IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
DANIEL J. MELIN,
Respondent.

No. 63439

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting respondent Daniel J. Melin's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Abbi Silver, Judge.

The State contends that the district court erred by granting Melin's habeas petition after finding that his counsel was ineffective.[1] When reviewing the district court's resolution of an ineffective-assistance claim, we give deference to the court's factual findings if they are supported by substantial evidence and not clearly wrong but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, the State contends that the district court erred by determining that Melin's counsel was ineffective for failing to retain an accident reconstructionist and an expert in the field of neurology. The district court specifically found that "[t]ogether these experts could have

[1]Melin entered an *Alford* plea to one count of leaving the scene of an accident and was initially sentenced to serve a prison term of 26-180 months. After the granting of his motion for reconsideration, Melin's prison term was modified to 24-60 months. Melin was also ordered to pay $426,782.40 in restitution.

presented a complete defense to the charges" of reckless driving and leaving the scene of an accident.[2] We disagree with the district court.

At the evidentiary hearing on his petition, Melin did not present an accident reconstructionist or provide any evidence demonstrating how retaining one would have either presented a defense to the charge he pleaded to—leaving the scene of an accident—or resulted in him proceeding to trial and rejecting the favorable plea deal offered by the State. *See Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (holding that a petitioner must demonstrate the underlying facts by a preponderance of the evidence); *see also McConnell v. State*, 125 Nev. 243, 252, 212 P.3d 307, 313 (2009) ("To establish prejudice resulting from trial counsel's inaction or omission, a defendant who pleaded guilty must demonstrate a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial."). Further, the district court order granting Melin relief failed to note any evidence presented at the hearing which supported its determination.

The record also indicates that in a motion to continue the trial setting, Melin's former counsel, William Kennedy, provided the district court with a letter from a neurologist caring for Melin, indicating that he "has a history of seizure disorder and sleep apnea," and that "[w]e cannot rule out that [he] did not suffer from a seizure . . . when he was involved in

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[2]Pursuant to the plea negotiations, the State agreed to dismiss the count of reckless driving. The State also agreed not to oppose probation. Additional terms of the plea deal included Melin pleading guilty to misdemeanor DUI of a controlled substance in case no. 09F241163X and the State agreeing to dismiss the felony count of DUI of a controlled substance in case no. 09F241163X.

the motor vehicle accident based on our findings."[3] Kennedy testified that it was his idea to hire a medical expert, and that if the case proceeded to trial, he would have in fact called the neurologist and retained an accident reconstructionist, but when the State agreed not to oppose probation, Melin accepted the State's plea offer and the issue became moot. Melin, however, did not produce a neurologist to testify on his behalf at the evidentiary hearing or demonstrate how the testimony might have provided a defense to the charge of leaving the scene of an accident. *See Means*, 120 Nev. at 1012, 103 P.3d at 33; *see also McConnell*, 125 Nev. at 252, 212 P.3d at 313. Therefore, based on all of the above, we conclude that counsel was not deficient and Melin failed to demonstrate prejudice, *see Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996), and substantial evidence does not support the district court's determination that Melin was entitled to relief on this basis.

Second, the State contends that the district court erred by determining that Melin's counsel was ineffective for failing to present exculpatory evidence to the district attorney's office and/or grand jury. *See generally* NRS 172.145(2) ("If the district attorney is aware of any evidence which will explain away the charge, the district attorney shall

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[3]The order granting Melin's habeas petition states that Kennedy received the information from the neurologist "[o]nly a month after the indi[c]tment," however, the record indicates that the letter was actually dated almost five months after the indictment. The order also states that the district court was not aware of Melin's contention regarding his medical condition "until *after* it sentenced" him, however, the letter from the neurologist was attached to the motion to continue the trial and provided to the district court eleven months prior to the first sentencing hearing.

submit it to the grand jury."). The district court specifically found that Melin informed Kennedy "prior to [the] Grand Jury presentment that he had a medical episode that caused him to black-out which led to the accident," and that "Kennedy never requested" that the State present this "contention" to the grand jury. As a result, the district court concluded that counsel was ineffective because "he failed to communicate with the District Attorney's Office regarding the presentation of any exculpatory evidence and/or statements on behalf of the Defendant to the Grand Jury." The district court's factual finding and legal conclusion are not supported by the record.

At the hearing on his petition, Melin's own counsel, Ulrich Smith, informed the district court that the grand jury proceeding occurred in June 2010 (actually July 6, 2010), and the "first medical diagnosis of a seizure . . . occurred in August of 2010. . . . So the seizure aspect of his defense could not have been mentioned as exculpatory evidence. . . . Mr. Kennedy is good on that issue. . . I'll concede that, I'm not even going to go there." After hearing Smith's explanation and/or clarification for the record, the district court agreed that if "there's no way [Kennedy] would have known about" the medical condition prior to the grand jury proceeding, "he wouldn't be ineffective on that." Kennedy confirmed Smith's assertion that he "didn't have information about any seizure to present to the Grand Jury." During his cross-examination by the State, Kennedy again confirmed that he did not possess any exculpatory evidence that "was pertinent to the Grand Jury." We conclude that the district court erred by finding that counsel was ineffective in this regard. *See Strickland*, 466 U.S. at 687-88, 694; *Kirksey*, 112 Nev. at 987, 923 P.2d at 1107.

Third, the State contends that the district court erred by determining that Melin's counsel was ineffective for failing to file a pretrial habeas petition challenging the grand jury proceedings. The district court found that the prosecutor "wrongfully inserted evidence of other bad acts" and "insinuated to the Grand Jury he would be back to present new charges of a felony DUI against this Defendant." The district court further found that the prosecutor "failed to admonish the members of the Grand Jury to not consider any mention of any other charges against the Defendant, in particular any DUI related charges, and he failed to obtain their collective assurance that they would not consider such mention during their deliberation." The district court determined that it would have granted a pretrial petition based on "prosecutorial misconduct and the said procedural deficiencies committed by the Deputy District Attorney in his presentation of the case to the Grand Jury." Melin did not raise this issue in his petition filed below.

Our review of the grand jury transcript reveals that the prosecutor instructed the grand jury on multiple occasions to consider only the two charges listed in the indictment—reckless driving and leaving the scene of an accident. Additionally, after an investigating officer during his grand jury testimony referred to making contact with Melin at the scene and administering a field sobriety test, the prosecutor again instructed the grand jury to consider only the two charges and informed them "that the defendant's blood was tested for alcohol and he was found to have no alcohol in his blood so we're having it tested for other things." The prosecutor concluded his admonishment by stating that any possible DUI case "will be down the road, but today do not consider a drunk driving charge of any sort against the defendant, consider only the [two] charges."

Melin's former counsel testified at the evidentiary hearing that he reviewed the grand jury transcript prior to the deadline for filing a habeas petition, but that he did not find "any issues necessarily that we would be successful on." We agree and conclude that the district court erred by finding that counsel was ineffective for not filing a pretrial habeas petition and that Melin was not entitled to relief on this basis. *See Strickland*, 466 U.S. at 687-88, 694; *Kirksey*, 112 Nev. at 987, 923 P.2d at 1107; *see also McConnell*, 125 Nev. at 252, 212 P.3d at 313.

Fourth, the State contends that the district court erred by finding that Melin's counsel was ineffective at his first sentencing hearing for failing to object to the State's assertion that Melin "had the controlled substance Oxycodone in his system at the time of the driving incident." The district court determined that counsel's failure to correct the prosecutor's misstatement "led to the Court's very stiff prison sentence." Initially, we note that while the subject of Melin's use of Oxycodone was raised by the prosecutor at the first sentencing hearing without objection or clarification, the district court was also informed by the prosecutor that Melin did in fact test negative for alcohol and illegal drugs, and as a result, the State did not pursue a DUI charge. Further, at no point in the proceedings below or on appeal has Melin disputed the State's claim that he informed officers arriving at the scene of the accident that he was taking Soma and "Roxycodine" (Oxycodone). But more importantly, the district court order granting Melin's petition fails to acknowledge that it previously provided relief for Melin based in part on the same argument when it granted his motion for reconsideration of sentence and greatly reduced his sentence. Even if Melin's counsel was deficient for failing to correct the prosecutor's statement at the first sentencing hearing, he

cannot demonstrate prejudice because, with the assistance of newly retained counsel, he was granted relief on this basis after his second sentencing hearing and he did not allege that counsel at his second sentencing hearing was ineffective. We conclude that the district court erred by granting relief on this ineffective-assistance claim. *See Strickland*, 466 U.S. at 687-88, 694; *Kirksey*, 112 Nev. at 987, 923 P.2d at 1107; *see also McConnell*, 125 Nev. at 252, 212 P.3d at 313. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Hardesty

_____, J.
Douglas

CHERRY, J. dissenting:

I dissent because I would affirm the order of the district court.

_____, J.
Cherry

cc: Hon. Abbi Silver, District Judge
Attorney General/Carson City
Clark County District Attorney
Ulrich W. Smith & Associates
Eighth District Court Clerk