

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK E. HOWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40211

FILED

DEC 19 2002

ORDER OF AFFIRMANCE

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

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

On June 2, 2000, Howell was convicted, pursuant to a guilty plea, of one count of burglary. The district court sentenced Howell to serve a prison term of 48-120 months, to be served consecutively to the sentence in another case; he was also ordered to pay restitution in the amount of \$27,443.20. Howell's conviction was affirmed by this court on appeal.¹ The remittitur was issued on November 7, 2000.

On October 15, 2001, Howell filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition and filed a motion to dismiss the petition. The district court appointed counsel to represent Howell and conducted an evidentiary hearing. On September 12, 2002, the district court denied Howell's petition. This timely appeal followed.

Howell contends that he received ineffective assistance of trial counsel. A criminal complaint was filed on July 1, 1997, charging Howell

¹See Howell v. State, Docket No. 36379 (Order of Affirmance, October 12, 2000).

with burglary. On August 25, 1997, Howell was convicted and sentenced in a Douglas County case, and immediately began serving a term of incarceration; as part of the plea negotiations, Howell agreed to plead guilty to the instant Lyon County burglary case. On March 13, 2000, while still incarcerated, Howell was finally arraigned in the district court for the Lyon County case. On April 24, 2000, Howell pleaded guilty. Howell argues that his right to a speedy trial was violated, and counsel was ineffective by not objecting to or filing a motion to have the charges against him dismissed due to the nearly three-year delay in prosecution. Howell contends that if the instant case had been prosecuted sooner, it would have resulted in a concurrent rather than a consecutive sentence. We disagree with Howell's contention.²

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness; and (2) that but for counsel's deficient performance, the outcome would have been different, and petitioner would not have pleaded guilty and would have insisted on going to trial.³ The court need not consider both prongs of the test set forth in Strickland v. Washington if the petitioner fails to make a showing on either prong.⁴ A district court's factual finding regarding a claim of

²Howell raised several additional arguments below regarding his allegedly deficient trial counsel, however, all but the one discussed herein were abandoned on appeal.

³Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996); see also Hill v. Lockhart, 474 U.S. 52 (1985).

⁴Strickland, 466 U.S. at 697.

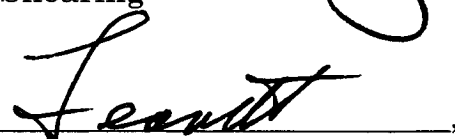
ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.⁵

We conclude that the district court did not err in rejecting Howell's claim. The district court's factual findings are supported by the record and are not clearly wrong. Howell argues that the delay cannot be justified, however, he has failed to demonstrate how he was prejudiced by the delay. At the hearing on the petition, the district court indicated that it would not have ordered concurrent sentences even if Howell had been sentenced immediately for the Lyon County offense. Moreover, Howell cannot demonstrate that a motion to dismiss the charges would have been successful. Therefore, we conclude that Howell was not prejudiced by his allegedly deficient counsel.

Having considered Howell's contention and concluded that it is without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

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

cc: Hon. David A. Huff, District Judge
Law Office of Kenneth V. Ward
Attorney General/Carson City
Lyon County District Attorney
Lyon County Clerk