

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

No. 36455

Appellant,

vs.

FILED

MARK ANTHONY DEMATTEI,

JAN 30 2001

Respondent.

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Ruben*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court granting respondent's post-conviction petition for a writ of habeas corpus. Respondent was convicted, pursuant to a guilty plea in accordance with *North Carolina v. Alford*, 400 U.S. 25 (1970), of battery causing substantial bodily harm. The district court sentenced respondent to serve a prison term of 16-60 months.

In his habeas petition, respondent contended that he received ineffective assistance of counsel at sentencing. The district court conducted an evidentiary hearing and granted the petition; the State filed this appeal.

A claim of ineffective assistance of counsel presents a mixed question of law and fact and is subject to independent review.¹ A district court's factual finding regarding a claim of ineffective assistance of counsel is

¹See *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.²

To state a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense.³ Deficient performance by counsel is representation that falls below an objective standard of reasonableness.⁴ To establish prejudice based on deficient performance at sentencing, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the sentence imposed would have been different.⁵

Trial counsel's performance may fall below an objective standard of reasonableness by failing to adequately prepare for and present mitigating evidence at sentencing.⁶ This court has stated that "when a judge has sentencing discretion . . . possession of the fullest information possible regarding the defendant's life and characteristics is essential to the selection of the proper sentence."⁷ When trial counsel fails to investigate mitigating evidence, he

²See *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

³See *Strickland v. Washington*, 466 U.S. 668 (1984).

⁴See *id.* at 688.

⁵See *id.* at 694; *Riley*, 110 Nev. at 650 n.7, 878 P.2d at 280 n.7.

⁶See *Brown v. State*, 110 Nev. 846, 850-52, 877 P.2d 1071, 1074 (1994).

⁷*Id.* at 851, 877 P.2d at 1074.

cannot make a reasonable tactical decision whether to present such evidence.⁸

In this case, respondent's counsel failed to obtain a psychological evaluation of respondent for presentation at sentencing. At the post-conviction evidentiary hearing, respondent's counsel presented a psychological evaluation. The district court concluded that trial counsel's failure to obtain the psychological evaluation was unreasonable error. The district court further concluded that if the evaluation was presented at sentencing, the sentence would have likely been different because the district court at sentencing possessed no information regarding respondent's attitude other than that pertaining to the missed appointment with the Department of Parole and Probation. The district court stated:

Absent a thorough and complete evaluation of Mr. DeMattei, this Court was left with the impression by way of trial counsel's failure to present adequate information, that Mr. DeMattei considered himself to be above the process and in fact, might represent a threat to the community should Mr. DeMattei be granted probation.

Giving the appropriate deference to the district court, we conclude that substantial evidence exists to support the district court's finding that respondent's counsel unreasonably erred by failing to obtain respondent's psychological evaluation. Furthermore, because the district court was in the best position to determine whether such an

⁸See *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 281 (1996) (holding that, in a death penalty case, trial counsel's failure to investigate the defendant's family for possible mitigating evidence constituted ineffective assistance of counsel).

evaluation would have affected the sentence, we conclude that the district court did not err in finding that counsel's failure was prejudicial. We therefore conclude that the district court properly granted respondent's habeas petition on the grounds of ineffective assistance of counsel.

Accordingly, we affirm the order of the district court granting appellant's post-conviction petition for a writ of habeas corpus.

It is so ORDERED.

Young J.
Young

Rose J.
Rose

Becker J.
Becker

cc: Hon. Jerome M. Polaha, District Judge
Attorney General
Washoe County District Attorney
Richard F. Cornell
Law Office of David R. Houston
Washoe County Clerk