

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHARON COLEEN PORTER A/K/A SHARON
PORTER,

No. 37045

Appellant,

vs.

WARDEN, NEVADA STATE PRISON, LOY
HAYES,

Respondent.

FILED

SEP 11 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus after an evidentiary hearing. Appellant Sharon Coleen Porter was charged with first-degree arson and first-degree murder but eventually pleaded guilty to second-degree murder. She claims that her trial counsel was ineffective in a number of ways. We conclude that none of her claims has merit.

Claims of ineffective assistance of counsel are properly presented in a timely, first post-conviction petition for a writ of habeas corpus because such claims are generally not appropriate for review on direct appeal.¹ A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.² To establish

¹See Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

²Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

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ineffective assistance of counsel in regard to a conviction based on a guilty plea, a claimant must demonstrate: 1) that her counsel performed deficiently, and 2) a reasonable probability that, but for counsel's deficiencies, she would not have pleaded guilty.³ Judicial review of a lawyer's representation is highly deferential, and a claimant must overcome the presumption that a challenged action might be considered sound strategy.⁴

Also, a petitioner for post-conviction relief must support any claims with specific factual allegations and has the burden of establishing those allegations.⁵

Porter first claims that her trial counsel was ineffective in failing to present evidence of her mental and emotional instability when she entered her guilty plea. In essence she claims that she was not competent and therefore her plea was not valid. Porter does not include in the record either her written plea agreement or the transcript of her change of plea. She relies primarily on Dr. Richard Lewis's testimony at the evidentiary hearing regarding her alcoholism and impaired ability to make rational decisions. She also cites a pretrial evaluation done by Dr. Chuck Dickson, who

³Reeves v. State, 113 Nev. 959, 960, 944 P.2d 795, 796 (1997).

⁴Strickland v. Washington, 466 U.S. 668, 689 (1984).

⁵Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984); Bejarano v. Warden, 112 Nev. 1466, 1471, 929 P.2d 922, 925 (1996).

wrote that Porter did not understand what rights she would give up in the event of a plea bargain.

A defendant is competent to stand trial or to plead guilty if she has "'sufficient present ability to consult with [her] lawyer with a reasonable degree of rational understanding' and a 'rational as well as factual understanding of the proceedings against [her].'"⁶

Porter fails to establish that she was incompetent when she entered her plea. Dr. Lewis specifically declined to state an opinion as to Porter's competence when she pleaded guilty. Dr. Dickson made his remark when Porter was planning to go to trial and had not discussed a plea bargain with her counsel. It does not show that she lacked understanding a few months later when she actually pleaded guilty. In fact, Dr. Dickson found Porter competent to stand trial.

Porter fails to show any deficient performance by trial counsel in this regard.

Second, Porter contends that her counsel was ineffective in failing to move to suppress the statements she made to police before and after her arrest. She asserts that the police subjected her to a custodial interrogation on the night of the fire without advising her of her Miranda rights. She also asserts that her waiver of her Miranda rights the

⁶Riker v. State, 111 Nev. 1316, 1325, 905 P.2d 706, 711 (1995) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)).

next day was not knowing and intelligent because she was recovering from her binge drinking and was severely depressed.

Statements made during a custodial interrogation are inadmissible at trial unless the police first advised the defendant of her Fifth Amendment privilege against self-incrimination.⁷ To determine if a custodial interrogation took place, this court must consider the totality of the circumstances.⁸ An individual is not in custody simply because police question the individual on-scene regarding the circumstances of a crime or the individual is the focus of an investigation.⁹ This court also examines the circumstances of a case to determine whether a defendant executed a valid waiver of her rights after receiving Miranda warnings.¹⁰ A valid waiver must be knowing and intelligent, and a confession must be made freely and voluntarily, not compelled.¹¹

Other than testimony of her own vague memories, Porter offered no evidence regarding the circumstances of her questioning. She alleges that the police suspected her of setting the fire when they questioned her on the night of the fire. Even if this is so, it would establish only that she

⁷See Miranda v. Arizona, 384 U.S. 436, 478-79 (1966).

⁸Alward v. State, 112 Nev. 141, 154-55, 912 P.2d 243, 252 (1996).

⁹State v. Taylor, 114 Nev. 1071, 1081-82, 968 P.2d 315, 323 (1998).

¹⁰Id. at 1083, 968 P.2d at 324.

¹¹Id.

was the focus of their investigation not that she was in custody. Nor is the evidence regarding her unstable mental condition sufficient to establish that she did not knowingly waive her Miranda rights the next day. She concedes that she was advised of her rights and signed a written waiver.

Porter fails to show that the police violated Miranda, that her waiver of her rights was not knowing and intelligent, or that her statements were not voluntary. She therefore fails to show that her counsel acted deficiently.

Third, Porter contends that her counsel was ineffective in failing to present "a plethora of mitigating evidence" at her sentencing hearing. She says counsel should have presented her complete medical records, the testimony of mental health providers who had evaluated her, and the testimony of her family.

Porter fails to carry the burden of establishing that abundant mitigating evidence existed which was not provided to the sentencing court. It appears that the only evidence she presented at the evidentiary hearing which was available but not provided to the sentencing court was the testimony of her former husband. He testified as to Porter's alcoholic problems, which the sentencing court was well aware of, and otherwise his testimony had little if any mitigating effect. The sentencing court was also aware of a report by Dr. Jerry Howle, presented at the hearing. Dr. Lewis's

evaluation and testimony were not available at the time of sentencing.

Porter fails to show that her counsel performed deficiently in this regard.

Fourth, despite evidence of her "severe alcoholism, her binge drinking, her blackouts, and her problematic mental history," Porter complains that her counsel "failed to explore fully the possibility of these defenses." Porter, however, does not explain how any of these problems constituted viable defenses. "It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."¹² At the hearing, Porter's trial counsel testified that she considered various ways to defend the case, including self-defense and intoxication, but concluded that none was likely to succeed and therefore recommended that Porter accept the plea bargain. We conclude that Porter fails to show that this was not reasonable conduct on counsel's part.

Next, relying on her own testimony, Porter claims the she did not understand the plea agreement and pleaded guilty because of a miscommunication with her mother and a mistaken belief that she was pleading guilty to arson. First, Porter fails to show how the miscommunication with her mother implicates either the effectiveness of her counsel or the

¹²Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

validity of her plea. Second, Porter presented no evidence that she thought she was pleading guilty to arson not murder. In fact, she testified, "I thought I was pleading second degree because I was responsible for the fire. I was not pleading in my mind to any malicious attempt on [the victim]." This provides an appropriate basis for second-degree murder: setting the fire as Porter did demonstrated a reckless disregard for human life constituting the malice required for murder.¹³ Third, trial counsel testified that she went over the plea negotiations in detail with Porter and had no doubt that Porter understood the plea agreement.

The district court's finding that Porter's guilty plea was voluntary and intelligent is supported by the record. There is no showing that counsel acted deficiently.

Finally, Porter claims that her counsel never informed her of her right to a direct appeal in violation of Lozada v. State.¹⁴ Trial counsel testified that she did inform Porter by letter of her right to appeal. The district court found this testimony credible and Porter's contrary testimony not credible. The court found that Porter never gave her counsel any reason to believe that she wished to appeal the conviction. These findings are also supported by the record,

¹³See Collman v. State, 116 Nev. 687, 712-13, 7 P.3d 426, 442 (2000), cert. denied, 121 S. Ct. 1617 (2001).

¹⁴110 Nev. 349, 871 P.2d 944 (1994), limitation of holding recognized by Evans v. State, 117 Nev. ___, ___ P.3d ___ (Adv. Op. No. 50, at p.39, July 24, 2001).

and again there is no showing that counsel acted deficiently.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Maupin, C.J.
Maupin

Young, J.
Young

Leavitt, J.
Leavitt

cc: Hon. Janet J. Berry, District Judge
Attorney General
Washoe County District Attorney
Marc P. Picker
Washoe County Clerk