

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRETT ALAN BUCKMASTER,

No. 37305

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

NOV 21 2001

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

BRETT ALAN BUCKMASTER,

No. 37306 ✓

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

Docket Nos. 37305 and 37306 are proper person appeals from orders of the district court denying appellant's post-conviction petitions for writs of habeas corpus. We elect to consolidate these appeals for disposition.¹

On June 1, 2000, the district court convicted appellant, pursuant to a guilty plea, of two counts of driving while having 0.10 percent or more by weight of alcohol in the blood. The district court sentenced appellant to serve two consecutive terms of twenty-four to sixty months in the Nevada State Prison and to pay four thousand dollars in fines. This court affirmed appellant's conviction.²

On September 21, 2000, appellant filed two identical proper person post-conviction petitions for a writ of habeas corpus in the district

¹See NRAP 3(b).

²Buckmaster v. State, Docket Nos. 36381, 36394 (Order of Affirmance, October 2, 2000).

court. The State opposed the petitions. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On December 12, 2000, the district court dismissed appellant's petitions. These appeals followed.

In his petition, appellant first argued that he was denied equal protection and due process of law by the district court's failure to order an evaluation, as mandated by NRS 484.3796, to determine whether he is an alcohol or drug abuser and whether he could be successfully treated. Appellant also argued that his sentence is excessive. These arguments are improperly raised in a petition for a writ of habeas corpus.³ Therefore, the district court did not err by dismissing them.

Appellant next argued that his trial counsel was ineffective for failing to make the district court aware that it had not complied with NRS 484.3796. The district court's order did not address this argument; instead the court dismissed appellant's petition as "not set[ting] forth any ground . . . which would fall within the appropriate grounds for the issuance of the a of habeas corpus."

When a petition for post-conviction relief raises claims supported by specific factual allegations that, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record.⁴ Appellant has met this initial burden.

NRS 484.3796 provides that before sentencing an offender pursuant to NRS 484.3792(1)(c), the district court "shall require that the offender be evaluated to determine whether he is an abuser of alcohol or drugs and whether he can be treated successfully for his condition." The evaluation serves at least two purposes. The results of this evaluation are included in the pre-sentence investigation report and may assist the district court in exercising its discretion when imposing a sentence on the offender.⁵ Also, if the evaluation indicates that alcohol rehabilitation

³See NRS 34.810(1)(a); Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

⁴Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

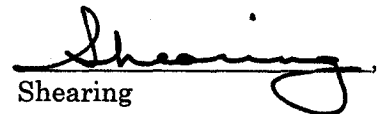
⁵NRS 176.145.

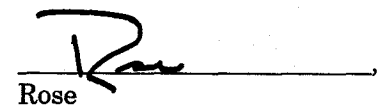
would be successful, the offender becomes eligible for an in-prison treatment program.⁶

From our review of the record, it appears that although the district court sentenced appellant under NRS 484.3791(1)(c), the district court did not order the evaluation and that appellant's trial counsel did not object. While the evaluation may not have had an impact on the length of appellant's sentence, it seems reasonable that an evaluation would enable appellant to participate in the treatment program during his last year of incarceration. Thus, trial counsel may have provided ineffective assistance, which prejudiced appellant, by failing to make the court aware of its noncompliance with NRS 484.3796.⁷

Because the district court did not address appellant's ineffective assistance of counsel claim, we cannot affirm its order in that regard. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for an evidentiary hearing on appellant's ineffective assistance of counsel claim.

 J.
Shearing

 J.
Rose

 J.
Becker

cc: Hon. Steven P. Elliott, District Judge
Attorney General/Carson City
Washoe County District Attorney
Brett Alan Buckmaster
Washoe County Clerk

⁶NRS 209.427.

⁷See Strickland v. Washington, 466 U.S. 668 (1984).