

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 35617

STEVEN J. BLAISDELL,

Appellant,

vs.

WARDEN, NORTHERN NEVADA
CORRECTIONAL CENTER, DAVID
MELIGAN,

Respondent.

FILED

AUG 16 2000

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

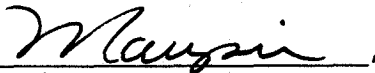
ORDER DISMISSING APPEAL

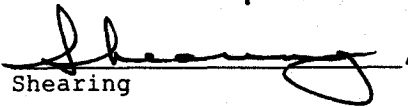
This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

In the petition, appellant presented claims of ineffective assistance of counsel. The district court found that counsel was not ineffective. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Appellant has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, appellant has not demonstrated that the district court erred as a matter of law.

Accordingly, for the reasons stated in the attached order of the district court, we

ORDER this appeal dismissed.¹


Maupin J.


Shearing J.


Becker J.

cc: Hon. Steven R. Kosach, District Judge
Attorney General
Washoe County District Attorney
Karla K. Butko
Washoe County Clerk

¹On appeal, appellant contends that the district court abused its discretion at sentencing. This issue was not raised below. We therefore decline to consider it. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). Moreover, this issue could have been raised on direct appeal, and has therefore been waived. Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE

* * *

STEVEN J. BLAISDELL,

Petitioner,

v.

Case No. CR97P2258

THE STATE OF NEVADA,

Dept. No. 8

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT

This cause came before the court upon a Petition for Writ of Habeas Corpus (Post-Conviction). Petitioner Blaisdell was originally charged with burglary and robbery arising from an incident at a Raley's store in Washoe County. He was represented at that time by John Calvert of the Washoe County Public Defender's Office. Mr. Calvert presented Blaisdell with an offer from the prosecutor to allow Blaisdell to plead guilty to the burglary in exchange for dismissal of the robbery charge. The agreement also called for Blaisdell to stipulate to revocation of his probation in an unrelated case. Calvert then handed the case

1 over to Deputy Public Defender Jeremy Bosler, who represented
2 Blaisdell during the entry of plea and the subsequent sentencing
3 hearing.

4 Blaisdell did not appeal from the judgment of
5 conviction. Instead, he filed a Petition for Writ of Habeas
6 Corpus alleging several variations of ineffective assistance of
7 counsel.

8 On December 17, 1999, the court conducted a hearing on
9 the petition and heard testimony from Blaisdell and from Bosler,
10 as well as a loss prevention officer from Raley's. The parties
11 also entered into factual stipulations regarding the extent of
12 injuries suffered by Blaisdell in a scuffle with security
13 officers. The parties further stipulated that the representative
14 of the Division of Parole and Probation who prepared the
15 presentence report acquired the description of Blaisdell's prior
16 criminal history in the normal fashion, through the computer
17 records of the National Crime Information Center.

18 Blaisdell claimed that his trial counsel was
19 ineffective in not disputing the representation in the
20 presentence report that he had previously suffered a conviction
21 in France for smuggling. According to Blaisdell, the proceedings
22 did not result in a conviction, although he admitted to serving
23 some 14 months imprisonment and described the proceedings as a
24 hearing to confirm the sentence. The court does not find it
25 necessary to resolve the issue of whether Blaisdell was in fact
26 convicted in France for several reasons. First, and perhaps

1 foremost, the sentence in this case was based on the fact that
2 Blaisdell committed a burglary while on probation for another
3 offense. Even if the court noticed the reference to the French
4 conviction, it would not have affected the sentence.

5 Next, the court finds that Bosler testified credibly
6 that he gave the presentence report to Blaisdell prior to the
7 sentencing hearing and instructed Blaisdell to review the report
8 and alert him to any errors in the report. Bosler testified, and
9 the court finds, that Blaisdell did not mention any errors in the
10 report. The court finds that an attorney may reasonably rely on
11 his client to find and report the type of alleged error at issue
12 here.

13 Blaisdell also asserted that it was inappropriate to
14 include the reference to the French conviction in the presentence
15 report. He relies on a prior appeal in which the Supreme Court
16 reversed one of Blaisdell's prior convictions due to an error
17 involving the French conviction. That decision, Blaisdell v.
18 State, Docket No. 14765, Order of Remand, dated April 25, 1995,
19 merely held that when the State offered to prove in that prior
20 trial that Blaisdell had a certain intent, the prosecution
21 improperly attempted to prove the facts of the French case
22 through hearsay evidence. Hearsay is not inadmissible in a
23 sentencing hearing, and there was nothing inappropriate in
24 including the reference to the French conviction in the presented
25 report. Thus, the court finds that if Blaisdell had asserted on
26 direct appeal from the conviction that the reference in the

1 presentence report was inappropriate, the judgment would have
2 been affirmed.

3 In a related vein, Blaisdell testified that the
4 presentence report inaccurately reported the number of his prior
5 convictions because some, he claimed, resulted in diversion
6 programs rather than probation. Again, the sentence in this case
7 was not affected by any distinction between probation and a
8 diversion program. The sentence was based on the fact that
9 Blaisdell committed the burglary while on probation. While the
10 court finds Blaisdell's testimony to be incredible, the court
11 also finds that even if he correctly described the nature of the
12 prior proceedings, the result would not have been different.

