

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER JAMES MARSHE,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
CRAIG FARWELL,
Respondent.

No. 38599

FILED

MAR 14 2002

JANETIE M. BLOOM
CLERK OF SUPREME COURT

BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing appellant Christopher James Marshe's post-conviction petition for a writ of habeas corpus.

On December 20, 2000, Marshe was convicted, pursuant to a guilty plea, of one count of felony statutory sexual seduction. The district court sentenced Marshe to serve a prison term of 24-60 months. Marshe did not pursue a direct appeal.

On June 11, 2001, Marshe filed a post-conviction petition for a writ of habeas corpus in the district court with the assistance of counsel. The State filed a motion to dismiss Marshe's petition, and on September 13, 2001, the district court granted the State's motion without conducting an evidentiary hearing. This timely appeal followed.

Marshe contends that the district court erred by determining that he did not receive ineffective assistance of counsel. Marshe contends that he received a harsher sentence than expected because his counsel was ineffective by (1) failing to object to prejudicial "hearsay victim impact statements"; and (2) failing to present sufficient evidence in mitigation. Marshe also contends that the district court erred by not conducting an

evidentiary hearing prior to dismissing his petition. We disagree with Marshe's arguments.

This court has held that a claim of ineffective assistance of counsel is a mixed question of law and fact subject to independent review.¹ Nevertheless, the factual findings of a district court regarding a claim of ineffective assistance of counsel are entitled to deference on review so long as they are supported by substantial evidence and are not clearly wrong.²

To state a claim of ineffective assistance of counsel, the petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's errors, there is a reasonable probability that the outcome of the proceedings would have been different.³ There is a presumption that counsel provided effective assistance unless the petitioner demonstrates "strong and convincing proof to the contrary."⁴ Moreover, this court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁵ A petitioner is entitled to an evidentiary hearing only if he supports his claims with specific allegations that, if true, would entitle him to relief.⁶ A petitioner is not entitled to an

¹State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

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

³Strickland v. Washington, 466 U.S. 668 (1984); accord Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴Davis 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)).

⁵Strickland, 466 U.S. at 697.

evidentiary hearing if the factual allegations raised in the petition are belied or repelled by the record.⁷

The district court found that Marshe's contention that his counsel was ineffective at sentencing was repelled by the record. Our review of the record on appeal reveals that Marshe has not demonstrated that the district court's factual findings are not supported by the record or are clearly wrong. Furthermore, Marshe has not demonstrated that the district court erred as a matter of law in dismissing his petition.

First, Marshe's contention that his counsel was ineffective by not objecting to the uncharged bad acts referred to in the victim impact statement is not supported by the record. At Marshe's sentencing, the district court expressly stated that it would not consider the remarks concerning the uncharged bad acts committed by Marshe, and subsequently based its sentencing decision on Marshe's juvenile and criminal history. Therefore, Marshe is unable to demonstrate that he was prejudiced by his counsel's failure to contemporaneously object, or that the district court erred by dismissing this claim.

Second, Marshe's contention that his counsel was ineffective by failing to present sufficient mitigating evidence at sentencing is also not supported by the record. Marshe contends that his counsel failed to (1) inform the district court about the relationship between Marshe's psychological/chemical disorders and criminal conduct; (2) use his

... continued

⁶Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

⁷Id. at 503, 686 P.2d at 225.


subpoena power to call expert witnesses on Marshe's behalf; and (3) cross-examine the witnesses against Marshe.

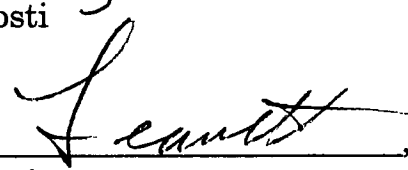
Our review of the record reveals that the information regarding Marshe's disorders was in fact presented to the district court prior to sentencing. The presentence investigation report contained both a detailed psychosexual evaluation and a psychiatric evaluation. Marshe cannot show that he was prejudiced by counsel's failure to call the authoring experts at the sentencing hearing because the district court had already considered their evaluations. Further, Marshe cannot demonstrate how he was prejudiced by counsel's failure to subpoena and question the victim and her family at the sentencing hearing in an effort to mitigate his sentence. Therefore, Marshe is unable to demonstrate that his counsel was ineffective by not providing more information regarding his disorders for purposes of mitigation, or that the district court erred by dismissing this claim.

Having considered Marshe's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Steven R. Kosach, District Judge
Attorney General/Carson City
Washoe County District Attorney
Mary Lou Wilson
Washoe District Court Clerk