

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ALAN STATZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34995

FILED

DEC 20 2000

HELENE M. BLOOM
CLERK OF SUPREME COURT
BY *H. Bloom*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from the district court's denial of a post-conviction petition for a writ of habeas corpus. Appellant, David Alan Statz, pleaded guilty to first degree murder and larceny and was sentenced to life with the possibility of parole and a concurrent ten year term.

On appeal, Statz argues that his trial counsel was ineffective for five reasons: (1) failing to investigate a self-defense argument; (2) failing to investigate mental incapacity as either a defense or for sentencing mitigation; (3) failing to investigate spoliation of the evidence; (4) failing to file a motion to suppress his first police interview; and (5) improperly advising him on the plea agreement. Because all of Statz's issues lack merit, we affirm the district court's order dismissing the post-conviction petition for a writ of habeas corpus.

We review a claim of ineffective assistance of counsel independently. See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). To prevail, Statz must show that: (1) counsel's performance fell below an objective standard of reasonableness and (2) such deficiencies prejudiced Statz and the ultimate outcome. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). If Statz fails to establish

one of the two prongs, we need not consider the other. See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland, 466 U.S. at 697). In the context of a guilty plea, Statz must demonstrate a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. See State v. Langarica, 107 Nev. 932, 933, 822 P.2d 1110, 1111 (1991).

First, Statz contends that his counsel was ineffective for failing to investigate self-defense. Failure to investigate a viable defense constitutes ineffective assistance only when it cannot be a reasonable trial strategy not to pursue the defense and there is sufficient evidence the attorney would have found had he investigated. See Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1992); but see Homick v. State, 112 Nev. 304, 913 P.2d 1280 (1996). Moreover, "strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992) (citing Strickland, 466 U.S. at 690).

Upon review of the record, we conclude that Statz's attorney sufficiently investigated the possibility of self-defense, and in fact considered it to be the one viable defense. He investigated the physical evidence, spoke with witnesses about Statz's reputation for peacefulness, and conferred with Statz about using this defense. Merely because he did not investigate every single option does not render his assistance ineffective. We conclude that the attorney sufficiently investigated self-defense, and accordingly we reject Statz's claim.

Second, Statz contends that counsel was ineffective for failing to order a psychological evaluation. We conclude

that counsel acted properly and was not ineffective. Although evidence of intoxication or mental incapacity is admissible to negate premeditation or deliberation for first degree murder, that evidence must be sufficient to show a condition that severely impacted the defendant's reasoning capabilities. See Dearman v. State, 93 Nev. 364, 367, 566 P.2d 407, 409 (1977) (diminished capacity not a recognized defense in Nevada); see also Dumas v. State, 111 Nev. 1270, 1272, 903 P.2d 816, 817 (1995). Likewise, such evidence may be admissible for sentencing purposes, but must also be severe enough that it is likely to mitigate sentencing. See Dumas, 111 Nev. at 1271-72, 903 P.2d at 817.

In this case, Statz fails to demonstrate that a psychological evaluation would have revealed information heretofore unknown by counsel or indicated a severe enough diagnosis that would mitigate intent or sentencing. Because Statz fails to provide evidence that would assist his defense of psychological conditions of which counsel was unaware, we conclude that counsel was not ineffective in failing to order a psychological evaluation.

Third, Statz argues that counsel's failure to investigate spoliation of the evidence, because the body bag seal was broken, was ineffective. We conclude that it was not. Statz presents no evidence to suggest tampering occurred. Absent a reasonable showing that tampering occurred, we conclude that Statz has not demonstrated that the claim had underlying merit. See Sorce v. State, 88 Nev. 350, 352, 497 P.2d 902, 903 (1972). Hence, we conclude that counsel was not ineffective.

Fourth, Statz contends that counsel was ineffective because counsel failed to file a motion to suppress Statz's

first police interview because he was not given Miranda¹ warnings and was intoxicated. We review a claim of ineffective assistance of counsel based on the failure to file a motion to suppress by whether the underlying claim was meritorious. See Kirksey, 112 Nev. at 990, 923 P.2d at 1109 (citing Kimmelman v. Morrison, 477 U.S. 365, 375 (1986)). If the admissibility of the confession is supported by substantial evidence, we will not reverse it on appeal. See Chambers v. State, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997). On appeal, this court defers to the factual findings of the district court and will not reverse them if they are supported by substantial evidence and are not clearly wrong. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

A confession is admissible if it is given freely, voluntarily and without coercion or inducement. See Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). We review voluntariness based on the totality of the circumstances. See id. Moreover, a person is only entitled to Miranda warnings when he is interrogated "in official custody." Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 251 (1996).

We conclude that Statz was not in official custody at the time of his first interview. As such, he is not entitled to Miranda warnings, and his interview cannot be suppressed for failure to give Miranda warnings. Likewise, our review of the interview indicates that the circumstances were entirely voluntary - Statz was told he could leave, was not pressured into speaking with the police, and was not intoxicated so as to render his interview involuntary. Based

¹Miranda v. Arizona, 384 U.S. 436 (1966).

on the totality of the circumstances, we conclude that Statz's interview was voluntary and admissible. Hence, a motion to suppress would not have been meritorious, and counsel was not ineffective for not pursuing that avenue.


Finally, Statz argues that his plea was invalid because he was induced to accept the plea agreement as a result of counsel's descriptions of the possibility of facing the death penalty. This too, we conclude, lacks merit. The mere subjective belief of a defendant as to a potential sentence does not render a guilty plea involuntary. See Rouse v. State, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975). On appeal, we will reverse a district court's finding on matters of credibility only if there is a clear showing that the district court reached the wrong conclusion. See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

In this case, Statz merely contends that his counsel persuaded him that the death penalty was a realistic option and described to his parents the process of execution. Counsel testified to the contrary at the evidentiary hearing. In light of the extensive colloquy Statz underwent when he pleaded guilty, we conclude that substantial evidence supports the district court's determination that Statz made his plea voluntarily. Likewise, the district court's conclusions as to the credibility of Statz and his counsel regarding the advice as to the death penalty are not clearly erroneous. Accordingly, we conclude that counsel was not ineffective in advising Statz on the plea agreement.

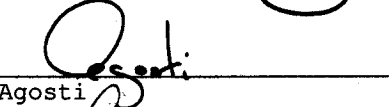
Having considered Statz's claims and determined that they have no merit, we order the district court's denial of

the post-conviction petition for a writ of habeas corpus affirmed.

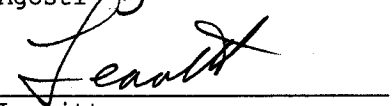
It is so ORDERED.



Shearing J.



Agosti J.



Leavitt J.

cc: Hon. Steven P. Elliott, Judge
Marc P. Picker
Attorney General
Washoe County District Attorney
Washoe County Clerk