IN THE SUPREME COURT OF THE STATE OF NEVADA

WESLEY L. LA PORTE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36103

FILED

OCT 12 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.

On May 12, 1998, the district court convicted appellant, pursuant to a guilty plea, of two counts of robbery.[1] The district court sentenced appellant to serve two consecutive terms of 40 to 144 months in the Nevada State Prison. This court dismissed appellant's direct appeal after appellant filed a motion to withdraw the appeal voluntarily. See LaPorte v. State, Docket No. 32523 (Order Dismissing Appeal, August 17, 1998).

Appellant filed a timely proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent appellant in the habeas

[1]The State originally charged appellant by criminal complaint with one count each of robbery with the use of a deadly weapon, robbery, burglary with the use of a firearm, burglary, false imprisonment with the use of a deadly weapon, false imprisonment, and battery with the use of a deadly weapon and with two counts of grand larceny. The charges arose from robberies at the Johnson Lane Store and a Wendy's Restaurant in Douglas County during February and March of 1998. Pursuant to plea negotiations, appellant agreed to plead guilty to two counts of robbery in exchange for the State's agreement not to file or pursue any other charges arising out of the incidents.

proceedings, conducted an evidentiary hearing, and denied the petition. This appeal followed.

Appellant contends that he received ineffective assistance of counsel because: (1) counsel failed to argue for the minimum possible sentences and for concurrent sentences, as requested by appellant; and (2) counsel failed to present any mitigating evidence at sentencing resulting in a higher sentence than was recommended by the Division of Parole and Probation.[2] We conclude that appellant is not entitled to relief.

A claim of ineffective assistance of counsel presents "a mixed question of law and fact 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 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). Moreover, "[o]n 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, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

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); Kirksey v. State, 112 Nev. 980, 987-88, 923

[2]The Division of Parole and Probation recommended two consecutive terms of 26 to 120 months.

(O)-4892

P.2d 1102, 1107 (1996); 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.

Sentencing recommendation

Appellant contends that counsel provided ineffective assistance by disregarding appellant's instructions to argue for the lowest possible sentence. However, this was not the exact issue raised below. We conclude that this contention lacks merit.

Appellant testified that trial counsel told him that there was an agreement that both the State and defense would recommend two years minimum on each count, to be served concurrently. Appellant further testified that he never told trial counsel to argue for the minimum sentence because he thought the sentencing recommendation was a "done deal." The record, however, demonstrates that the State did not agree to make a particular sentence recommendation. Moreover, trial counsel testified that he never told appellant that the State had agreed to recommend a particular sentence (including concurrent sentences) and that the State had not made such an agreement. Counsel further testified that he spoke to appellant before the sentencing hearing about the sentence that appellant's co-defendant had just received and counsel's belief that the court would not be favorable to a recommendation of a sentence less than what had been imposed against appellant's co-defendant.[3] According to trial counsel, appellant told counsel to do what he thought would be

[3]Appellant's co-defendant also pleaded guilty to two counts of robbery and was sentenced just prior to appellant's sentencing hearing to a minimum of 30 months on each count.

(O)-4892

best with respect to the sentence recommendation.[4] Although the district court did not make a specific finding that trial counsel's testimony was more credible than appellant's testimony, it is clear from the court's findings of fact that it believed trial counsel's testimony.

Appellant has failed to demonstrate that the district court committed clear error in accepting the testimony of trial counsel. See Howard, 106 Nev. at 722, 800 P.2d at 180. Moreover, trial counsel's testimony directly contradicts appellant's account of the circumstances surrounding the sentencing hearing and supports the conclusion that trial counsel's performance at the hearing did not fall below an objective standard of reasonableness. Accordingly, we conclude that appellant's claim of ineffective assistance of counsel must fail.

Mitigating evidence

Appellant next contends that trial counsel provided ineffective assistance of counsel by failing to present mitigating evidence at sentencing. However, this contention was not raised in the post-conviction petition or supplement to the petition and was not considered by the district court; therefore, we need not address it. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

Appellant has not demonstrated that the district court erred in denying the post-conviction petition for a writ

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[4]At sentencing, counsel informed the court that he had intended to concur with the minimum sentence recommended by the Division. However, counsel further explained that after the court sentenced the co-defendant to a higher minimum sentence, counsel had concluded that it was unlikely that the court would give appellant a lesser minimum sentence. Counsel therefore asked the court not to go beyond the minimum sentence imposed against the co-defendant.

(O)-4892

of habeas corpus. We therefore affirm the district court's order denying the petition.

It is so ORDERED.

Young, J.

Maupin, J.

Becker, J.

cc: Hon. David R. Gamble, District Judge
Attorney General
Douglas County District Attorney
Kay Ellen Armstrong
Douglas County Clerk