

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 35406

THE STATE OF NEVADA,
Appellant,
vs.
MARK STEVEN SILVA,
Respondent.

FILED

JUL 10 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *Richard*
CHIEF DEPUTY CLERK

ORDER OF REMAND

This is an appeal from an order of the district court granting, in part, respondent's post-conviction petition for a writ of habeas corpus.

Respondent was convicted, pursuant to a guilty plea, of one count of leaving the scene of an accident involving personal injury. The district court sentenced respondent to 36-100 months in prison, and ordered respondent to pay restitution in the amount of \$9,852.93.

Respondent filed a direct appeal, which was dismissed by this court. *Silva v. State*, Docket No. 32293 (Order Dismissing Appeal, August 3, 1998).

Respondent filed a post-conviction petition for a writ of habeas corpus, arguing inter alia, that trial counsel was ineffective for failing to object to the amount of restitution, and that appellate counsel was ineffective for failing to argue on appeal that the State breached the plea agreement at sentencing.

The district court appointed counsel for respondent and conducted an evidentiary hearing on the petition. After the evidentiary hearing, the district court took the matter under submission and subsequently entered findings of fact and

conclusions of law. The district court granted the petition, in part, concluding that trial counsel was ineffective for failing to object to the amount of restitution, and appellate counsel was ineffective for failing to argue on appeal that the State had breached the plea agreement at sentencing.


Turning first to the issue of the alleged plea breach, we conclude that the district court erred in granting the petition on this ground. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, respondent must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that respondent was prejudiced by counsel's inadequate performance. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984).

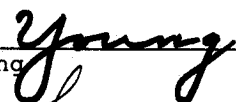
We conclude that respondent satisfied neither element of the Strickland test. First, the evidence presented at the evidentiary hearing showed that, at the time of respondent's direct appeal, the prevailing professional norm was not to argue a plea breach when the State merely argued in favor of a recommended sentence. It cannot be said, therefore, that appellate counsel's performance fell below an objective standard of reasonableness. Second, looking at the current state of the law, there was no breach of the plea agreement at sentencing. See *Sullivan v. State*, 115 Nev. 383, 389, 990 P.2d 1258, 1261-62 (1999) ("the state is not required to explicitly reserve the right to argue in favor of a recommended sentence where it has promised to recommend a certain sentence") (overruling, in part, *Statz v. State*, 113 Nev. 987, 944 P.2d 813 (1997)). Respondent has therefore failed to demonstrate prejudice. See *Lockhart v. Fretwell*, 506 U.S. 364 (1993) (failure to object based on case law that

is later overruled is not prejudicial for purposes of ineffective assistance of counsel). We therefore conclude that the district court erred by concluding that appellate counsel was ineffective and we reverse the district court's order to the extent that it grants respondent's petition on this ground.

We conclude, however, that the district court correctly granted the petition on the ground that a new restitution hearing was required. In setting the amount of restitution, a district court must "rely on reliable and accurate evidence." *Martinez v. State*, 115 Nev. 9, 13, 974 P.2d 133, 135 (1999). In the instant case, the district court concluded that trial counsel should have reviewed the documentary evidence concerning restitution. The State does not challenge this finding and does not object to a hearing to determine the proper amount of restitution. Accordingly, we remand this matter for a new restitution hearing.

It is so ORDERED.


_____, C.J.
Rose


_____, J.
Young


_____, J.
Leavitt

cc: Hon. Jerome M. Polaha, District Judge
Attorney General
Washoe County District Attorney
Karla K. Butko
Washoe County Clerk