

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL P. MITCHELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40070

FILED

JUL 02 2003

ORDER OF AFFIRMANCE

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

This is a proper person appeal from a district court order denying a post-conviction petition for a writ of habeas corpus.

After a night of drinking, appellant David Parker Mitchell shot the victim, his friend of ten years, in the chest after a verbal argument over Mitchell's refusal to assist the victim in a bar fight earlier in the evening. Two eyewitnesses observed the shooting. Although the victim survived, the bullet severed his spine, paralyzing him from the waist down.

On April 21, 2001, Mitchell was charged with one count each of attempted murder with the use of a deadly weapon, battery with a deadly weapon causing substantial bodily harm and aiming a firearm at a human being. On August 2, 2001, pursuant to plea negotiations with the State, Mitchell pleaded guilty to one count of battery with a deadly weapon causing substantial bodily harm. The district court sentenced Mitchell to serve a prison term of 72 to 180 months. An amended judgment of conviction was entered on September 19, 2001. Mitchell did not file a direct appeal.

On May 13, 2002, Mitchell filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition, and Mitchell filed a reply to the State's opposition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent Mitchell. On July 25, 2002, the district court conducted an evidentiary hearing on the claims raised in Mitchell's petition and provided for Mitchell to be present at the hearing. Thereafter, on August 16, 2002, the district court denied Mitchell's petition. This appeal followed.

In the petition, Mitchell raised several claims of ineffective assistance of counsel. To establish ineffective assistance of counsel, a petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.¹ Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.²

First, Mitchell claimed that his counsel was ineffective for failing to file a notice of appeal after Mitchell expressly requested that his counsel do so. We conclude that the district court did not err in rejecting Mitchell's claim.

"[T]here is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a

¹Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

²See Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

direct appeal” unless the defendant inquires about an appeal or there exists a direct appeal claim that has a reasonable likelihood of success.³ The burden is on the defendant to indicate to his attorney that he wishes to pursue an appeal.⁴

In the instant case, the district court found that Mitchell failed to demonstrate that he requested an appeal. The district court’s factual finding is supported by substantial evidence and is not clearly wrong.⁵ In particular, Mitchell’s counsel, Robert Lucherini, testified at the evidentiary hearing that Mitchell did not request an appeal, and that if he had done so, Lucherini would have filed an appeal on his behalf. Although Mitchell alleged that he requested an appeal and proffered a letter requesting an appeal, which he purportedly sent to Lucherini,⁶ the district court acted within its discretion in finding Lucherini’s testimony to the contrary more credible. Accordingly, we conclude that the district court did not err in rejecting Mitchell’s claim that he was deprived of his right to a direct appeal.

Second, Mitchell claimed that his counsel was ineffective at sentencing because he failed to call live witnesses or present mitigating

³See Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

⁴See Davis v. State, 115 Nev. 17, 974 P.2d 658 (1999).

⁵See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁶Lucherini also testified that he did not recall receiving a letter from Mitchell requesting an appeal, but instead Mitchell had requested his records.

evidence on Mitchell's behalf, and for failing to point out errors in the presentence investigation report (PSI). The district court did not err in rejecting Mitchell's claims.

Preliminarily, we note that most of Mitchell's claims regarding counsel's deficient conduct at sentencing lack sufficient specificity.⁷ In the petition and at the evidentiary hearing, Mitchell failed to identify the substance of the witnesses' testimony that could have been presented in mitigation, identify the specific errors contained in the PSI or explain how such evidence would have changed the outcome of the proceeding. Therefore, the district court did not err in rejecting those claims.

The district court also did not err in rejecting Mitchell's claims that his counsel was ineffective for failing to present mitigating evidence of self-defense and in failing to challenge his juvenile convictions set forth in the PSI. At the evidentiary hearing on the habeas petition, Lucherini explained that, in light of the injuries to the victim and the emotional nature of his victim impact statement,⁸ Lucherini advised Mitchell that his best approach to mitigate the sentence was to admit what he had done was wrong and apologize, rather than attempt to blame the victim or attempt to prove that the victim had a gun. The district court found that

⁷See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

⁸The victim, seated in his wheelchair, gave an emotional impact statement about the effects of the shooting on his life. The victim described his physical and emotional pain, described how he was no longer able to work or play with his children and how Mitchell, his long-time friend, "robbed" him of his life and "soul."

