IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL J. MCCORMICK,
Appellant,
vs.
WARDEN, LOVELOCK CORRECTIONAL CENTER, CRAIG FARWELL; AND THE STATE OF NEVADA,
Respondents.

No. 38760

FILED

OCT 08 2002

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

ORDER OF AFFIRMANCE

This is an appeal of a district court order denying post-conviction relief. Pursuant to a plea agreement, appellant Michael McCormick pleaded guilty to one count of sexual assault on his four-year old daughter. McCormick filed a petition for a post-conviction writ of habeas corpus, alleging various grounds of ineffective assistance of counsel. McCormick contends that the district court erred in denying the relief sought and in doing so without first conducting an evidentiary hearing. We disagree.

NRS 34.770(1) provides the district court with discretion to determine whether an evidentiary hearing is required. NRS 34.770(2) provides the district court with discretion to deny the petition without an evidentiary hearing.

McCormick attempts to rely on a prior decision where we held that "[w]hen a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to

relief, the petitioner is entitled to an evidentiary hearing."[1] However, in Hargrove v. State, we also held that to the extent that a defendant presents merely "naked" allegations, he is not entitled to an evidentiary hearing.[2]

Here, McCormick raised various allegations of ineffective assistance of counsel and submitted three affidavits in support of his contention that he retained his attorney to set aside his guilty verdict and that his attorney failed to do so. The district court considered the briefs and evidence submitted by both parties and determined that a hearing was not required. McCormick has failed to demonstrate how this decision was an abuse of discretion.

McCormick also contends that the district court erred in rejecting his claims that his attorney was ineffective in failing to set aside his guilty plea; in failing to move to suppress his confession; in failing to investigate his wife's ulterior motives to fabricate the charges; and in failing to prepare for sentencing. We conclude that McCormick's claims lack merit.

The United States Supreme Court in Strickland v. Washington,[3] set forth a two-prong test which a defendant must satisfy in order to prove he was denied "reasonably effective assistance" of counsel.[4] Under this test, the defendant must first show that his counsel's

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[1]Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994) (citing Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984)).

[2]100 Nev. at 502-03, 686 P.2d at 225.

[3]466 U.S. 668 (1984).

[4]Id. at 687.

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.[5]

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.'"[6] To successfully satisfy the second prong, prejudice, 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[7]." 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.[8]

McCormick first contends that his counsel was ineffective in failing to set aside his guilty plea. 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

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[5]Strickland, 466 U.S. at 688.

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

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

[8]Homick 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))).

case."[9] We have also held that the record must reflect that the plea was entered knowingly and understandingly. [10]

Here, the guilty plea agreement signed by McCormick provided a record of all the information required by Higby v. Sheriff.[11] Further, McCormick 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 McCormick claims that he did not know that the crime carried a ten year minimum sentence, the plea agreement also contained a provision setting forth the minimum sentence. In addition, in response to an inquiry as to whether his attorney had informed him of the penalty that could be imposed, McCormick stated "yes . . . you could give me a ten-to-life sentence or a ten-to-twenty-five year sentence."[12]

We conclude that McCormick has failed to prove how any of his attorney's alleged errors would have altered the plea process. We further conclude that since McCormick failed to overcome the presumption of adequate representation, the district court did not err in denying him post-conviction relief on this basis.

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

[10]Higby 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).

[11]Id.

[12]JA 40.

McCormick also claims that his trial counsel was ineffective because he failed to move to suppress McCormick's statement to police on the basis that McCormick was not read his rights pursuant to Miranda.[13] We conclude this argument also lacks merit.

While a defendant is entitled to be given the Miranda warnings prior to custodial interrogation,[14] the warnings are not required when a defendant voluntarily goes to a police station and becomes the focus of undisclosed police suspicion.[15] In addition, we have held that "[w]hen an ineffective assistance claim is based upon counsel's failure to file a motion to suppress evidence allegedly obtained" illegally, the prejudice prong in Strickland must be established by showing that the motion would have been successful and would have changed the result of a trial.[16]

Here, McCormick incorrectly argues that his attorney's failure to investigate whether his statements were taken in violation of Miranda, alone, sets forth a prima facie case for ineffective assistance of counsel. At the time his attorney was retained, McCormick had waived his right to trial by entering into a plea agreement and a motion to suppress would thus not have had any affect. McCormick also voluntarily went to the police station to file a missing person report on his wife. After interviewing his daughter and based on the reports obtained from child

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[13]Miranda v. Arizona, 384 U.S. 436 (1966).

[14]Id. at 443.

[15]Stansbury v. California, 511 U.S. 318, 321 (1994).

[16]Kirskey, 112 Nev. at 990, 923 P.2d at 1109.

welfare authorities, the officer suspected McCormick of sexual assault and confronted McCormick with his daughter's allegations. As soon as McCormick asserted his right to counsel, the interview was terminated and he was taken into custody and read his rights. Accordingly, we conclude that McCormick has not shown that a motion to suppress his statements to police would have been successful. We therefore conclude that McCormick failed to demonstrate the required prejudice and was not entitled to relief.

Finally, McCormick contends that the district court erred in rejecting his claims of ineffective assistance based on his attorney's failure to investigate his wife's ulterior motives to fabricate the charges against him and in failing to prepare for the sentencing hearing.

McCormick claims that his wife was intent on leaving him and taking his children and the marital assets. He contends that his attorney erred in failing to investigate these claims. However, McCormick does not state how his wife's intentions, even if true, would exculpate him or change the result of the sentencing hearing. "A silent record is the equivalent of no proof at all."[17] Further, we have indicated that every effort should be made to assess the attorney's performance from "counsel's perspective at the time."[18]

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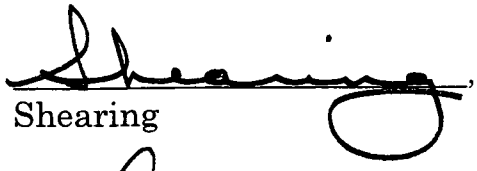
[17]White v. State, 95 Nev. 159, 161, 591 P.2d 266, 268 (1979).

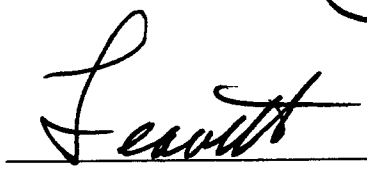
[18]Kirskey, 112 Nev. at 987-88, 923 P.2d at 1107 (quoting Strickland, 466 U.S. at 689).

McCormick was charged with seven counts of sexual crimes against his daughter and step-daughter and pleaded guilty to one count of sexual assault of his four-year old daughter. We conclude that he has failed to show any evidence that his attorney's failure to probe into his wife's motives during the sentencing prejudiced him. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Shearing



_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Jeffrey D. Sobel, District Judge
Robert E. Glennen III
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk