

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD ALLAN WEIZENECKER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 37912

**FILED**

APR 16 2002

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition. The district court properly dismissed appellant's claims numbered 2-5 prior to the evidentiary hearing because he failed to provide specific facts, which if true, would have entitled him to relief.<sup>1</sup> As to appellant's first claim, the district court found that counsel was not ineffective at sentencing. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>2</sup> The district

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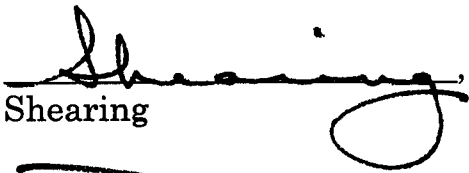
<sup>1</sup>Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984); see also Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

Appellant's claims 2-5 included: (1) his trial counsel was ineffective for stipulating to a waiver of the preliminary hearing, (2) his trial counsel failed to inform him of his right to a direct appeal, (3) his trial counsel failed to investigate or prepare a defense, and (4) his guilty plea was invalid.

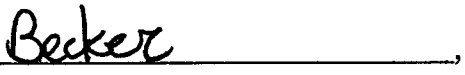
<sup>2</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

court's findings of fact are supported by substantial evidence and are not clearly wrong. Moreover, the district court did not err as a matter of law. Therefore, for the reasons stated in the attached order of the district court, the order of the district court is affirmed. Therefore, briefing and oral argument are not warranted in this case.<sup>3</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>4</sup>

  
Shearing, J.

  
Rose, J.

  
Becker, J.

cc: Hon. Steven P. Elliott, District Judge  
Attorney General/Carson City  
Washoe County District Attorney  
Donald Allan Weizenecker  
Washoe District Court Clerk

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<sup>3</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>4</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE

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DONALD WEIZENECKER,

Petitioner,

v.

Case No. CR99P0861

DONALD L. HELLING, WARDEN,  
NEVADA STATE PRISON,

Dept. No. 10

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND JUDGMENT

This cause came before the court upon a Petition for Writ of Habeas Corpus (Post-Conviction). The record reveals that petitioner was represented by Sandra Unsworth when he pleaded guilty to one count of sexual assault upon a child and one count of lewdness upon a child, in exchange for dismissal of other counts. The court imposed consecutive sentences for those offenses. Weizenecker did not appeal. Instead, he filed a petition for writ of habeas corpus alleging several variations of ineffective assistance of counsel.

The State answered and moved to dismiss most of the

1 claims, asserting that they were inadequately pleaded. The court  
2 granted that motion and then appointed counsel and afforded  
3 counsel the opportunity to supplement the petition. Counsel for  
4 petitioner then filed a supplemental petition amplifying the sole  
5 surviving claim of ineffective assistance of counsel at  
6 sentencing. However, counsel raised no additional claims. The  
7 cause was then set for a hearing to inquire into the claim of  
8 ineffective assistance of counsel at sentencing.

9 Two themes were advanced. The first was that counsel  
10 was ineffective in failing to present her sentencing argument in  
11 a different fashion. The second theme was that counsel was  
12 ineffective in asking the court to rely on several favorable  
13 letters instead of calling live witnesses.

14 The court finds that counsel made a reasonable  
15 strategic decision to avoid minimizing the gravity of the  
16 offense. She took damning information in the presentence report  
17 and in the report of a psychologist and incorporated that  
18 information into her argument in favor of concurrent sentences.  
19 That is a legitimate tactic. The court also notes that the  
20 tactic was partially successful in that this court gave serious  
21 consideration to the possibility of concurrent sentences.

22 Ms. Unsworth relied on letters from friends and family  
23 members and pointed out to the court that petitioner enjoyed wide  
24 support. She did not however, call live witnesses at sentencing.  
25 She explained her thoughts behind that decision and the court  
26 finds her strategic decision to be reasonable. Live witnesses

1 are not nearly as predictable as those who merely write letters.  
2 Furthermore, live witnesses are subject to cross-examination and  
3 there is always some risk that a live witness will end up  
4 damaging the defense case.

5           At the habeas corpus hearing petitioner had a full  
6 opportunity to show what live witnesses would have said had they  
7 been called at sentencing. He elected to present only two: the  
8 defendant's mother and his sister. The court finds that the  
9 proposed live testimony of those two witnesses would not have  
10 affected the sentence. There is nothing more or different that  
11 counsel could have done that would have led to concurrent  
12 sentences.

13           A party asserting ineffective assistance of counsel  
14 bears the burden of showing by strong and convincing evidence  
15 that counsel's performance fell below an objective standard of  
16 reasonableness and that but for counsel's failings a different  
17 result was likely. Riley v. State, 110 Nev. 638, 646, 878 P.2d  
18 277, 278 (1994). The issue is not whether there was something  
19 that could have been done better or differently. The question is  
20 whether counsel's performance was so deficient that the court can  
21 declare it to be unreasonable. Tactical and strategic decisions,  
22 especially, are virtually unassailable absent extraordinary  
23 circumstances. Doleman v. State, 112 Nev. 843, 848, 921 P.2d  
24 278, 280-81 (1996).

25           Ms. Unsworth testified credibly that she made her  
26 strategic and tactical decisions, after consultation with and

1 agreement by her client, based on her notable experience with  
2 other cases involving sexual offenses on children. Upon  
3 evaluation of the evidence, this court is not persuaded that her  
4 conduct fell below the objective standard of reasonableness. It  
5 appears that she did the best she could with what she had to work  
6 with. The court further finds that petitioner was not prejudiced  
7 by any of the alleged failings of counsel. The sentence would  
8 not have been different had counsel taken a different approach or  
9 presented different evidence. Accordingly, the Petition for Writ  
10 of Habeas Corpus (Post-Conviction) is DENIED.

11 DATED this 3 day of May, 2001.

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DISTRICT JUDGE