

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY JOSEPH TURNER,

No. 36698

Appellant,

vs.

WARDEN, NEVADA STATE PRISON, DAVID
MELIGAN,

Respondent.

FILED

MAR 15 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
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 November 3, 1998, the district court convicted appellant, pursuant to a guilty plea, of felony driving under the influence in violation of NRS 484.379 and NRS 484.3792. The district court sentenced appellant to serve 12 to 72 months in prison. Appellant did not file a direct appeal.

On November 2, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent appellant and conducted an evidentiary hearing. Thereafter, the district court denied the petition. This appeal followed.

Appellant contends that trial counsel provided ineffective assistance by failing to preserve in writing a sentencing agreement that was entered after appellant pleaded guilty and by failing to inform the district court that the State had not complied with that oral agreement.¹ We conclude

¹We note that the second claim was not specifically raised in the proper person petition or the supplement filed by counsel. Normally, we will not consider a claim raised for the first time on appeal. See *Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). However, both claims raised by appellant basically come down to the same point—trial
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that appellant has failed to demonstrate that the district court erred in denying these claims.

A claim of ineffective assistance of counsel presents "a mixed question of law and fact and is thus subject to independent review."² 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.³ 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."⁴

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.⁵ The court need not consider both prongs of the Strickland test if the defendant makes an insufficient showing on either prong.⁶

Both of appellant's claims involve the terms of an agreement regarding the State's sentencing recommendation that was reached after appellant entered his guilty plea. Appellant and his mother testified at the evidentiary hearing

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counsel failed to make a record of the sentencing agreement— and the analysis is identical for both claims.

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

³Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁴Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

⁵Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁶Strickland, 466 U.S. at 697.

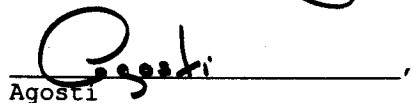
that the prosecutor agreed to recommend a sentence of 12 to 30 months in this case. Appellant's trial counsel and the prosecutor testified that the prosecutor agreed to recommend a minimum sentence of 12 months but that he never agreed to recommend a maximum sentence of 30 months. At sentencing, the prosecutor recommended a sentence of 12 to 72 months and appellant's trial counsel concurred in that recommendation.


Based on our review of the record, we conclude that appellant failed to demonstrate prejudice with respect to either claim of ineffective assistance. The district court found the testimony of the prosecutor and appellant's trial counsel to be credible. There is nothing in the record to suggest that the finding is clearly wrong. Moreover, based on that finding, the State complied with the agreement and recommended a minimum sentence of 12 months. Accordingly, appellant cannot demonstrate prejudice.

Having considered appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


Shearing J.


Agosti J.


Rose J.

cc: Hon. David A. Huff, District Judge
Attorney General
Lyon County District Attorney
Williams & Emm
Lyon County Clerk