

IN THE SUPREME COURT OF THE STATE OF NEVADA

BILLY MAX ACOX,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38782

FILED

MAR 01 2002

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court denying appellant Billy Max Acox' post-conviction petition for a writ of habeas corpus.

On October 26, 2000, Acox was convicted, pursuant to a guilty plea, of one count of felony driving under the influence. The district court sentenced Acox to serve a prison term of 28-72 months, and ordered him to pay restitution in the amount of \$7,835.37, and a fine of \$2,000.00. Acox was given credit for 72 days time served.

On July 25, 2001, Acox, represented by counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss Acox' petition in part, and Acox opposed the motion. On August 31, 2001, the district court filed an order granting in part the State's motion, and found that an evidentiary hearing was warranted on Acox' surviving claims. The claim in the petition dismissed by the district court pertained to Acox' guilty plea; the district court concluded in its order that Acox entered a knowing and voluntary plea.¹

¹In the instant appeal, Acox contends that the district court erred by dismissing the claim pertaining to his guilty plea without conducting an
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On October 4, 2001, the district court conducted an evidentiary hearing on the remaining claims and ultimately denied Acox' petition. This timely appeal followed.

Acox contends the district court erred by determining that he did not receive ineffective assistance of counsel. Acox argues that his counsel provided ineffective assistance by (1) failing to present witnesses in mitigation at sentencing; and (2) failing to discuss his rights on appeal thereby depriving him of a direct appeal. We disagree.

This court has held that a claim of ineffective assistance of counsel is a mixed question of law and fact subject to independent review.² Nevertheless, the factual findings of a district court regarding a claim of ineffective assistance of counsel are entitled to deference on subsequent review so long as they are supported by substantial evidence and are not clearly wrong.³

To state a claim of ineffective assistance of counsel, the appellant 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

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evidentiary hearing. The district court's order of August 31, 2001, is separately appealable, and Acox failed to appeal from the district court's ruling. Therefore, this contention is not properly raised and is waived, and we will not address it any further. See NRS 34.575(1); NRS 177.015(1)(b).

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

³Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

would have been different.⁴ There is a presumption that counsel provided effective assistance unless the appellant demonstrates "strong and convincing proof to the contrary."⁵ Moreover, this court need not consider both prongs of the Strickland test if the appellant makes an insufficient showing on either prong.⁶

The district court found that Acox' counsel was not ineffective. Our review of the record on appeal reveals that Acox has not demonstrated that the district court's factual findings are not supported by the record or are clearly wrong. Furthermore, Acox has not demonstrated that the district court erred as a matter of law in rejecting his claim of ineffective assistance.

Acox' argument that counsel failed to present mitigating evidence at sentencing is belied by the record; furthermore, he failed to prove that the presentation of additional mitigating evidence would have affected the imposed sentence. The district court was informed prior to sentencing by both counsel and the presentence investigation report that Acox experienced post-traumatic stress syndrome. Acox' argument that his counsel was ineffective by depriving him of his right to a direct appeal is also belied by the record. At the evidentiary hearing, Acox testified that after discussing his appellate rights with counsel, he chose not to pursue a

⁴Strickland 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).

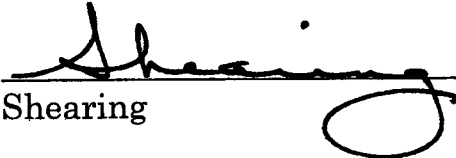
⁵Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991) (quoting Lenz v. State, 97 Nev. 65, 66, 624 P. 2d 15, 16 (1981)).

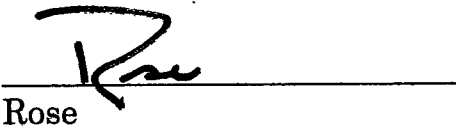
⁶Strickland, 466 U.S. at 697.

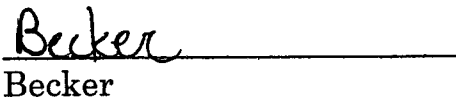
direct appeal. We therefore conclude that the district court did not err in denying Acox' petition.

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

ORDER the judgment of the district court AFFIRMED.


Shearing J.


Rose J.


Becker J.

cc: Hon. Steven P. Elliott, District Judge
Attorney General/Carson City
Washoe County District Attorney
Karla K. Butko
Washoe District Court Clerk