

IN THE SUPREME COURT OF THE STATE OF NEVADA

BENTLEY GREGG CALLISON,

No. 38745

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

JAN 23 2002

JANETTE 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 denying appellant Bentley Gregg Callison's post-conviction petition for a writ of habeas corpus.

On April 6, 2000, Callison was convicted, pursuant to a guilty plea, of one count each of robbery of a person 65 years of age or older (count I) and burglary (count II). The district court sentenced Callison to serve two consecutive prison terms of 60-180 months for count I, and a consecutive prison term of 26-120 months for count II; he was also ordered

to pay restitution in the amount of \$1,690.03, and was given credit for 66 days time served. Callison did not file an appeal.

On December 28, 2000, Callison filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Callison and conducted an evidentiary hearing.¹ On September 27, 2001, the district court denied Callison's petition. This timely appeal followed.

In the petition, Callison presented claims of ineffective assistance of counsel. The district court found that counsel was not ineffective. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.² Callison has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, Callison has not demonstrated that the district court erred as a matter of law.³

¹On April 11, 2001, counsel filed a supplemental petition for a writ of habeas corpus in the district court.


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

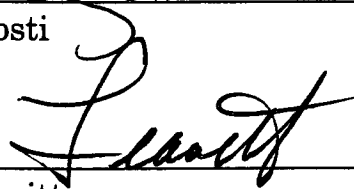
³Callison also argues on appeal that his counsel was ineffective for not informing him that the age enhancement, pursuant to NRS 193.167, was applicable for sentencing purposes. This issue was not raised in the
continued on next page . . .

Accordingly, for the reasons stated in the attached order of the district court, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Young

 _____, J.
Agosti

 _____, J.
Leavitt

cc: Hon. Janet J. Berry, District Judge
Attorney General/Carson City
Washoe County District Attorney
Karla K. Butko
Washoe County Clerk

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petition filed in district court. Generally, this court declines to consider on appeal issues not raised in the petition filed below. See Hill v. State, 114 Nev. 169, 178, 953 P.2d 1077, 1084 (1998).

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AMY HARVEY, CLERK

BY [Signature] DEPUTY

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

* * *

BENTLEY CALLISON,

Petitioner,

v.

Case No. CR00P0346

THE STATE OF NEVADA,

Dept. No. 1

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). Petitioner Callison was convicted by pleas of guilty to robbery and burglary. The robbery charge was enhanced due to the age of the victim. In exchange for the pleas, the State agreed to dismiss additional charges and to not seek to have Callison sentenced as a habitual criminal. Callison did not appeal.

Callison then filed a timely petition for writ of habeas corpus alleging that he was deprived of the effective assistance of counsel. The court appointed counsel who filed a

1 supplemental petition. The cause was then set for a hearing. At
2 that hearing the court heard testimony from Callison and from his
3 former counsel, Deputy Public Defender Rich Molezzo. These
4 findings are based upon the relative credibility of those
5 witnesses.

6 Callison claims that Molezzo never informed him of the
7 right to appeal. Molezzo admitted as much. However, Callison
8 failed to show that the circumstances were such that Molezzo had
9 a duty to inform his client of the right to appeal. When a
10 defendant pleads guilty, counsel does not have an absolute duty
11 to inform him of the right to appeal. Thomas v. State, 115 Nev.
12 ____, 979 P.2d 222 (1999). Counsel must pursue an appeal if the
13 defendant expresses a desire to litigate further, but Callison
14 presented no credible evidence that he expressed such a desire.
15 Counsel should inform the client of the right to appeal even
16 without such an expression if the circumstances would lead the
17 reasonable attorney to perceive some potential benefit from an
18 appeal. Id. Here, Callison presented no evidence leading to the
19 conclusion that the reasonable attorney would have perceived
20 fruitful grounds for an appeal.

21 Callison also claimed that he pleaded guilty with the
22 belief that he would serve no more than four years in the Nevada
23 prison system. The court finds his testimony on this subject to
24 be incredible. This finding is based in part on the court's
25 observations of Callison's demeanor at the habeas corpus hearing
26 and at the entry of plea.

1 Callison testified that his expectation of a certain
2 sentence was not based on anything said by the prosecutor or the
3 court. Instead, he testified that his extensive experience with
4 the California legal system led him to believe that when you
5 strike a deal for a specific sentence, the court will impose that
6 sentence. There are several flaws with this proposition. First,
7 the plea bargain struck by Callison in this case did not have a
8 sentencing component. Both parties were free to argue for an
9 appropriate sentence. Second, Molezzo testified credibly that he
10 never hinted that a certain sentence was assured. He testified,
11 and the court finds, that he fully explained the court's
12 sentencing discretion and the range of sentences available to the
13 court. Third, the court fully informed Callison of the court's
14 sentencing discretion at the time of the entry of plea. Callison
15 acknowledged the court's discretion and said nothing about his
16 alleged beliefs that he was assured of a lenient sentence. At
17 the habeas corpus hearing, he admitted that no one had instructed
18 him regarding the proper responses to the canvass. Accordingly,
19 the court concludes that at the time Callison entered his plea he
20 was fully aware of the range of available sentences and of the
21 court's discretion.

22 Callison also asserts that he is entitled to some
23 relief because Molezzo informed him that the prosecutor intended
24 to seek a declaration that he was a habitual criminal if he
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1 rejected the plea bargain offer.¹ The court finds first that the
2 prosecutor did indeed express her intent to seek the enhancement
3 if there was to be no plea bargain. Contrary to Callison's view,
4 that is not improper. Schmidt v. State, 94 Nev. 665, 584 P.2d
5 695 (1978). Nor is it improper for counsel to inform the client
6 of the prosecutor's intent. Indeed, that is the role of counsel:
7 to provide the client with full and frank advice concerning the
8 potential consequences of both a trial and a plea bargain.

9 One who would assert a claim of ineffective assistance
10 of counsel bears the burden of showing by strong and convincing
11 evidence that counsel's performance fell below an objective
12 standard of reasonableness and that but for the failings of
13 counsel the result of the trial would have been different. In
14 the case of a guilty plea, the petitioner must show that but for
15 the failings of counsel he would have insisted on a trial on all
16 available charges. Kirksey v. State, 112 Nev. 980, 923 P.2d 1102
17 (1996). Callison has failed to meet either prong. His own
18 testimony was incredible in many respects. Further, the court
19 is convinced that Callison was determined to plea bargain and
20 thereby avoid the finding that he is a habitual criminal.
21 Callison made his own calculated decision to plea bargain and
22 Molezzo could not have convinced him to do otherwise.

23 Callison also claimed that counsel was ineffective in
24 failing to investigate. The court notes first that Callison's

25 ¹Callison was indeed eligible for sentencing as a habitual
26 criminal.

1 insistence on a plea bargain in the early stages of these
2 proceedings negated the need for extensive investigation
3 concerning the merits of the charges. Furthermore, the court
4 finds that Callison has failed to adduce any evidence tending to
5 prove that additional investigation would have yielded any
6 helpful evidence.

7 Because Callison failed to support his claims with any
8 credible evidence, the Petition for Writ of Habeas Corpus (Post-
9 Conviction) is denied.

10 DATED this 25th day of September, 2001.

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DISTRICT JUDGE