

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN CHARLES PERRY,
Appellant,
vs.
ROBERT BAYER, DIRECTOR,
Respondent.

No. 35683

FILED

MAY 08 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.

Appellant was convicted, pursuant to a jury verdict, of being in actual physical control of a motor vehicle with .10 percent or more by weight of alcohol in the blood. The offense was treated as a felony because appellant had two or more prior convictions for the same or similar offenses. The court sentenced appellant to sixteen (16) to seventy-two (72) months in prison and fined him \$2,000.00. Appellant pursued a direct appeal. *Perry v. State*, Docket No. 32737 (Order of Remand, December 9, 1998).¹

Appellant subsequently filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent appellant, conducted an evidentiary hearing and denied the petition. This appeal followed.

¹This court remanded for resentencing because it appeared that the district court erroneously believed that it lacked discretion to impose the sentence concurrently with a sentence for another DUI conviction.

Appellant contends that he received ineffective assistance of counsel because his counsel: (1) failed to object to a delay of more than two months between appellant's initial appearance in justice court and his preliminary hearing; (2) failed to conduct sufficient pretrial investigation; and (3) failed to call witnesses to testify at sentencing.

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 sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984). 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.

Appellant first contends that counsel provided ineffective assistance by failing to object to the delay between appellant's initial appearance in justice court and his preliminary hearing. Appellant points out that NRS 171.196(2) requires that a preliminary hearing must be held within 15 days

unless good cause is shown to extend the time. Appellant argues that counsel was negligent in failing to seek a dismissal of the charges as a result of the delay. We conclude that appellant's contention lacks merit.

Counsel testified that appellant agreed to a continuance of the preliminary hearing that was originally scheduled within 15 days of appellant's initial appearance in justice court. Appellant was not in custody at the time. The preliminary hearing was delayed further because appellant was again arrested for driving under the influence. The preliminary hearing for the instant case was then conducted at the same time as the preliminary hearing in the second case, within 15 days after appellant's arrest in the second case and approximately two months after appellant's initial appearance in this case. Counsel testified that no evidence was lost to the defense as a result of the delay. Under the circumstances, we conclude that appellant has failed to meet either prong of the Strickland test.

Appellant next contends that trial counsel provided ineffective assistance by failing to uncover evidence that impeached the primary defense witness² or to adequately investigate the facts as to the allegation that appellant was

²The defense witness apparently testified that she telephoned a taxi at appellant's request and took the taxi from her home to the Pinion Plaza. The witness then drove appellant in his car to the Wells Fargo Bank where appellant subsequently was arrested. This testimony was offered to show that appellant did not drive his vehicle and was not in actual physical control of his vehicle. In rebuttal, the State called a witness from the only taxicab company in Carson City. The rebuttal witness testified that no cabs were dispatched to the defense witness's home and then to the Pinion Plaza on the date and time indicated by the defense witness. Appellant's complaint in the post-conviction petition appears to be that trial counsel was ineffective for failing to contact the taxi cab company and discover this information.

in actual physical control of the vehicle. We conclude that this claim of ineffective assistance of counsel lacks merit.

Other than the impeachment evidence against the defense witness, appellant has not specifically indicated what material evidence would have been discovered through additional investigation or how that evidence would have effected the outcome of the trial.³ Appellant therefore has failed to meet the two prongs of the Strickland test with respect to his general allegation that counsel failed to conduct an adequate investigation. With respect to the impeachment evidence, we conclude that trial counsel was not ineffective for failing to uncover evidence indicating that the defense witness was lying where appellant and the witness gave counsel no reason to disbelieve the witness's testimony. Under the circumstances, we conclude that appellant has failed to demonstrate that counsel's investigation fell below an objective standard of reasonableness or that appellant was prejudiced.


Finally, appellant contends that counsel provided ineffective assistance by failing to call witnesses at either sentencing hearing. Counsel testified that she solicited letters in appellant's behalf and that in cases like the instant one she had found it of little additional benefit to call witnesses to testify at sentencing. Appellant's father provided a letter to the court. Appellant failed to specify what witnesses, other than his father, counsel should have presented or what additional relevant information they would have provided. Moreover, considering appellant's history of

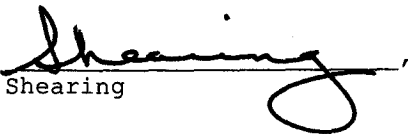
³We note that trial counsel testified that the public defender's office spent just over 74 hours on appellant's case from arraignment through sentencing and that just over 14 hours of that time was logged by the office's investigator.


DUI convictions, the district court specifically stated that no additional information would have affected the sentence. Appellant therefore cannot demonstrate prejudice. Because appellant failed to meet either prong of the Strickland test, we conclude that this claim of ineffective assistance lacks merit.

Having considered appellant's contentions and concluded that they lack merit, we

ORDER this appeal dismissed.


Maupin J.


Shearing J.


Becker J.

cc: Hon. Michael R. Griffin, District Judge
Attorney General
Carson City District Attorney
Kay Ellen Armstrong
Carson City Clerk