IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW WICKER,

Appellant,

vs.

WARDEN, NEVADA STATE PRISON, JOHN IGNACIO,

Respondent.

No. 36468

FILED

OCT 30 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On June 7, 1999, the district court convicted appellant, pursuant to a guilty plea, of grand larceny of a motor vehicle and sentenced appellant to serve 24 to 60 months in prison. Appellant did not pursue a direct appeal.

On October 21, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent appellant and subsequently dismissed the petition. This appeal followed.

Appellant contends that the district court erred in rejecting his claim that trial counsel provided ineffective assistance by advising appellant to plead guilty to the same offense for which he had already been convicted in Colorado. In particular, appellant claims that counsel's performance was deficient and that he was prejudiced as a result because the Nevada conviction violates the Double Jeopardy Clause of the United States Constitution. We disagree.

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). 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.

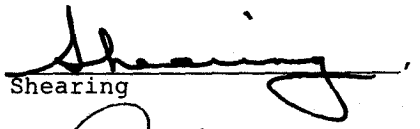
Appellant contends that his conviction in Colorado for theft by receiving was for the same offense as the grand larceny conviction in Nevada because both offenses involved the same motor vehicle. Appellant contends that counsel failed to raise a double jeopardy challenge and failed to advise him of the possibility of raising such an argument. He therefore concludes that he was prejudiced because he would not have entered the guilty plea in the Nevada case had he been properly advised.

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend V. However, under the dual sovereignty doctrine, "two identical offenses are not the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns." Heath v. Alabama, 474 U.S. 82, 92 (1985). The United States Supreme Court has held that the states are separate sovereigns and, therefore, the dual sovereignty doctrine applies to successive prosecutions by different states. See id. at 88-91. Accordingly, the Double Jeopardy Clause does not bar successive prosecutions by two states for the same offense. See id. at 88.

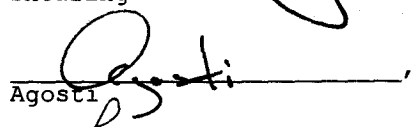
Based on the Supreme Court's decision in Heath, we conclude that even assuming that the Colorado and Nevada convictions are for the "same offense," they are not barred by the Double Jeopardy Clause. We therefore conclude that appellant cannot demonstrate that trial counsel was ineffective for failing to argue or advise appellant that a conviction in Nevada might violate the Double Jeopardy Clause. Accordingly, we conclude that the district court did not err in dismissing the petition.

Having considered appellant's contentions and concluded that they lack merit, we affirm the district court's order dismissing appellant's post-conviction petition for a writ of habeas corpus.

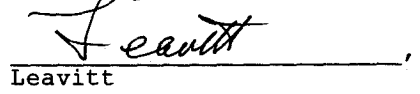
It is so ORDERED.



Shearing, J.



Agosti, J.



Leavitt, J.

cc: Hon. Archie E. Blake, District Judge
Attorney General
Lyon County District Attorney
Williams & Emm
Lyon County Clerk