

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGELA CHRISTINE CADY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41340

ANGELA CHRISTINE CADY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41341

FILED

AUG 13 2003

ORDER OF AFFIRMANCE

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

These are consolidated appeals from a single order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

Appellant pleaded guilty, pursuant to plea agreements in separate district court cases, to a total of two counts of obtaining and using personal identification of another for an unlawful purpose. The district court combined the cases for sentencing purposes.

At the sentencing hearing, the Nevada Division of Parole and Probation ("the Division") recommended consecutive prison terms of 22 to 96 months. The prosecuting deputy district attorney argued for consecutive prison terms of 48 to 120 months. In contrast, appellant's trial counsel argued that if the sentencing court was inclined to follow the Division's recommendation, then the court should impose the sentences to run concurrently. After hearing these arguments, the district court

imposed consecutive prison terms of 36 to 100 months. The district court entered its judgments of conviction on January 29, 2002.

Appellant directly appealed from the judgments of conviction, but subsequently moved to withdraw her appeals. This court granted appellant's motions and ordered her appeals dismissed.¹

On April 18, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel, who filed a supplemental petition on appellant's behalf. The petition and supplemental petition challenge appellant's convictions based on various claims of ineffective assistance of trial counsel. On March 26, 2003, the district court held an evidentiary hearing on appellant's petition, and on April 11, 2003, the court entered its order denying relief. Appellant now appeals from that order.

Pursuant to Strickland v. Washington,² to demonstrate ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that this deficient performance prejudiced the defense.³ The prejudice prong requires a defendant to show a reasonable probability that counsel's

¹Cady v. State, Docket No. 39282 (Order Dismissing Appeal, May 30, 2002); Cady v. State, Docket No. 39284 (Order Dismissing Appeal, March 29, 2002).

²466 U.S. 668 (1984).

³Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996) (citing Strickland, 466 U.S. 668).

errors affected the outcome of the proceedings at issue.⁴ A court may consider the two prongs in any order and need not consider both if the defendant makes an insufficient showing on either one.⁵ On appeal from a district court's determination on a claim of ineffective assistance of counsel, this court will defer to the district court's factual findings, but will independently review questions of law.⁶

Appellant first contends that the district court erred in denying her claims that trial counsel was ineffective at sentencing because counsel argued only for concurrent prison terms and not for a drug treatment diversion program and probation. We disagree.

Appellant's contentions appear to be based on assertions that: she was a drug addict who committed her crimes to feed her addiction; she performed well in the Washoe County Jail HISTEP boot camp program until she was dropped from the program for repeated rule violations; she had no previous criminal convictions;⁷ she initially cooperated with the police by giving statements regarding her involvement in the crimes; and the Division initially considered recommending probation before ultimately determining that terms of incarceration were more appropriate

⁴See id. at 988, 923 P.2d at 1107.

⁵Id. at 987, 923 P.2d at 1107.

⁶Hill v. State, 114 Nev. 169, 175, 953 P.2d 1077, 1082 (1998); Kirksey, 112 Nev. at 987, 923 P.2d at 1107.

⁷We note that the record shows that at the time of sentencing appellant faced outstanding felony and misdemeanor warrants in at least one other jurisdiction.

given the circumstances, including the serious nature of the crimes, their impact on the victims, and the pending felony charges and warrants from other jurisdictions.

In concluding that trial counsel's argument at sentencing did not constitute deficient performance, the district court found that counsel made a reasonable, tactical decision to argue for sentences that he discerned were at the lenient end of the spectrum that the sentencing court might consider. We conclude that the record supports the district court's determination. Trial counsel testified at the evidentiary hearing on appellant's post-conviction petition that, before appellant entered the plea agreements in these cases, counsel approached the prosecuting deputy district attorney regarding a diversion program for appellant. However, the deputy district attorney adamantly refused to support the grant of such a program. Moreover, trial counsel testified that in his opinion there was no realistic hope that the district court would grant appellant the opportunity for a diversion program or probation. Thus, counsel determined that appellant's interests would best be advanced if counsel aimed his sentencing argument at minimizing the terms of imprisonment sought by the State. We conclude that under the circumstances here counsel's tactical decision to advance the argument in favor of concurrent terms was a reasonable one.

