

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD THOMAS QUICK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41031

FILED

JUN 06 2003

ORDER OF AFFIRMANCE

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

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

On August 30, 2001, the district court convicted appellant, pursuant to a guilty plea, of driving under the influence ("DUI") on or about June 25, 2001, with two prior offenses within seven years, a felony. The underlying prior convictions were for a November 1995 felony DUI (third offense) prosecuted in the Second Judicial District Court and a January 2001 misdemeanor DUI prosecuted in Reno Municipal Court ("the RMC prior offense"). At sentencing, the district court admitted evidence of the prior convictions and concluded that each was constitutionally adequate. The court then sentenced appellant to serve a minimum term of twenty-four months to a maximum term of sixty months in prison and to pay a \$2,000.00 fine. Appellant appealed directly from his judgment of conviction, contending that the State breached the plea agreement during the sentencing hearing. This court affirmed the judgment of conviction on January 17, 2002.¹

¹Quick v. State, Docket No. 38558 (Order of Affirmance, January 17, 2002).

On May 3, 2002, appellant filed in the district court a proper person petition for a writ of habeas corpus. The district court appointed counsel, who filed a supplemental petition on appellant's behalf, alleging ineffective assistance of trial and appellate counsel. Appellant claimed that the conviction of the RMC prior offense had been the result of a plea bargain reducing the original charge from a second offense to a first offense. Therefore, appellant argued, his RMC prior offense could not have been treated as a second offense to enhance his current offense to a felony and counsel were ineffective in failing to challenge the enhancement. He relied on this court's previous opinions holding that the use of a second DUI conviction to enhance a conviction for a third DUI offense to a felony is prohibited "where the second conviction was obtained pursuant to a guilty plea agreement specifically permitting the defendant to enter a plea of guilty to first offense DUI and limiting the use of the conviction for enhancement purposes."²

The district court conducted an evidentiary hearing on appellant's petition, and, on January 29, 2003, the court denied relief. This appeal followed.

Appellant argues that the district court erred in rejecting his claims that (1) trial counsel were ineffective in failing to investigate the legality of using his RMC prior offense for enhancement purposes; (2) trial counsel were ineffective in failing to defend against the use of the RMC prior offense to enhance his current offense to a felony; and (3) appellate

²See Speer v. State, 116 Nev. 677, 680, 5 P.3d 1063, 1065 (2000) (citing State v. Crist, 108 Nev. 1058, 843 P.2d 368 (1992); Perry v. State, 106 Nev. 436, 794 P.2d 723 (1990); State v. Smith, 105 Nev. 293, 774 P.2d 1037 (1989)).

counsel was ineffective in failing to raise the issue of improper enhancement based on the RMC prior offense.³ We disagree.

Claims of ineffective assistance of counsel present mixed questions of law and fact and are subject to independent review.⁴ However, a district court's factual findings regarding claims of ineffective assistance of counsel are entitled to deference so long as they are supported by substantial evidence and not clearly wrong.⁵ To prevail on a claim of ineffective assistance of counsel, appellant must establish that counsel's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced the defense.⁶ Because appellant's conviction was the result of a guilty plea, to demonstrate the requisite prejudice, he must show that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."⁷ To sufficiently establish prejudice based on the deficient assistance of

³Appellant also claimed in his petition that ineffective assistance of counsel affected the validity of his guilty plea and that he was unable to form an adequate relationship with counsel due to representation by different counsel at different stages of the proceedings and inadequate time to spend with them. Appellant does not specifically address these points on appeal, and we conclude that he has failed to show any ineffective assistance of counsel on these grounds.

⁴State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

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

⁶Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

⁷Id. at 988, 923 P.2d at 1107 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)) (emphasis omitted).

appellate counsel, appellant must demonstrate that the omitted issue would have had a reasonable probability of success on appeal.⁸

Here, the district court found that appellant presented no credible evidence that trial counsel were unreasonable in advising him to enter a guilty plea despite the existence of a potential defense to use of the RMC prior offense for enhancement and without further investigation of this defense. The court also found that appellant believed that the strategy of forgoing a challenge to the use of the RMC prior offense and entering a guilty plea was in his best interest as it was consistent with his desire to receive the most lenient sentence. The court concluded that no evidence showed that appellant would not have pleaded guilty but for counsel's failure to challenge the use of the RMC prior offense. Substantial evidence in the record, including the evidence of the RMC prior conviction, the transcripts of the court proceedings leading to the felony DUI conviction at hand, and the evidentiary hearing testimony from trial counsel and appellant, supports these findings.

First, the proscription regarding the enhancement use of a prior DUI offense negotiated to a first offense "depend[s] on the existence of a plea agreement limiting the use of the prior conviction for enhancement purposes."⁹ Our review of the record in this case shows that scant evidence was presented below regarding the circumstances leading to the amendment of the RMC prior offense to a first offense. The municipal court minutes reflecting the entry of appellant's plea merely

⁸Id. at 998, 923 P.2d at 1114.

