IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD CHARLES MCCRAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 32759

FILED

MAR 19 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant Richard McCray's post-conviction petition for a writ of habeas corpus.

On November 24, 1997, the district court convicted McCray, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon. The district court sentenced McCray to two consecutive terms of 43 to 192 months in the Nevada State Prison. McCray filed a motion for new trial which was denied on October 29, 1997. He appealed to this court from his conviction and then voluntarily withdrew the appeal.[1]

On April 3, 1998, McCray filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court declined to appoint counsel to represent McCray but conducted an evidentiary hearing. The district court denied McCray's petition and this appeal followed.

[1]McCray v. State, Docket No. 31422 (Order Dismissing Appeal, March 25, 1998).

In his petition, McCray made several claims of ineffective assistance of trial counsel.[2] Specifically, he contended that his counsel had no contact with him, did not prepare a proper defense, did not inform him adequately about the option of pleading guilty, and improperly sent another attorney in his place to McCray's calendar call.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so prejudicial to petitioner's case as to render the jury's verdict unreliable.[3] Further, the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[4]

We conclude that the district court properly found that McCray's claims did not entitle him to relief. First, his claim that his counsel had no contact with him is belied by the record.[5] At the evidentiary hearing for this petition, McCray complained that he gave counsel a list of witnesses, but counsel did not call the witnesses at trial.

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[2]McCray also made several other claims, including prosecutorial misconduct, insufficiency of the evidence, and the impropriety of a jury instruction, which should have been raised on direct appeal. Because this court dismissed McCray's direct appeal at his request before reaching its merits, we conclude that the direct appeal claims have been waived. See NRS 34.810(1)(b)(2).

[3]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[4]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[5]Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Counsel testified at the hearing and said that he spoke to some of the witnesses and concluded that their testimony would not help McCray's case.

Second, McCray's contention that counsel did not prepare a proper defense for him lacks merit. McCray testified himself at trial that the victim, his roommate, attacked him first and that he then hit the victim repeatedly in the head and face with a hammer in self-defense. The jury had the opportunity to evaluate defendant's self-defense theory, and they rejected it. Therefore, McCray cannot demonstrate that he was prejudiced by counsel's alleged ineffectiveness in this regard.[6]

Third, McCray's argument that counsel did not inform him adequately about the option of pleading guilty also lacks merit. Particularly, McCray argued that his counsel did not inform him about a second, more favorable, plea-bargain offer by the State, did not "bargain affirmatively" for a plea, and did not advise him whether to accept a plea bargain or risk going to trial. At the evidentiary hearing, McCray did not present any evidence that the more favorable plea offer was ever made, and the prosecutor and defense counsel both stated there was only one plea offer made.[7] Counsel's alleged failure to bargain affirmatively is similarly unsupported by the record. Counsel told the district court that

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[6]See Homick v. State, 112 Nev. 304, 311, 913 P.2d 1280, 1285 (1996) (holding that defendant was not prejudiced by counsel's failure to call or locate witness where theory to have been advanced by witness was presented at trial and jury had chance to evaluate theory, which it ultimately rejected).

[7]See id., 112 Nev. at 310, 913 P.2d at 1285 (it is presumed that trial counsel was effective and fully discharged his duties, and defendant can only overcome presumption by strong and convincing proof).

he sent another attorney from his office to McCray's calendar call because he was attempting to negotiate a deal for McCray with the prosecutor. McCray did not attempt to refute this statement at the evidentiary hearing. Finally, the record on appeal shows that McCray was fully aware of the benefits of pleading guilty in this case. When he waived his preliminary hearing, he told the justice court that he was pleading guilty and understood the plea negotiations, but then he changed his mind, deciding to plead not guilty and proceed to trial. Therefore, we conclude that the district court did not err in finding that McCray was adequately informed about his plea options.

Last, McCray's contention that counsel was ineffective because he sent another attorney in his place to McCray's calendar call lacks merit as well. McCray has not demonstrated that any prejudice to his case occurred as a result of his attorney's absence at the calendar call.[8] The substitute attorney simply informed the district court that McCray and his counsel were ready to proceed to trial. Moreover, as noted above, counsel explained his absence by stating that he was trying to negotiate a plea for McCray.

We note in closing that the district court erred by concluding that McCray's ineffective assistance of counsel claim was barred by the doctrine of the law of the case. The law of the case doctrine applies only to subsequent appeals; a district court cannot apply the doctrine where, as here, the merits of McCray's claims have not been considered on appeal.[9]

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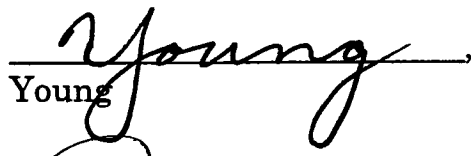
[8]See id.

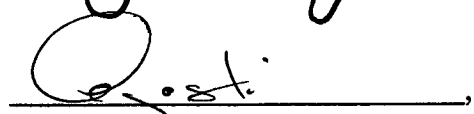
[9]McKague v. Warden, 112 Nev. 159, 166, 912 P.2d 255, 259 (1996).

We conclude, however, that the district court reached the correct result in denying McCray's petition, albeit for the wrong reason.[10] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[11]



_____, J.
Young



_____, J.
Agosti

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Leavitt

cc: Hon. James C. Mahan, District Judge
Richard Charles McCray
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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[10]Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 632 P.2d 1155 (1981).

[11]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.