IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES ERIC REID,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36486

FILED

OCT 24 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 January 14, 1997, the district court convicted appellant, pursuant to a guilty plea, of ten counts of burglary and sentenced appellant to serve 24 to 120 months on each count, with the sentences for five of the counts to be served consecutively. Appellant did not pursue a direct appeal.

On December 10, 1997, appellant filed a 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 denying his claim that he received ineffective assistance of counsel at sentencing. In particular, appellant complains

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that counsel (1) failed to obtain a psychological evaluation of appellant to demonstrate that he was not dangerous in a sexual way,[1] and (2) failed to call any witnesses at the sentencing hearing. We conclude that the district court did not err in rejecting these claims.[2]

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 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

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[1]Although the specific intent alleged in each burglary charge was the intent to commit larceny, there apparently was some suggestion that appellant could be dangerous in a sexual way. He was facing charges for gross lewdness in another case for allegedly exposing himself from his apartment window. Those charges were similar to offenses that he committed in Oregon in 1990. Additionally, in one of the burglaries, appellant armed himself with a knife and, in another of the burglaries, appellant took a teddy, a corset and a set of girl's underwear.

[2]Appellant raised several other claims in the petition and supplemental petition filed in district court. He has not raised those issues on appeal.

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.

Attorney David Otto represented appellant at the sentencing hearing. Otto testified that he had determined that the best option at sentencing was to avoid any additional information about appellant's sexual history. Otto was concerned because evidence with respect to one of the burglary charges indicated that the victim awoke to find appellant standing at the end of her bed and that after he ran away she found a butcher knife from her kitchen on the bedroom floor. He believed any additional information that would suggest the burglaries were sexually motivated might lead to a harsher sentence. Otto further testified that he believed he spoke with Dr. Bob Hiller on the telephone who confirmed his belief that an evaluation would do more harm than good. Finally, Otto testified that he had a note in his file to contact appellant's father about sentencing, but that he had no notation of having followed up on that. However, he further testified that it would have been his general practice to follow up on such a note and that it was likely that he had done so and determined that appellant's father could not provide any helpful mitigation testimony.

Appellant offered the testimony of William Danton, a psychologist who interviewed appellant and administered a Minnesota Multi-Phasic Personal Inventory Exam. Dr. Danton testified that in his opinion there was a low probability of appellant's conduct "escalating into any kind of violent sexual crime because of the nature of his past behavior and because of the test results." However, Dr. Danton admitted that he was not familiar with the nature and circumstances of the burglaries.

The district court concluded that appellant failed to meet either prong of the Strickland test. First, the court accepted Otto's testimony and concluded that Otto's performance did not fall below an objective standard of reasonableness because a mental health evaluation of appellant likely would have made appellant appear more dangerous. Second, the court found that an evaluation would not have changed the outcome of the sentencing proceeding.

Appellant has not demonstrated that the district court's factual findings are not supported by the record or are clearly wrong. Moreover, appellant has not demonstrated that the district court erred as a matter of law in rejecting his claim of ineffective assistance. We therefore conclude that the district court did not err.

Additionally, we note that the district court order does not specifically mention the allegation that counsel provided ineffective assistance by failing to call witnesses

at the sentencing hearing. However, appellant failed to specify what witnesses counsel should have called or how their testimony would have affected the outcome of the sentencing hearing. Accordingly, we conclude that this claim of ineffective assistance must fail because appellant has not demonstrated that counsel's performance was deficient or that appellant was prejudiced.

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

It is so ORDERED.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Peter I. Breen, District Judge
Attorney General
Washoe County District Attorney
Ian E. Silverberg
Washoe County Clerk