13 Furthermore, as with the French conviction, Blaisdell
14 did not notify his counsel of the alleged errors in the
15 presentence report, and thus, counsel was not ineffective in
16 failing to assert at sentencing that the report was incorrect.

17 Blaisdell also claimed that his lawyers failed to
18 inform him of how to initiate an appeal. That testimony was
19 false. Blaisdell was fully informed of the right to appeal, and
20 further informed that if he wished to appeal, he need only
21 express that desire to the Public Defender's office. He never
22 expressed that desire. Thus, the court finds that Blaisdell was
23 not deprived of the right to appeal due to ineffective assistance
24 of counsel. See Thomas v. State, 115 Nev. ___, Adv. Op. No. 22
25 (June 7, 1999).

26 Blaisdell claimed in the Supplemental Petition that

1 counsel was ineffective in failing to present additional
2 mitigating evidence. Because no such evidence was presented at
3 the habeas corpus hearing, the court finds that Blaisdell has
4 failed to show that there was any additional mitigating evidence
5 available.

6 Blaisdell claimed at the habeas corpus hearing
7 (although not in his petition) that counsel was ineffective at
8 sentencing in failing to point out that the dismissed charge of
9 robbery was not factually sound because he had abandoned the
10 property before the use of any force. The record reveals that
11 sentencing counsel did an admirable job of describing and
12 minimizing the facts of the case.

13 Blaisdell claimed in his petition that counsel should
14 have overridden his decision to plead guilty because the bargain
15 was not advantageous, because the facts of the case would not
16 have supported a robbery conviction had Blaisdell elected to try
17 the robbery and the burglary charges. He supported that claim
18 with the testimony of a loss prevention officer to the effect
19 that after Blaisdell left the store with the stolen property, he
20 was approached by a security officer, and then began to run away.
21 The officer testified that Blaisdell was several feet away from
22 the stolen property when he used force to attempt his escape.

23 Bosler testified, and the court finds, that no counsel
24 could ever guarantee an acquittal and that the agreement to
25 dismiss the robbery charge was a valuable agreement. Bosler
26 further testified credibly that most practitioners would have

1 perceived a reasonable risk of conviction based on the facts of
2 the case and the law as it existed at that time. He testified
3 that most practitioners perceived a change in the law by the
4 subsequent decision of Martinez v. State, 114 Nev. 746, 961 P.2d
5 752 (1998). After that case, most practitioners would find
6 acquittal on the robbery charge to be more likely. The
7 likelihood of conviction on the burglary charge, however, was
8 unchanged by Martinez.

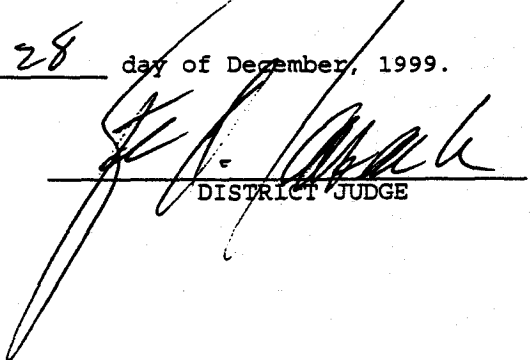
9 The court finds that when Blaisdell pleaded guilty to
10 burglary, most reasonable lawyers would have perceived a risk of
11 conviction for robbery even if it were shown that the use of
12 force was several feet away from the stolen property as the
13 defendant attempted to escape, if the use of force was part of a
14 continuing transaction not widely separate from the taking of the
15 property. Accordingly, the court finds that counsel did not act
16 unreasonably in failing to force Blaisdell to take his chances at
17 trial, or even in recommending the plea agreement.

18 The court has evaluated the relative credibility of the
19 witnesses and finds Bosler to be more credible than Blaisdell.
20 Bosler's testimony establishes that the public defender's office
21 did not fail Blaisdell in any way.

22 One who would assert a claim of ineffective assistance
23 of counsel must bear the burden of demonstrating that counsel's
24 performance fell below an objective standard of reasonableness
25 and that, but for counsel's failings, the result would likely
26 have been different. Strickland v. Washington, 466 U.S. at 687,

1 104 S.Ct. at 2064; see also, Dawson v. State, 108 Nev. 112, 115,
2 825 P.2d 593, 595 (1992), cert. denied, 507 U.S. 921, 113 S.Ct.
3 1286, 122 L.Ed.2d 678 (1993). A court may consider the two test
4 elements in any order and need not consider both prongs if the
5 defendant makes an insufficient showing on either one.
6 Strickland, 466 U.S. at 697, 104 S.Ct. at 2069. Blaisdell failed
7 to meet his burden. Accordingly, the Petition for Writ of Habeas
8 Corpus is denied.

9 DATED this 28 day of December, 1999.

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13 DISTRICT JUDGE
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