IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 51635

ORDER OF AFFIRMANCE

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 two concurrent prison terms amounting to 10 to 25 years. We affirmed the judgment of conviction on direct appeal. Bickom v. State, Docket No. 44016 (Order of Affirmance, January 11, 2006).

On April 14, 2006, Bickom filed a 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 filed a response, Bickom filed a reply, and the district court denied the petition without the benefit of an evidentiary hearing. We affirmed the district court's judgment in part, reversed it in part, and remanded the matter for an evidentiary hearing on two of

Bickom's ineffective assistance of counsel claims. Bickom v. State, Docket No. 48564 (Order Affirming in Part, Reversing in Part, and Remanding, October 18, 2007).

On February 5, 2008, the district court conducted an evidentiary hearing and advised the parties that it would take the matter under submission and issue a decision from chambers. Later, the district court entered a minute order which denied the petition, made a finding of fact, and ordered the State to prepare the findings of fact and conclusions of law. Thereafter, the district court entered the findings of fact, conclusions of law, and order prepared by the State. This appeal followed.

First, Bickom contends that "[t]he district court abused its discretion in signing a Findings of Fact, Conclusions of Law, and Order that varied significantly from the [district] court's finding in its minute order." Bickom asserts that the district court's minute order only contained one finding: The "evidence established the Defendant rejected the State's offer after discussing it with his attorney; based on his belief he would be remanded at the time his plea was entered." Bickom claims that the findings of fact prepared by the State contained two additional findings: "Defendant has not shown counsel did not understand the nature of the State's evidence" and "Defendant did not receive ineffective assistance of counsel." Bickom argues that the actions of the State and the district court violated our "directive" in Byford v. State, 123 Nev. 67, 70-71, 156 P.3d 691, 693 (2007).

In Byford, on remand, we instructed the district court to reconsider the petitioner's claims of ineffective assistance of counsel. Id. at 69, 156 P.3d. at 692. However, the district court did not place the case back on the calendar, the State submitted a proposed order without

obtaining a new ruling and without advising the petitioner, and the district court signed and filed the proposed order without bringing the parties before it or notifying the petitioner. Id. We concluded that both the State and the district court acted improperly for the following reasons: First, the State submitted its proposed order without the district court first ruling. Id. Second, the district court did not provide the petitioner with an opportunity to be heard on the State's proposed findings of fact and conclusions of law before they were entered. Id. at 69-70, 156 P.3d. at 692-93. Finally, "[t]he district court's endorsement of the order drafted unilaterally by the State did not satisfy" our specific instruction to the district court to "reconsider" the petitioner's claims of ineffective assistance of counsel. Id. at 70, 156 P.3d. at 693. We noted that "at the very least the district court should have advised both parties that it had reconsidered the claims and stated its new ruling, explaining its findings and conclusions, thereby providing guidance to the State in drafting a new proposed order." Id.

Here, unlike in Byford, the district court followed our instructions by conducting an evidentiary hearing on the two claims of ineffective assistance of counsel. Following the hearing, the district court announced that it would take the matter under submission; that it would issue a decision from chambers in the form of a minute order; and that it sometimes made specific comments that it wanted included in the findings, otherwise it would direct the prevailing party "to do that." The district court subsequently entered a minute order denying the petition, the State prepared a proposed order, and the district court informed Bickom "that the [State's proposed] order is in chambers and will be

reviewed by the court; if it comports with the court's order, it will be signed."

It is unclear from the documents provided to this court whether Bickom received a copy of the proposed order before it was entered by the district court. Bickom has not alleged that he did not receive a copy of the proposed order or that he was otherwise denied an opportunity to be heard on the State's proposed findings of fact and conclusions of law. Instead, Bickom's claims are focused on the propriety of the district court signing an order that included specific factual findings beyond those that it made in its minute order. We note that the district court retains the authority to reconsider its decision until such time as a written judgment is entered, Tener v. Babcock, 97 Nev. 369, 632 P.2d 1140 (1981), and we conclude that Bickom has not demonstrated that the district court abused its discretion by accepting and entering the State's proposed findings of fact, conclusions of law, and order.

Second, Bickom contends that the district court erred by denying his habeas petition because the testimony presented during the evidentiary hearing established that counsel's performance was deficient and that he was prejudiced by counsel's actions. Bickom specifically claims that trial counsel was ineffective for failing to understand the nature of the State's evidence prior to trial and for inadequately counseling him with regard to the State's plea offer.

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

687 (1987)). The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong. See Strickland, 466 U.S. at 697. A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). The district court's factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Here, the district court found that Bickom rejected the State's plea offer after counsel explained the terms of the offer to him, failed to demonstrate that counsel did not understand the nature of the State's evidence, and did not receive ineffective assistance of counsel.

During the evidentiary hearing, the district court heard testimony that defense counsel believed that the State's constructive possession case against his client was weak because the paperwork that placed Bickom in the residence was 15-years-old, there were no reported eyewitnesses who could place Bickom in the residence, and the State's only piece of direct evidence was a fingerprint on a flask that was recovered from the codefendant's storage unit. However, immediately prior to trial, defense counsel learned that the flask had been recovered from the residence and not the storage unit. Defense counsel moved for a continuance based on this fundamental change in the state of the evidence, but the district court denied the motion. During the trial, defense counsel began negotiations with the State, the State extended a plea offer, and defense counsel advised Bickom to take the offer. The district court had a policy that if an individual was not in custody at the time he entered his guilty plea to a crime that carried a mandatory prison

sentence it would remand the individual to custody at the time the plea was entered. Defense counsel asked the district court about the policy and argued that it should not apply in Bickom's case. However, the district court was not willing to waver from its policy. Bickom was not in custody, and he did not want to be remanded to custody, so he did not take the State's offer.

We conclude that Bickom has not demonstrated that defense counsel's performance was prejudicially inadequate or that the district court's factual findings are clearly wrong. And, having considered Bickom's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Parraguirre, J.

Douglas, J.

Pickering, J.

cc: Hon. Valerie Adair, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk