

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES VICARY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 35149

**FILED**

OCT 02 2000

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

ORDER OF AFFIRMANCE

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.

On September 1, 1998, the district court convicted appellant, pursuant to a guilty plea, of one count of being in actual physical control of a vehicle while having a 0.10 percent or more of alcohol in the blood (a felony) in district court case no. CR98-1120. The district court sentenced appellant to serve a minimum term of twelve months to a maximum term of thirty-six months in the Nevada State Prison. On September 1, 1998, the district court also convicted appellant, pursuant to a guilty plea, of one count of driving while having 0.10 percent or more by weight of alcohol in the blood (a felony) in district court case no. CR98-1599.<sup>1</sup> The district court sentenced appellant to serve a minimum term of twelve months to a maximum term of thirty-six months in the Nevada State Prison, to be served consecutively to the sentence imposed in district court case no. CR98-1120.

On April 2, 1999, appellant filed a motion to vacate sentence in the district court. The State opposed the motion. On July 6, 1999, the district court denied appellant's motion to vacate sentence. Appellant did not file an appeal from the district court's order.

<sup>1</sup>In both district court cases, the district court found that appellant had suffered two or more constitutionally valid prior DUI type convictions within the last seven years.

On July 27, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court.<sup>2</sup> The State filed a motion to dismiss. The State argued that the district court should dismiss three of appellant's four claims because appellant was not entitled to relief on these claims. The State also requested that the district court conduct a hearing on appellant's claim that his counsel failed to present available mitigating evidence during the sentencing hearing. On September 28, 1999, the district court entered an order granting the State's motion to dismiss three of the four claims and directing the State to set appellant's ineffective assistance of counsel claim for hearing.<sup>3</sup> On November 12, 1999, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

Appellant claimed that his counsel was ineffective at sentencing because counsel failed to present available mitigating evidence. Appellant argued that his counsel failed to call his ex-wife and a VA counselor to testify at the sentencing hearing about appellant's addiction to alcohol, amenability to treatment, and family and community support. Appellant believed that counsel did not present a lengthy enough argument at sentencing.

---

<sup>2</sup>Appellant's petition designated that he was challenging his convictions and sentences in both district court cases.

<sup>3</sup>Appellant's dismissed claims included: (1) the district court breached the plea agreement between appellant and the State by imposing consecutive sentences, (2) the State breached the spirit of the plea agreement because the district court imposed consecutive sentences despite the fact that the State argued for concurrent sentences pursuant to the negotiations, and (3) appellant retained the right to argue issues raised in his motion to vacate sentence.

Based upon our review of the record on appeal, we conclude that the district court properly granted the State's motion to dismiss these claims because appellant was not entitled to the relief requested. See *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984). The district court was not part of the plea agreement and was not bound by the plea negotiations to impose concurrent sentences. The State argued for concurrent sentences pursuant to the plea negotiations. Appellant was informed during the plea canvass that the district court was not required to follow the negotiations. Finally, the district court was not required to reconsider its previous decision denying his motion to vacate sentence.

We conclude that the district court did not err in denying this claim.

A claim of ineffective assistance of counsel presents a mixed question of law and fact and is therefore subject to independent review. See *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). However, a district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong. See *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).


To state a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. See *Strickland v. Washington*, 466 U.S. 668 (1984). "Deficient" performance of counsel is representation that falls below an objective standard of reasonableness. See id. at 688. To establish prejudice based on deficient performance at sentencing, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the sentence imposed would have been different. See id. at 694. The court need not consider both prongs of the Strickland test if the defendant makes an insufficient showing on either prong. See id. at 697.

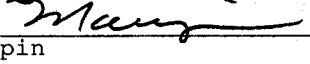
Based upon our review of the record on appeal, and giving the appropriate deference to the district court's factual findings, we conclude that the district court did not err in denying appellant's petition. The district court found that counsel acted reasonably in not presenting the testimony of appellant's proposed witnesses at sentencing and that appellant was not prejudiced by counsel's performance. The district court found that appellant's counsel presented the sentencing court with letters from appellant's ex-wife and VA counselor at the sentencing hearing thereby providing the district court with appellant's mitigating information. The district court found that appellant had not demonstrated that the testimony of the live


witnesses would have added any significant information to the district court's decision at sentencing; appellant did not present the testimony of his ex-wife or VA counselor at the evidentiary hearing. The district court further found that appellant's counsel testified credibly when he stated that "he did not present either [the VA counselor] or [appellant's ex-wife] as live witnesses because each would possibly offer damaging testimony, under cross-examination, of [appellant's] undesirable conduct when he was intoxicated." Finally, the district court found that even if the testimony of appellant's ex-wife and VA counselor would have been presented, appellant would still have received the same sentence based on the seriousness of the offenses.<sup>4</sup> These findings are supported by substantial evidence in the record on appeal.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976). Accordingly, we affirm the order of the district court.

It is so ORDERED.

  
\_\_\_\_\_, J.  
Young

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Becker

cc: Hon. Jerome M. Polaha, District Judge  
Attorney General  
Washoe County District Attorney  
Charles Vicary  
Washoe County Clerk

<sup>4</sup>Appellant committed the offense in district court case no. CR98-1120 while he was in treatment and committed the offense in district court case no. CR98-1159 while he was on bail in district court case no. CR98-1120.