argues that the district court abused its discretion in sentencing him, this claim is procedurally barred as it should have been raised on direct appeal. See Franklin v. State, 110 Nev. 750, 751-52, 877 P.2d, 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).