

IN THE SUPREME COURT OF THE STATE OF NEVADA

HARLAND RAYMOND FEREBEE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39301

FILED

JUL 15 2002

JANE M. BLOOM
CLERK OF THE SUPREME COURT
CLERK

ORDER OF AFFIRMANCE

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

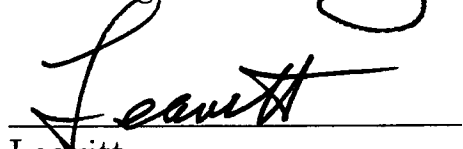
In the petition, appellant presented claims of ineffective assistance of counsel and involuntariness of his plea. The district court found that counsel was not ineffective and that appellant's plea was voluntary. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.¹ Appellant has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, appellant has not demonstrated that the district court erred as a matter of law.


¹See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

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

ORDER the judgment of the district court AFFIRMED.


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Jerome Polaha, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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RONALD A. JUSTIN, JR.

BY

39301

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

* * *

HARLAND R. FEREBEE,

Petitioner,

v.

Case No. CR00P0719A

WARDEN, NEVADA STATE PRISON,

Dept. No. 3

Respondent.

- 2002

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT

This matter came before the court on the State's Motion to Dismiss Ferebee's Petition for Writ of Habeas Corpus (Post-Conviction). There has been a hearing on the State's motion. The court, now being fully advised of the premises, hereby grants the Motion to Dismiss.

GROUND ONE

In his petition, Ferebee alleged that his trial counsel, M. Jerome Wright, afforded him ineffective assistance of counsel. Specifically, Ferebee claims Wright unreasonably failed to investigate and then present the testimony of Dr. Jerry Nims,

1 a local mental health professional, during the sentencing hearing
2 in this case. In support of his claim, Ferebee has submitted
3 affidavits executed by both Wright and Dr. Nims. The court has
4 carefully reviewed the affidavits, and, for purposes of the
5 present proceeding, accepts their assertions as true. Despite
6 the assertions of both Wright and Nims, the court believes no
7 evidentiary hearing is required on this claim. NRS 34.770.

8 To be entitled to an evidentiary hearing on a claim of
9 actual ineffective assistance of counsel at sentencing, Ferebee
10 had to plead specific facts demonstrating that counsel's
11 performance was unreasonable under prevailing professional norms,
12 and that, but for counsel's deficient performance, there is a
13 reasonable probability that the result of the sentencing hearing
14 would have been different. Strickland v. Washington, 466 U.S.
15 668 (1984); see also Davis v. State, 107 Nev. 600, 602, 817 P.2d
16 1169 (1991). In the present case, the court need not address
17 Ferebee's claim that Wright's performance was substandard,
18 because the error Ferebee cites was not prejudicial under the
19 Strickland standard. Accord Sechrest v. State, 108 Nev. 158,
20 161, 826 P.2d 564 (1992); see also Strickland, 466 U.S. at 697.

21 As noted above, the court accepts Dr. Nims' assertions
22 as true. But if Dr. Nims testified during Ferebee's sentencing
23 hearing and offered the information contained in his affidavit,
24 there is no reasonable probability that, given the nature of
25 Ferebee's crimes, the level of violence involved, and Ferebee's
26 degree of culpability, the court would have been more lenient in

1 fashioning sentence. Indeed, there are passages in Dr. Nims'
2 report which now convince the court that the sentence imposed was
3 just, and other passages which support the view that the sentence
4 imposed might have been too lenient.

5 In either event, counsel's failure to present Dr. Nims'
6 report and/or testimony was not, to a reasonable probability,
7 prejudicial. Accordingly, Ground One is dismissed.

8 GROUND TWO

9 Ferebee also alleges that Wright's performance was
10 prejudicially deficient under the Strickland standard, because he
11 failed to object to the admission of victim impact evidence at
12 sentencing. As above, it will not be necessary to evaluate
13 counsel's performance in this context, because the error, if any,
14 was not prejudicial. In other words, had trial counsel objected,
15 and cited the grounds offered in Ferebee's petition, there is no
16 reasonable probability that the objection would have been
17 sustained. Moreover, even if the objection had been sustained,
18 there is no reasonable probability that Ferebee's sentence would
19 have been any different without the victim impact evidence.
20 Accordingly, no evidentiary hearing is required. NRS 34.770.¹

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22 _____
23 ¹Although Ferebee pursued a direct appeal and raised only
24 issues respecting the propriety of his sentence, he never
25 challenged the admissibility of victim impact evidence on appeal.
26 The State claimed that Ground Two is barred owing to Ferebee's
failure to brief the admission of victim impact evidence on appeal.
Accord NRS 34.810(1)(b). The State's argument is rejected, because
the present claim is couched in terms of ineffective assistance of
counsel, and is properly before the court as such. Pellegrini v.
State, 117 Nev. ___, 34 P.3d 519 (2001).