⁹Speer, 116 Nev. at 680, 5 P.3d at 1065; Grover v. State, 109 Nev. 1019, 862 P.2d 421 (1993).

show that the DUI second offense was amended to a first offense and that other driving related charges were dismissed. However, none of the municipal court documents indicate the reason for the amendment, i.e., whether it was part of a plea bargain versus, for instance, an inability to prove the alleged prior offense at the time of the plea. According to appellant's post-conviction counsel, no further record of the plea in municipal court existed at the time of the evidentiary hearing on appellant's petition.¹⁰ Appellant did not present any testimony from counsel who represented him during the municipal court proceedings.

During the proceedings in district court that resulted in the instant felony DUI conviction, appellant was represented by two different attorneys. No testimony was presented from the counsel who first represented appellant during the waiver of preliminary hearing and plea negotiations. Testimony from the counsel who later represented appellant, during the arraignment and sentencing, showed that counsel questioned appellant's chance of success in a defense against use of the prior offense as a second offense. Counsel did not recall appellant claiming that the amendment of the RMC prior offense was part of a plea bargain, but counsel did recall some "complexity" in the issue of whether the plea had been negotiated. Appellant's own testimony at the evidentiary hearing is inconsistent on whether the amendment was a bargained for consideration for his guilty plea. For instance, appellant testified that he informed the first counsel that the RMC prior offense had been "negotiated down to a first, considered a first." However, when asked

¹⁰The district court accepted counsel's representation that any tape recording would have been destroyed after one year from conviction.

whether the RMC conviction was amended due to plea negotiations, appellant testified, "It was reduced to a first DUI with no priors. They had no record of priors, and they considered that a first DUI."

Second, the record shows that appellant made an informed choice to waive the potential defense to enhancement for strategic reasons. Counsel had concluded that appellant could not successfully defend against the new DUI charge. Further, appellant had been convicted of numerous DUI offenses that occurred before the applicable seven-year enhancement period, and counsel testified that he understood that absent a negotiated plea, the State would have sought a maximum sentence. A conviction for felony DUI carries a sentence of one to six years and a fine of \$2,000.00 to \$5,000.00.¹¹ But, in exchange for appellant's agreement to plead guilty and to waive any challenge to the enhancement use of the RMC prior offense, the State had agreed to recommend a minimal sentence of one to two-and-one-half years and a fine of \$2,000.00. A memorandum from the first counsel was read into the record, and it stated, in part:

[P]er this offer from the State, absent a Constitutional problem, I agreed not to dispute the priors. Client informed me that the 2nd DUI he pled to on 1/27 in Reno Muni, he pled to as a first-time DUI. I told him there is some case law which, with appropriate motion, this DUI could possibly be a second, but with this offer from the State he originally wanted to concur we would not dispute the first second-DUI issue on the 1/27 RCM [sic] case. . . ."

¹¹See NRS 484.3792(1)(c).

At the time of the plea canvass in this case, appellant's counsel informed the court that, in exchange for the State's sentencing recommendation, appellant was waiving the potential defense to the use of the RMC conviction for enhancement. Counsel stated, in part, "There is some case law that does disallow [sic] a negotiated first prior to be disputed and not be used for enhancement purposes. . . . It's my understanding that in this case that did not apply, and we are stipulating to that" The court thoroughly canvassed appellant before accepting his guilty plea.

We conclude that the evidence amply demonstrates that appellant, though fully aware of the existence of a potential defense to the enhancement use of the RMC prior offense, made an informed decision to stipulate to the legality of using it as a second offense for enhancement purposes in exchange for the State's lenient sentencing recommendation. It was not unreasonable for counsel to act in furtherance of appellant's choice. Thus, appellant has failed to show that the district court erred in denying appellant's claims of ineffective assistance of trial counsel.¹²

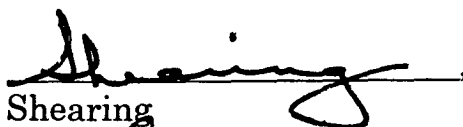
Finally, the district court concluded that appellate counsel acted reasonably in determining not to challenge the use of the RMC prior offense for enhancement. The court relied on the lack of evidence showing that appellant bargained for the amendment of the RMC prior offense to a first offense and on evidence showing that the issue had not been preserved for appeal. We agree with the district court's assessment and


¹²See Krauss v. State, 116 Nev. 307, 310-11, 998 P.2d 163, 165 (2000) (rejecting claim that counsel was ineffective for failing to test validity of prior DUI convictions where defendant indicated he had been represented by counsel when convicted of the prior offenses and asserted desire to proceed at sentencing without disputing evidence of prior offenses).

conclude that appellant failed to show a reasonable probability of success on appeal had the issue been raised.

Having considered appellant's contentions and concluded that they lack merit, we hereby

ORDER the judgment of the district court AFFIRMED.

 J.

 J.
Leavitt

 J.
Becker

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