IN THE SUPREME COURT OF THE STATE OF NEVADA

CLYDE S. PURCELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35776

FILED

SEP 13 2000

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

ORDER OF AFFIRMANCE

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

The district court convicted appellant, pursuant to a jury verdict, of three counts of statutory sexual seduction, adjudicated appellant a habitual criminal, and sentenced appellant to 10 to 25 years in the Nevada State Prison. This court dismissed appellant's direct appeal, concluding that the issues raised on appeal lacked merit. See Purcell v. State, Docket No. 32480 (Order Dismissing Appeal, August 27, 1998).

Appellant filed a timely 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 timely appeal followed.

Appellant contends that the district court erred in rejecting his claim that trial counsel provided constitutionally ineffective assistance of counsel by failing to communicate a favorable plea offer to appellant and that, but for counsel's error, appellant would have accepted the plea offer.[1] We conclude that appellant's contention lacks merit.

A claim of ineffective assistance of counsel presents "a mixed question of law and fact and is thus subject to independent review." State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). However, a district court's factual

[1]Appellant has not challenged the district court's denial of the other claims raised in his post-conviction petition.

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findings regarding a claim of ineffective assistance of counsel 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 counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's errors, there is a reasonable probability that the outcome of the proceedings would have been different. 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. See Strickland, 466 U.S. at 697.

In this case, the district court rejected appellant's claim of ineffective assistance of counsel based on the prejudice prong of the Strickland test. To establish prejudice based on an allegation that counsel failed to communicate a plea offer, the defendant must demonstrate that there is a reasonable probability that, but for counsel's error, he would have accepted the plea offer.[2] See United States v. Day, 969 F.2d 39, 45 (3d Cir. 1992); see also Johnson v. Duckworth, 793 F.2d 898, 902 n.3 (7th Cir. 1986) (dicta). Although appellant testified at the evidentiary hearing that he would have accepted the plea offer, trial counsel testified that appellant had rejected other offers, maintained his innocence and was convinced that he would be acquitted by a jury, and had refused to accept any offer that would require him to plead guilty to a felony offense. The district court believed trial counsel rather than appellant. "On matters of credibility this court will not reverse a trial court's finding absent a clear showing that the court reached the wrong conclusion." Howard v. State,

[2]We recognize that some other courts have also required the defendant to demonstrate that the trial court would have accepted the plea agreement. See Day, 969 F.2d at 45-46 n.10. We decline to reach this issue.

106 Nev. 713, 722, 800 P.2d 175, 180 (1990). Appellant has failed to demonstrate that the court ruled incorrectly. Therefore, because appellant failed to establish prejudice, his claim that his trial attorney was ineffective because he failed to communicate a plea offer is without merit. Accordingly, we affirm the district court's order denying appellant's post-conviction petition.[3]

It is so ORDERED.

Shearing, J.

Agosti, J.

Leavitt, J.

cc: Hon. John P. Davis, District Judge
Attorney General
Nye County District Attorney
Lewis S. Taitel
Nye County Clerk

[3]We note that counsel for respondent attached an affidavit to the fast track response. The affidavit was not presented to the district court and thus is not part of the record on appeal. Accordingly, we have not considered the affidavit in resolving this appeal. See Jernigan v. Sheriff, 86 Nev. 387, 469 P.2d 64 (1970).