

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT WILLIAM LYONS,

Appellant,

vs.

WARDEN, NEVADA STATE PRISON, JOHN
IGNACIO,

Respondent.

No. 35500

FILED

MAR 17 2000

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

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On May 7, 1997, the district court convicted Lyons, pursuant to a guilty plea, of five counts of burglary. The court sentenced Lyons to prison for 180 months with a minimum parole eligibility of 72 months for count I. For each of the remaining four counts, the court sentenced Lyons to prison for 120 months with a minimum parole eligibility of 48 months, with the sentence for each count to run consecutive to the prior counts. Lyons filed a direct appeal, which this court dismissed. See Lyons v. State, Docket No. 30523 (Order Dismissing Appeal, March 5, 1998).

On March 8, 1999, Lyons filed a timely post-conviction petition for a writ of habeas corpus. The district court appointed counsel and conducted an evidentiary hearing. On December 9, 1999, the court denied Lyons' petition. This appeal followed.

Lyons contends that he received ineffective assistance of counsel at sentencing and on direct appeal. With respect to counsel's performance at sentencing, Lyons

claims that counsel was ineffective because he: (1) failed to correct two errors in the presentence investigation report; (2) failed to object when attorney Paul Giese appeared on behalf of two victims and made a sentencing statement; (3) failed to cross-examine Giese; (4) failed to object to victim impact testimony on the basis that the individuals were not victims of the crimes for which Lyons was being sentenced; and (5) failed to subpoena two law enforcement officers to testify at sentencing regarding Lyons' cooperation in their investigation of his offenses and Lyons' attempts to provide other assistance to police. With respect to counsel's performance on direct appeal, Lyons contends that counsel was ineffective because he: (1) filed a no-merit appeal after this court's decision in *Ramos v. State*, 113 Nev. 1081, 944 P.2d 856 (1997), overruling *Sanchez v. State*, 85 Nev. 95, 450 P.2d (1969); (2) failed to argue that Giese's comments at sentencing were improper because (a) Giese was not a victim, (b) Giese's comments violated the Confrontation Clause, (c) Giese's comments violated an attorney-client relationship with Lyons, and (d) Giese's comments contained highly suspect or impalpable evidence; and (3) failed to argue that the State violated the plea agreement by permitting Giese to make a statement on behalf of the victims.

A claim of ineffective assistance of counsel presents a mixed question of law and fact and is therefore subject to independent review. *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). However, a district court's factual findings regarding a claim of ineffective assistance are entitled to deference so long as 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).

To state a claim of ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. See Hill v. Lockhart, 474 U.S. 52 (1985); Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996). "Deficient" assistance of counsel is representation that falls below an objective standard of reasonableness. Strickland, 466 U.S. at 688. To establish prejudice based on the deficient assistance of counsel 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. To establish prejudice based on the deficient assistance of appellate counsel, a defendant must show that the omitted issue would have a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. The court need not consider both prongs of the Strickland test if the defendant makes an insufficient showing on either prong. Strickland, 466 U.S. at 697.

Having reviewed the documents submitted with this appeal and giving the appropriate deference to the district court's factual findings, we conclude that the district court did not err in denying Lyons' post-conviction petition. As to the claims of ineffective assistance of counsel at sentencing, even assuming counsel's performance fell below an objective standard of reasonableness, Lyons cannot demonstrate prejudice. The district court explained that the sentence imposed was based on the nature of the offenses and Lyons' extensive criminal history. The court specifically found that the sentence imposed would have been the same even if counsel had done everything that Lyons complains he failed to do. Lyons therefore cannot demonstrate prejudice. Similarly, we

conclude that, even assuming counsel's performance on appeal fell below an objective standard of reasonableness, Lyons cannot demonstrate prejudice because none of the omitted issues would have had a reasonable probability of success on appeal. Because Lyons cannot demonstrate prejudice, his claims of ineffective assistance of counsel must fail. We therefore

ORDER this appeal dismissed.

<u>Young</u> Young	J.
<u>Agosti</u> Agosti	J.
<u>Leavitt</u> Leavitt	J.

cc: Hon. Janet J. Berry, District Judge
Attorney General
Washoe County District Attorney
Karla K. Butko
Washoe County Clerk