IN THE SUPREME COURT OF THE STATE OF NEVADA

MITCHELL ALLEN BLASCHE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40942

FILED

JUN 20 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On September 21, 2000, Blasche was convicted, pursuant to a jury verdict, of one count of driving under the influence causing death in violation of NRS 484.3795.[1] The district court sentenced Blasche to serve a prison term of 80-200 months and ordered him to pay a fine of $2,000.00 and $5,000.00 in restitution; he was given credit for 336 days time served. Blasche pursued a direct appeal, and this court affirmed the judgment of conviction and sentence.[2] The remittitur issued on June 13, 2001.

On March 13, 2002, with the assistance of retained counsel, Blasche filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, but conceded that an evidentiary hearing was needed for one of the arguments raised by Blasche. On November 15, 2002, the district court conducted an

[1]The jury found Blasche not guilty of involuntary manslaughter.

[2]Blasche v. State, Docket No. 37140 (Order of Affirmance, May 18, 2001).



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evidentiary hearing; at the end of the hearing, the district court announced that it would take the case under advisement. On January 9, 2003, the district court entered an order denying Blasche's petition in its entirety. This timely appeal followed.

Blasche contends that the district court erred in finding that he did not receive ineffective assistance of counsel during the plea negotiation phase of the proceedings. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that there was a reasonable probability that the outcome would have been different.[3] The court need not consider both prongs of the Strickland test if the petitioner fails to make a showing on either prong.[4] A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.[5] The tactical decisions of defense counsel are "virtually unchallengeable absent extraordinary

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

[4]Strickland, 466 U.S. at 697.

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

circumstances."[6] Further, the right to the effective assistance of counsel also applies "when deciding whether to accept or reject a plea bargain."[7]

First, Blasche contends that counsel provided ineffective assistance by not conveying a plea offer. We disagree. Blasche's trial counsel, James Buchanan, testified at the evidentiary hearing and stated unequivocally that although he could not recall the specifics of the conversation, he discussed all plea offers, including the final plea offer of 2-5 years, with Blasche. On cross-examination, the following exchange took place:

> Q. Would you ever out of hand reject such an offer without consulting with your client?
>
> A. No. I think it's an ethical thing that I have to give the client every offer that's made.
>
> . . . .
>
> A. We discussed the plea. And we discussed the time in jail. And that was his hang up. He didn't want to go to jail. I couldn't get the plea down low enough that we could have got him probation.

Additionally, the prosecutor, Gary Booker, testified at the evidentiary hearing that he made four separate plea offers prior to trial with the last two communicated in the presence of Blasche. Therefore, we conclude that there was substantial evidence to support the district court's finding that counsel was not ineffective in this regard.

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[6]Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691), modified on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

[7]See Larson v. State, 104 Nev. 691, 693 n.6, 766 P.2d 261, 262 n.6 (1988) (citing McMann v. Richardson, 397 U.S. 759 (1970)).

Second, Blasche contends that, assuming the plea offer was in fact conveyed, counsel was ineffective for not providing an opinion or advising him whether to accept the offer.[8] For support, Blasche notes the testimony of Buchanan at the evidentiary hearing: "I make it a practice in my professional work never to come and tell a guy what to do. I give them the options and I let them make the decision." We conclude that the district court did not err in rejecting Blasche's contention.

At the evidentiary hearing, the State specifically asked Buchanan whether he gave Blasche an opinion regarding the plea offer –

> A. I don't know. I would imagine I would. That's what I was paid for. And I worked very closely with the family in this case, with the experts, with Mr. Blasche, in jail and everyplace.
>
> And I would imagine that I gave him the deal. And in fact, his father's in the courtroom, and he and I talked about the deals, about the offers, about the trial, about the witnesses we were going to hire and how expensive it was and everything.
>
> So I'm sure we talked about the alternative here.

Buchanan also testified that he informed Blasche that his potential maximum exposure was 20 years if the case proceeded to trial. Buchanan further stated, "I know it's my practice and my decision and my advice to clients that it's better to take a deal than to go to a jury trial because you never know what a jury is going to do." The district court concluded that Buchanan fully advised Blasche regarding the plea offers and the consequences of proceeding to trial. We conclude that Blasche has failed

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[8]We note that although Blasche did not raise this issue in his petition below, it was argued during the evidentiary hearing and addressed in the district court's order denying the petition. Therefore, we conclude that the issue has been preserved for review on appeal.

to demonstrate that counsel's performance was deficient in this regard, and that the district court's findings are supported by the record and are not clearly wrong.

Third, Blasche contends that counsel was ineffective in preparing a flawed theory of defense, thus rendering his decision to proceed to trial unintelligent. Blasche argues that defense counsel's strategy – to demonstrate that the victim's excessive speed was the sole cause of his death – was not supported by law, and had Blasche been informed of this flawed legal reasoning, he would have pleaded guilty. We conclude that Blasche's contention is without merit.

The district court concluded that counsel was not ineffective because he presented a viable defense. If the jury had determined that the victim was the sole cause of the accident, Blasche could have been exculpated due to the State's failure to prove that he was the proximate cause of the victim's death.[9] Moreover, the State's willingness to enter into plea negotiations and offer a deal demonstrates the strength and viability of the defense. Pursuant to NRS 484.3795(2), the prosecutor could not dismiss the charges relating to driving under the influence causing death in exchange for a guilty plea to a lesser charge "unless he knows or it is obvious that the charge is not supported by probable cause or cannot be proved at the time of trial." Accordingly, the prosecutor testified at the evidentiary hearing that he made four separate plea offers prior to trial, each with less potential exposure, because of his concern for the strength of Blasche's case. Therefore, we conclude that counsel was

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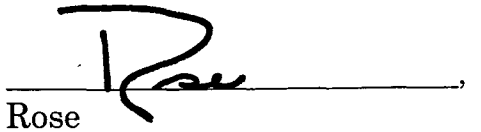
[9]See Etcheverry v. State, 107 Nev. 782, 785, 821 P.2d 350, 351 (1991); see also Williams v. State, 118 Nev. ___, ___, 50 P.3d 1116, 1125, cert. denied, ___ U.S. ___, 123 S. Ct. 569 (2002).

not ineffective and that the district court's finding was supported by the record.

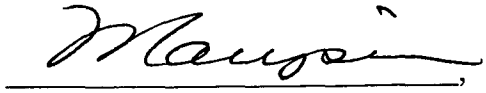
Finally, Blasche contends that "fundamental error" occurred and counsel was ineffective in allowing the prosecutor to participate in two discussions with himself and defense counsel regarding the alleged plea offer. Blasche did not raise this issue in his petition below or provide any argument on the matter during the evidentiary hearing on the petition. We therefore decline to consider this issue.[10]

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

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



_____, J.
Maupin

_____, J.
Gibbons

cc: Hon. John S. McGroarty, District Judge
Alan Burke Andrews
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[10]See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (this court need not consider ground for relief that was not part of original petition for post-conviction relief).