

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY M. WISENBAKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38148

FILED

NOV 21 2002

ORDER OF AFFIRMANCE

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

This is an appeal of a district court order denying post-conviction relief. Pursuant to a plea agreement, appellant Larry Wisenbaker pleaded guilty to seven counts of sexually related offenses involving minors. Wisenbaker filed a petition for a post-conviction writ of habeas corpus, alleging that his trial counsel was ineffective and that his plea was not knowingly entered because his trial counsel “coerced” him into accepting the plea bargain by leading him to believe that he would receive concurrent sentences. The district court denied the relief sought.

Wisenbaker first contends that the district court erred in denying his petition on the basis that his trial counsel was ineffective. We disagree.

The United States Supreme Court in Strickland v. Washington,¹ set forth a two-prong test which a defendant must satisfy in order to prove he was denied “reasonably effective assistance” of counsel.² We have previously held that this test is applicable to both the guilt and

¹466 U.S. 668 (1984).

²Id. at 687.

penalty proceedings.³ Under this test, the defendant must first show that his counsel's representation fell below an objective standard of reasonableness; and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different.⁴

In Strickland, the United States Supreme Court also noted that it had previously recognized "that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys in criminal cases.'"⁵ To successfully satisfy the prejudice prong, a defendant claiming ineffective assistance of counsel after a guilty plea "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."⁶ We have previously held that the court begins with a presumption of effectiveness and then must determine whether or not a defendant has demonstrated, "by 'strong and convincing proof,'" that counsel was ineffective.⁷

³Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

⁴Strickland, 466 U.S. at 688.

⁵Id. at 687 (quoting McMann v. Richardson, 397 U.S. 759, 770-71 (1970)).

⁶Kirskey, 112 Nev. at 988, 923 P.2d at 1107 (citations omitted).

⁷Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996) (citing Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991) (quoting Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981))).

Here, shortly before sentencing, the State became aware that Wisenbaker had failed to disclose a Georgia conviction for cruelty to a child, for which he violated probation by leaving the state. Wisenbaker claims that his trial counsel was ineffective in not fully investigating his criminal history, in not correcting the State's alleged mischaracterization of his Georgia conviction, and in not fully informing the court that he had left Georgia under the mistaken belief that he had been asked to leave the state.

We conclude that Wisenbaker has failed to rebut the presumption that his trial counsel was effective. He has failed to demonstrate how his counsel's other alleged errors would have led to a different result during the penalty proceedings. He elected not to disclose the Georgia conviction to his attorney and cannot now complain that his attorney was ineffective by being unprepared to defend against allegations related to the conviction.

Wisenbaker next contends that his plea was not voluntary because it was entered under the false belief that he would receive concurrent sentences. We disagree.

We have previously held that in determining whether a guilty plea is valid, the district court should consider "the totality of the facts and circumstances of a defendant's case."⁸ We have also held that the record must reflect that the plea was entered knowingly and understandingly.⁹

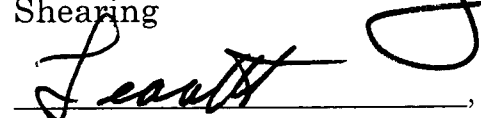
⁸Bryant v. State, 102 Nev. 268, 271, 721 P.2d 364, 367 (1986).

⁹Higby v. Sheriff, 86 Nev. 774, 781, 476 P.2d 959, 963 (1970) (setting forth a list of factors which the record should reflect in order to conclude that a guilty plea is valid).

Here, Wisenbaker's claim that his counsel coerced him into accepting the plea agreement is belied by the record. The guilty plea agreement signed by Wisenbaker provided a record of all the information required by Higby v. Sheriff.¹⁰ In this agreement, the State expressly reserved the right to argue for consecutive sentences. Further, Wisenbaker was fully canvassed by the district court and he asserted that he was voluntarily pleading guilty and understood the terms and consequences of his plea. Though Wisenbaker claims that all parties agreed that concurrent sentences would be imposed, the State expressly reserved the right to argue for consecutive sentences in the plea agreement. In addition, the agreement contained a provision clearly putting Wisenbaker on notice that the district court judge had discretion to impose either concurrent or consecutive sentences. We conclude that the district court properly determined that Wisenbaker's guilty plea was valid and therefore did not err in denying his petition for post-conviction relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

¹⁰Id.

cc: Hon. Kathy A. Hardcastle, District Judge
Amesbury & Schutt
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk