

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD JOSEPH HAMM,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42188

**FILED**

FEB 12 2004

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's post-conviction petition for a writ of habeas corpus.

In the petition, appellant presented claims of ineffective assistance of counsel. The district court found that counsel was not ineffective. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>1</sup> Appellant has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, appellant has not demonstrated that the district court erred as a matter of law.

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<sup>1</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Accordingly, for the reasons stated in the attached order of the district court, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.  
Becker

Agosti, J.  
Agosti

Gibbons, J.  
Gibbons

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

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RONALD L. [unclear] JR.

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE

\* \* \*

RICHARD JOSEPH HAMM,

Petitioner,

v.

Case No. CR01P1622

STEFANIE HUMPHREY, WARDEN,  
WARM SPRINGS CORRECTIONAL CENTER,  
and THE STATE OF NEVADA,

Dept. No. 10

Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND JUDGMENT

This matter came before the court on Hamm's Petition for Writ of Habeas Corpus (Post-Conviction). The court has conducted an evidentiary hearing. The court, now being fully advised of the premises, denies the relief requested.

FINDINGS OF FACT

1. On May 24, 2001, Hamm was arrested and charged with a large number of theft related felonies.
2. Following Hamm's arrest, the Washoe County Public Defender's Office was appointed. Hamm's case was assigned to John Malone.

1 Owing to his training and experience, Malone was well qualified  
2 to represent Hamm.

3 3. After a reasonably complete investigation, Malone advised  
4 Hamm to accept a plea bargain. The plea bargain provided that,  
5 in exchange for Hamm's plea to three counts of burglary (and a  
6 plea to misdemeanor DUI in another case), the State would dismiss  
7 or otherwise not pursue any other charges or enhancements. It  
8 was understood the State could comment upon dismissed charges and  
9 was otherwise "free to argue" for the appropriate sentence. Hamm  
10 accepted the plea bargain.

11 4. On August 9, 2001, Hamm pleaded guilty to the three burglary  
12 counts. The court accepted Hamm's pleas following a thorough  
13 canvass.

14 5. Hamm's case proceeded to sentencing on September 11, 2001.

15 6. Prior to the sentencing hearing, Malone conducted a  
16 reasonably complete investigation designed to uncover mitigating  
17 evidence that would offset or otherwise diminish the impact of  
18 the severity of Hamm's numerous crimes and his extensive and  
19 undistinguished criminal history.<sup>1</sup>

20 a. Following the investigation, Malone concluded the  
21 best strategy would be to offer a favorable substance  
22 abuse evaluation submitted by a local concern known as  
23 Family Counseling Services. The evaluation was

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24  
25 <sup>1</sup>To the extent that Hamm claimed that his present sentence is  
26 based on a material mistake about his criminal record, the court  
finds the claim to be unfounded, or otherwise supported by evidence  
unworthy of belief.

1 submitted by Malone at the sentencing hearing, and the  
2 court took the evaluation into consideration when  
3 fashioning sentence. In conjunction with the  
4 evaluation, Malone would stress Hamm's long term and  
5 heretofore untreated drug addiction and then argue for  
6 concurrent sentences. Malone's theory being that a  
7 concurrent sentence would spell an earlier release for  
8 Hamm and then a quicker placement into the appropriate  
9 drug treatment program. Hamm agreed with this  
10 strategy; Hamm's testimony to the contrary at the  
11 habeas proceeding is not credible. Moreover, Malone's  
12 approach was not unreasonable under prevailing  
13 professional norms.

14 b. At sentencing, Malone did not argue for probation.

15 i. Malone's failure to argue for probation  
16 was not unreasonable under prevailing  
17 professional norms. Further, the court finds  
18 that no reasonably competent attorney, given  
19 Hamm's extensive criminal history, a history  
20 which included failed probations, would have  
21 even mentioned probation.

22 ii. Had Malone argued for probation, there  
23 is no reasonable probability that probation  
24 would have been imposed.

25 c. At the sentencing hearing, Malone did not present  
26 any testimony from Hamm's family members, specifically

1 he did not present the testimony of his mother, father,  
2 aunt or ex-wife.

3 i. The court finds that, had these  
4 witnesses been called at Hamm's sentencing  
5 hearing, each would have testified as he or  
6 she did in the present habeas proceeding.

7 ii. Even if Malone did not contact these  
8 individuals personally and interview them,  
9 his decision to omit the testimony of these  
10 witnesses was not unreasonable under  
11 prevailing professional norms.

12 iii. Had Malone presented the testimony of  
13 these omitted character witnesses, the court  
14 finds that there is no reasonable probability  
15 that a more lenient sentence would have been  
16 imposed.<sup>2</sup>

17 d. Malone did not offer a document titled "Request  
18 for Program" commissioned by Hamm himself and submitted  
19 by the Salvation Army.