1 For example, during the sentencing hearing, the
2 prosecutor, without objection, read a few excerpts of John
3 Scroggins' testimony from Walter Crawford's preliminary hearing;
4 Crawford was Ferebee's co-offender and was tried separately. The
5 excerpts describe the crimes committed by Ferebee and Crawford,
6 and how the victim was injured by Ferebee. This description was
7 also repeated in the pre-sentence report. See Transcript of
8 Sentencing, August 31, 2000, pp. 21-24. Ferebee claims that,
9 although a victim may offer victim impact evidence at sentencing,
10 NRS 176.015(3)(b), counsel was ineffective in not objecting to
11 procedures by which the information was admitted, because he has
12 the right to have the victim present and subject to cross-
13 examination before such evidence is admitted.

14 Clearly, Mr. Scroggins' prior sworn testimony from
15 Crawford's preliminary hearing is hearsay, NRS 51.035, and would
16 be subject to an objection on that ground. Moreover, there was
17 no showing that Scroggins was unavailable for the hearing so as
18 to be within the prior sworn testimony exception to the hearsay
19 rule. Accord NRS 51.315, NRS 51.325.

20 Nevertheless, the court finds that had an objection
21 been made, citing the absence of the declarant, that objection
22 would have been overruled. Accord NRS 51.075. (A statement is
23 not excluded by the hearsay rule if its nature and the special
24 circumstances under which it was made offer assurances of
25 accuracy not likely to be enhanced by calling the declarant as a
26 witness, even though he is available.) Moreover, Ferebee's

1 petition failed to allege that, had Scroggins been called at
2 sentencing, and cross-examined, he would have testified any
3 different in the habeas proceeding or in the sentencing
4 proceeding than he did in Crawford's preliminary hearing.
5 Without such an allegation, Ferebee has simply failed to plead
6 facts which, if true, would entitle him to relief. Finally,
7 since the preliminary hearing excerpts are virtually the mirror
8 image of the pre-sentence report narrative, the absence of the
9 excerpt could not have affected the outcome of Ferebee's
10 sentencing proceeding.

11 In addition, Ferebee claims counsel was ineffective in
12 failing to object to the portion of the pre-sentence report in
13 which Scroggins recommended "incarceration." Presentence Report,
14 p. 6. Since this is a non-capital case, a victim may express his
15 or her view respecting sentence and may do so without being
16 cross-examined. Accord Randall v. State, 109 Nev. 5, 7-8, 846
17 P.2d 278 (1993); see also Smith v. State, 112 Nev. 871, 873, 920
18 P.2d 1002 (1996); Witter v. State, 112 Nev. 908, 922, 921 P.2d
19 886 (1996); Wood v. State, 111 Nev. 428, 430, 892 P.2d 944
20 (1993); see also Buschauer v. State, 106 Nev. 890, 893-94, 804
21 P.2d 1046 (1990).


22 Moreover, as above, Ferebee failed to plead any facts
23 indicating that Scroggins would have recommended some other, more
24 lenient sentence had he appeared for the sentencing hearing in
25 person, or had he appeared and testified at the habeas
26 proceeding.

1 plea was involuntary. Bryant v. State, 102 Nev. 268, 721 P.2d
2 364 (1986). The court believes that the only promises prompting
3 Ferebee's plea are those contained in the plea bargain itself:
4 namely, the elimination of more serious crimes and resultant
5 sentences. Accordingly, Ground Three is dismissed.²

6 CONCLUSION

7 It is hereby the judgment and order of this court that
8 the State's Motion to Dismiss Ferebee's Petition for Writ of
9 Habeas Corpus (Post-Conviction) is granted.

10 DATED this 21st day of February, 2002.

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13 _____
14 DISTRICT JUDGE
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22 ²During the oral arguments on the State's Motion to Dismiss,
23 and particularly the oral arguments on Ground Three, Ferebee,
24 apparently mindful that this claim was repelled by the record,
25 requested that he be granted leave to amend Ground Three. The
26 court does not believe that this sort of procedure is allowed by
NRS 34.720 et seq. generally, or NRS 34.750 specifically.
Moreover, Ferebee cited no legitimate reason or cause for allowing
such an amendment at this late date. Accordingly, the amendment
was not allowed.