We further conclude that appellant has failed to demonstrate that she was prejudiced by her counsel's failure to request more lenient sentences. We note that in orally ruling on appellant's post-conviction petition, the district court judge, who had also been appellant's sentencing judge, stated:

I realize I was the person that sentenced. I realize what I sentenced. I know why I sentenced. And it's something that you must know. I thought at the time of sentencing that you were amok. I thought I could not rehabilitate. I gave a sentence to what I thought fit the crime. I thought it was a horrendous crime. Numerous counts. The plea bargain was very fair from the standpoint of what counts were dismissed. The victim . . . influenced me because of the crime.

In the district court's written order denying appellant's post-conviction petition, the court further stated:

The court . . . finds that this sentencing judge was well aware of the entire range of available options, including diversion and probation. [Trial counsel] provided the sentencing court with the report and recommendation from the [substance abuse counselor]. That report indicated that petitioner was an addict and was amenable to treatment and therefore, pursuant to NRS 458.290 et seq., a diversion program was theoretically available. Thus, the court had all the necessary information to select from all available options. Arguing for a lesser sentence would not have resulted in imposition of a lesser sentence. The court properly considered all available options, not just those mentioned by the attorneys, and selected a just sentence.


Thus, the district court found that the arguments, which appellant contends trial counsel should have made, would not have affected the sentencing determination. The court's factual findings that appellant suffered no prejudice are entitled to deference. Our review reveals no error, and we conclude that appellant is not entitled to relief on her claims related to counsel's argument at sentencing.


Appellant further contends that the district court erred in rejecting her claims that trial counsel was ineffective in failing to advise and assist her in obtaining a better plea bargain and lesser sentences by cooperating with law enforcement efforts to apprehend her accomplices. Appellant's argument lacks merit.

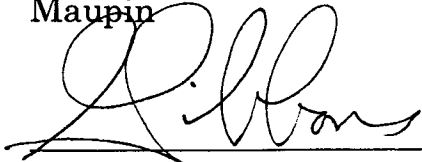
The district court found that appellant failed to support her claims with any showing of prejudice. The testimony adduced at the evidentiary hearing on appellant's post-conviction petition supports the district court's conclusion. Appellant's own testimony showed that she would not have cooperated in the apprehension of her accomplices unless she had a written guarantee of specific benefits in exchange for her efforts. No evidence showed that law enforcement or prosecutors would have been willing to make such a guarantee. To the contrary, the testimony from a supervising member of the prosecution team and from trial counsel showed that, even if law enforcement had been interested in working with appellant to bring her accomplices to justice, this would not have affected the plea negotiations. The prosecuting deputy district attorney agreed to dismiss or not pursue multiple pending or potential charges in exchange for appellant's plea, and his office was not interested in negotiating further benefits for appellant in exchange for her assistance. Trial counsel also testified that appellant showed no interest in providing information merely to show mitigation at sentencing. In sum, appellant failed to demonstrate that she was prejudiced by trial counsel's failure to market her ability to assist law enforcement or advise her in the matter. Accordingly, the district court properly denied appellant's claims.

Having considered appellant's contentions and concluded that they lack merit,⁸ we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

⁸Appellant does not specifically challenge the district court's conclusion that her guilty pleas were constitutionally valid and not affected by any ineffective assistance of counsel. Nor does appellant challenge the district court's denial of the claims, raised in her proper person and supplemental post-conviction petitions, that trial counsel was ineffective in: promising that all felony charges would be dismissed; promising that the court would impose concurrent sentences; threatening appellant that she faced additional charges if she did not plead guilty pursuant to the plea agreements; failing to show that appellant was not the ringleader in the crimes; failing to advise appellant regarding drug treatment diversion; failing to object to the State's filing of separate informations; failing to argue first at sentencing; failing to move for a continuation of sentencing to investigate evidence that would mitigate appellant's boot camp failure; failing to present such mitigating evidence; and generally failing to zealously represent appellant at sentencing. Accordingly, we conclude that appellant has not shown any error arising in connection with the denial of these additional claims.

cc: Hon. Steven R. Kosach, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk