IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
GARY WAYNE SCHERER,
Respondent.

No. 37468

FILED

SEP 25 2002

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

ORDER OF AFFIRMANCE

The State of Nevada appeals from the district court's judgment granting Gary Wayne Scherer's petition for a writ of habeas corpus. Scherer was tried and convicted in connection with the murder of his former friend and business partner, Harold Dice Goodwine; however, we overturned Scherer's conviction on appeal and remanded for a new trial. Prior to the date scheduled for his second trial, Scherer entered guilty pleas pursuant to North Carolina v. Alford[1] to second-degree murder with use of a deadly weapon and robbery of a person sixty-five years of age or older. Scherer subsequently petitioned for a writ of habeas corpus arguing that the ineffective assistance of his attorneys rendered his decision to enter the guilty pleas pursuant to Alford involuntary. The district court granted Scherer's petition after finding that Scherer's attorneys had failed to conduct a thorough investigation of the State's case against Scherer. The State argues on appeal that the district court erred by granting Scherer's petition for a writ of habeas corpus. We conclude that the State's arguments are without merit. We affirm.

[1]In North Carolina v. Alford, the United States Supreme Court held that the constitution does not bar a criminal defendant from "voluntarily, knowingly, and understandingly consent[ing] to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." 400 U.S. 25, 37 (1970).

A claim of ineffective assistance of counsel is reviewed under the two-prong "reasonably effective assistance" standard, which was established in Strickland v. Washington[2] and later adopted by this court.[3] The defendant must first demonstrate that the representation of his trial counsel "'fell below an objective standard of reasonableness.'"[4] Defendant's counsel is presumed to have been effective, absent strong and convincing proof to the contrary.[5] In determining if counsel's performance was objectively ineffective, the court takes into account prevailing professional norms and the totality of the circumstances.[6] Second, the defendant must demonstrate a reasonable probability that, but for the errors of his counsel, he would not have pleaded guilty and would have insisted on going to trial.[7] When a defendant claims that he was prejudiced by his counsel's failure to investigate or discover exculpatory evidence, the United States Supreme Court has held that a court should determine the "likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea."[8]

When reviewing claims of ineffective assistance, this court has held that such claims present mixed questions of law and fact subject to

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[2]466 U.S. 668 (1984).

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

[4]Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996) (quoting Davis v. State, 107 Nev. 600, 601, 817 P.2d 1169, 1170 (1991)).

[5]Id.

[6]Id.

[7]Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

[8]Hill v. Lockhart, 474 U.S. 52, 59 (1985).

independent review.[9] However, the district court's factual findings are entitled to deference so long as they are supported by substantial evidence and are not clearly wrong.[10]

We conclude that the district court did not err when it granted Scherer's petition for a writ of habeas corpus. First, the representation of Scherer's attorneys fell below an objective standard of reasonableness because their steadfast plea bargain recommendation was premised upon an inadequate investigation. When an attorney's advice is based upon a less than complete investigation, the attorney's advice is only as reasonable as the attorney's decision to limit the investigation.[11] Here, Scherer's attorneys based their advice to Scherer primarily upon their perception of the persuasiveness of the testimony of Scherer's former co-defendants, Claudia Canada and Ann Schuck. Given that Scherer's attorneys believed that the testimony of Canada and Schuck was critical to the case, it was unreasonable for them not to thoroughly and critically review this testimony.[12] As noted by the district court, it was not enough to merely review the trial transcripts with regard to such critical evidence.

Second, Scherer was prejudiced by the ineffective assistance of his attorneys because he was deprived of a meaningful choice between accepting a plea bargain and going to trial. Given Scherer's exhaustive

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[9]Love, 109 Nev. at 1138, 865 P.2d at 323.

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

[11]Strickland, 466 U.S. at 690-91.

[12]We note that Scherer's attorneys interviewed Canada, but admitted that they never directly compared her testimony to the physical evidence from the crime scene. Additionally, Scherer's attorneys never interviewed Schuck or most of the other witnesses who testified against Scherer in the first trial.

efforts to defend himself in this case and the existence of conflicting evidence, there was a reasonable probability that, but for the incomplete investigation of Scherer's attorneys, he would not have entered guilty pleas pursuant to Alford and would have insisted on going to trial.[13] In other words, Scherer only became interested in entering into a plea agreement after his attorneys' inadequate investigation left him without any defenses on the eve of trial. Therefore, the district court did not err when it granted Scherer's petition for a writ of habeas corpus. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Sally L. Loehrer, District Judge
Attorney General
Clark County District Attorney
Daniel J. Albregts, Ltd.
Clark County Clerk

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[13]See Kirksey, 112 Nev. at 988, 923 P.2d at 1107.