Lucherini's tactical approach to the sentencing proceeding was not deficient, explaining:

Lucherini, if he did as Mr. Mitchell suggests, and that was to advise Mr. Mitchell not to bring up a lot of argument about self-defense, and not to belabor the question of minor . . . discrepancies in the [PSI], he did the right thing, because he knows, he's been in this Court long enough to know I don't want to hear a plea of guilty but I'm not guilty. That's what this would amount to. And failure to admit wrongdoing does not [inure] to anyone's benefit in this Court at sentencing.

In light of the district court's findings that the additional evidence would not have resulted in a lighter sentence, we conclude that Mitchell failed to show that his counsel was ineffective at sentencing.

Third, Mitchell claimed that his counsel was ineffective in failing to properly investigate the facts of his case to prove Mitchell's theory of self-defense.⁹ In particular, Mitchell claimed that if counsel had conducted an adequate investigation, he would have discovered: (1) evidence that there was another weapon found at the scene of the crime thereby substantiating Mitchell's claim of self-defense; (2) that there was insufficient evidence to support the elements of the charged crimes; and

⁹Mitchell also alleged that his counsel was ineffective for failing to file a motion for bail and requesting Mitchell pay the attorney's fees owed with "stolen goods." We conclude that the district court did not err in rejecting Mitchell's claim because he failed to allege that the deficient conduct alleged to have occurred would have changed the outcome of the proceeding.

(3) that there were conflicting statements given by the witnesses at the crime scene. The district court did not err in rejecting Mitchell's claim.

The district court found that counsel conducted an adequate investigation, sufficient to evaluate whether the case should be taken to trial. That finding is supported by sufficient evidence.¹⁰ In particular, Lucherini testified that he conducted an investigation, and interviewed Mitchell, Mitchell's girlfriend, and an eyewitness to the shooting. After considering the evidence gathered, Lucherini determined that, in order to prevail at trial, Mitchell would have to testify, and Lucherini did not believe that Mitchell would have made a good witness. Further, although Lucherini conceded that during the course of his investigation he did not interview the victim, visit the crime scene or investigate where the gun came from, Lucherini explained that, in light of the facts of the case, he did not feel further investigation was warranted. Because Mitchell failed to show that his counsel's investigation was deficient, or that further investigation would have altered his decision to plead guilty and convinced him to go to trial, we conclude that the district court did not err in rejecting his claim.

Finally, Mitchell claimed that his counsel was ineffective and that his guilty plea was not knowing and voluntary because his plea agreement was unconstitutional and his sentence was illegal. In particular, Mitchell claimed that his guilty plea was invalid because: (1) the district court failed to advise him of the sentencing range for the

¹⁰See Riley, 110 Nev. at 647, 878 P.2d at 278.

offense to which he pleaded guilty, including the minimum term he must serve before parole eligibility; (2) his counsel informed him that he would receive a sentence of 1 to 6 years; and (3) the guilty plea agreement contained the wrong statutory provision for the crime. We conclude that the district court did not err in rejecting Mitchell's claims involving the validity of his plea.


Although the guilty plea agreement incorrectly referred to the statutory provision for assault as NRS 200.471, instead of NRS 200.481, the record reveals that Mitchell knew he was pleading guilty to the offense of battery with a deadly weapon causing substantial bodily harm. The first sentence of the plea agreement provides that Mitchell was pleading guilty to the offense of "BATTERY WITH A DEADLY WEAPON, WITH SUBSTANTIAL BODILY HARM." The signed plea agreement also provided the correct sentencing range for that offense, 2 to 15 years and contained an acknowledgement that Mitchell had not been promised a particular sentence by anyone. Similarly, at the plea canvass, Mitchell expressly admitted committing the offense of battery with a deadly weapon causing substantial bodily harm and acknowledged that the "matter of sentencing [was] entirely up to [the district court]." Accordingly, the district court did not err in rejecting Mitchell's claims involving the validity of his plea. The totality of the circumstances reveals that Mitchell was properly advised of the direct consequences of the offense to which he pleaded guilty.¹¹


¹¹See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Mitchell is not entitled to relief and that briefing and oral argument are unwarranted.¹² Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹³


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Donald M. Mosley, District Judge
Daniel P. Mitchell
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹²See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹³We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.