20 i. Malone, while being aware of the  
21 Salvation Army document and its contents,  
22

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23 <sup>2</sup>It should be noted that, while the court ordered each of  
24 Hamm's 16-72 month prison terms to run consecutively, Hamm was not  
25 given the maximum sentence. In short, the court finds that,  
26 whether taken alone or in conjunction with other omitted mitigating  
evidence, there is no reasonable probability that a more lenient  
sentence would have been imposed than the sentence already imposed  
in this case.

1           declined to offer it or argue its contents  
2           during the sentencing hearing.

3           ii. Malone's decision to omit the Salvation  
4           Army document was not unreasonable under  
5           prevailing professional norms.

6           iii. Had Malone offered the Salvation Army  
7           document and argued its mitigating value,  
8           there is no reasonable probability that a  
9           more lenient sentence would have been imposed  
10          than the sentence already imposed.

11          e. Whether taken alone or in conjunction with every  
12          other item of mitigating evidence Hamm claimed Malone  
13          failed to offer, there is no reasonable probability  
14          that a more lenient sentence would have been imposed in  
15          this case.

16          7. During the sentencing hearing, the prosecutor referred to  
17          Hamm as a "habitual criminal," even though Hamm was not formally  
18          charged as such.

19          a. Malone did not object to the prosecutor's remark  
20          on any grounds, including that it may have been a  
21          breach of the plea bargain.

22          b. While the plea bargain stipulated the prosecutor  
23          was "free to argue," it also stipulated that he could  
24          mention or comment on all charges which were dismissed  
25          or otherwise not pursued.

26          c. Malone's failure to object to the prosecutor's

1 characterization of Hamm as a "habitual criminal" was  
2 not unreasonable under prevailing professional norms.

3 d. Had Malone objected, on the theory that the  
4 prosecutor's remark breached the plea bargain, the  
5 court would have overruled the objection.

6 8. Following the imposition of sentence, no appeal was pursued.

7 a. Malone did not inform or otherwise advise Hamm of  
8 his right to appeal.

9 b. At no relevant time did Hamm express a desire to  
10 appeal, nor did Hamm inquire about an appeal.

11 c. No event or circumstance transpired at the  
12 sentencing hearing giving rise to a situation in which  
13 Hamm might benefit from receiving advice about an  
14 appeal, including, but not limited to, the existence of  
15 a claim that had a reasonable likelihood of success.

16 i. The appellate claim pressed in the  
17 present habeas proceeding is the claim that  
18 the prosecutor breached the plea bargain.  
19 For the reasons already mentioned, and the  
20 findings already entered, the court believes  
21 that no objectively reasonable counsel would  
22 have believed this claim enjoyed a reasonable  
23 likelihood of success on appeal.

24 ii. Had an appeal been taken from the  
25 judgment of conviction, claiming the  
26 prosecutor breached the plea bargain, the



1 court believes there is no reasonable  
2 probability that the Nevada Supreme Court  
3 would have reversed on that ground.  
4 iii. It is not disputed that Hamm was  
5 "unhappy" with his sentence. Accordingly, to  
6 the extent that Hamm's mere unhappiness  
7 triggered an obligation in Malone to advise  
8 Hamm of his appellate rights, and assuming  
9 Hamm would have insisted on an appeal  
10 challenging the severity of his sentence, the  
11 court finds that Hamm presented no theory in  
12 the habeas proceeding, which, if presented to  
13 the Nevada Supreme Court, would create a  
14 reasonable probability of reversal. The  
15 sentence was well within the statutory range,  
16 it was not based on suspect or impalpable  
17 evidence, it did not shock the conscience,  
18 nor is the statute under which the sentence  
19 was imposed unconstitutional.

20 9. The court has had a full and fair opportunity to review each  
21 of Hamm's claims under both state and federal standards pleaded  
22 in the petition.

#### 23 CONCLUSIONS OF LAW

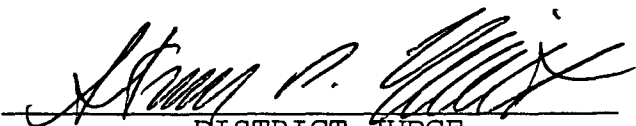
24 Hamm has not been denied his right to the effective  
25 assistance of counsel within the contemplation of Strickland v.  
26 Washington, 466 U.S. 668 (1984) or any of its local progeny.

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JUDGMENT

It is therefore the judgment and order of the court that Hamm's Petition for Writ of Habeas Corpus (Post-Conviction) be, and hereby is, denied.

DATED this 10 day of September, 2003.

  
DISTRICT JUDGE