IN THE COURT OF APPEALS OF THE STATE OF NEVADA

D'VAUGHN KEITHAN KING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74703-COA

ORDER OF REVERSAL AND REMAND

D'Vaughn Keithan King appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus filed on July 16, 2015, and supplemental petition filed on March 30, 2017. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

King contends the district court erred by dismissing his claim of ineffective assistance of defense counsel without first conducting an evidentiary hearing. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697.

King argued defense counsel was ineffective for failing to present expert psychological testimony in mitigation at sentencing. King was entitled to the effective assistance of counsel at sentencing, *see Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 938 (1978), and a

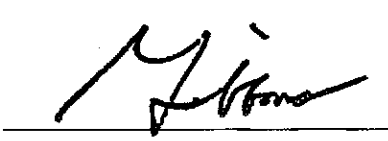
19-11422

sentencing judge's "possession of the fullest information possible regarding the defendant's life and characteristics is essential to the selection of the proper sentence." *Brown v. State*, 110 Nev. 846, 851, 877 P.2d 1071, 1074 (1994). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that, if true and not repelled by the record, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

King's allegations are not belied by the record. And where, as here, the district court had a range of sentencing options available to it, we cannot say there is not a reasonable probability of a less severe sentence had the mitigating evidence been presented. Accordingly, we are unable to conclude the district court did not err by dismissing King's petition without first conducting an evidentiary hearing. We therefore remand this matter to the district court to conduct an evidentiary hearing on King's claim that counsel was ineffective for failing to present expert mitigating evidence at the sentencing hearing.

For the foregoing reasons, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Gibbons

_____, J.
Bulla

TAO, J., dissenting:

I respectfully dissent. Convicted of murder with use of a deadly weapon, King alleges that counsel was constitutionally ineffective for failing to present the following supposedly mitigating evidence before the district court sentenced King:

> [Expert witness] Dr. Martha Mahaffey "is expected to testify that had the [psychological] evaluation been presented, it would have shown a low risk to re-offend [and petitioner] was amenable to treatment and rehabilitation . . . . [O]ther mitigating psychological evidence such as the impact of Mr. King's ADHD, learning disabilities, drug abuse, and childhood would have been presented indicating the need for rehabilitation."

But King's petition is deeply flawed and falls far short of warranting an evidentiary hearing, much less any additional relief beyond that.

In the context of a post-conviction petition for writ of habeas corpus, King must allege, at a minimum, that counsel's performance was objectively deficient along with a reasonable probability that a different outcome would have resulted had counsel been effective. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). An evidentiary hearing is justified only where the petitioner has made factual allegations that, if true, would entitle him to the relief sought, which in this case is reversal of King's sentence. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

All of that means this: to warrant an evidentiary hearing, King must make allegations sufficient to mandate reversal of his sentence if the court believes those allegations to be more likely to be true than false (the

standard of proof being preponderance of the evidence). The evidentiary hearing then serves as the vehicle for determining whether those allegations are indeed true by subjecting them to the crucible of cross-examination and weighing their credibility against that of any competing evidence introduced by the State. However, if the allegations are insufficient to require relief even if accepted as true on their face, then no evidentiary hearing is necessary because there is no point in determining whether allegations that lead nowhere might be true or false. *See U.S. v. de la Fuente*, 548 F.2d 528, 533 (5th Cir. 1977) (trial court did not err in refusing to hold evidentiary hearing when defendant failed to make "initial showing by affidavit or otherwise" of prima facie entitlement to relief, and motion "never seriously challenged by allegations or evidence" any of the underlying facts); *U.S. v. Smith*, 499 F.2d 251 (7th Cir. 1974) (no error when trial court concluded that defendant was not entitled to an evidentiary hearing because he failed to make the necessary "initial showing" that any facts were in dispute); *see generally, Nardone v. U.S.*, 308 U.S. 338, 341 (1939) ("the burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that [there is some factual question in dispute]. Once that is established . . . the trial judge must give opportunity [for a hearing]").

In this case, even if everything King alleges in his petition is accepted as true, he would not have shown any legal basis requiring his sentence to be overturned. An evidentiary hearing would thus be pointless and unnecessary.

King's allegation is not well articulated, so let's start by identifying what he's really saying in his petition. He alleges that the court should have learned about his difficult childhood, ADHD, drug addiction,

and learning disability before sentencing him. However, he does not allege that his counsel was deficient merely for failing to bring these things, in and of themselves, to the court's attention. Had he simply said that and stopped there, he might have had a better chance of obtaining relief or at least an evidentiary hearing (although he would have run into the stumbling block of why he himself failed to mention these things when given the chance to speak on his own behalf). But that is not what he alleges. He does not contend that those facts would have intrinsically added value to his sentencing just by themselves. Instead, he alleges that their potential value to his sentencing was that they rightfully should have been included within a "psychological evaluation" pointing to his "amenability" and "need" for "treatment and rehabilitation."

So, the deficiency that he cites is not merely a failure to present mitigating facts about his childhood, but rather a failure to include those facts in a psychological evaluation geared toward demonstrating that he is a good candidate for what he calls treatment and rehabilitation. But the problem here is that King apparently has still not had such a report prepared even now. Without the ability to review such a report, we have no way of knowing what the report supposedly would have said, other than the bland generalities that King was "amenable to treatment and rehabilitation." Without that knowledge, we cannot determine whether King's allegation is one that, "if true," would entitle him to have his sentence vacated. King has simply not given us enough to determine what "truth" he wanted the district court to know.

What King needed to do was present enough of the details of such a report to show that it would have made some difference and the district court might have imposed a different sentence had it had the report

in hand. But his petition stops well short, averring only that the report would have "indicat[ed] the need for rehabilitation," that he was "amenable to treatment and rehabilitation," and was a "low risk to re-offend." Nothing in the law requires district judges to impose a shorter sentence in a murder case just because a psychologist testifies that the defendant is "amenable to treatment." It's not even clear from King's petition what kind of "treatment" he refers to—he does not contend that there is some kind of medically recognized treatment for committing murder, so he must mean something else, like treatment for drug addiction, or perhaps ADHD. But when sentencing a defendant for committing murder, district courts have complete freedom to ignore a defendant's alleged amenability to treatment for conditions unrelated to the murder itself. Likewise, King claims that a psychologist would have classified him as a "low risk to reoffend"; but while this may have much legal significance in sentencing a sex offender (see, for example, NRS 176A.110), King was convicted of murder, not a sex crime. All King is really saying here is that a psychologist thinks he may be unlikely to commit another murder in the future; but that hardly means the district court would have imposed a shorter sentence for the murder King already committed if only the court had heard the psychologist say that.

Indeed, taken literally, King's central allegation—that a psychological evaluation would have proven that he is in need of "rehabilitation"—actually supports the need for punishment, "rehabilitation" being a primary purpose for incarcerating murderers in the penal system. As the district court correctly observed, King's argument is typical of the kind of evidence more appropriately presented in a capital case to stave off the death sentence in favor of incarceration through the promise of eventual "rehabilitation." But this is not a capital case, and

King's argument does not logically support his conclusion that the law entitled him to a shorter term of imprisonment than he received. A "need for rehabilitation" argues in favor of some kind of imprisonment, but says nothing about how long or short it must be or why the district court likely would have done anything other than it did.

King's petition is insufficient, or perhaps stated more accurately, incomplete. Even if everything he says is taken to be absolutely true—that counsel should have ordered up a psychological evaluation identifying his suitability for rehabilitation—what he alleges is not enough to grant him the relief he seeks. I would therefore affirm the district courts denial of his petition without requiring a pointless evidentiary hearing designed to assess the truth of allegations that lead nowhere even if proven entirely true.

_____, J.
Tao

cc: Hon. David A. Hardy, District Judge
Troy Curtis Jordan
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk