

IN THE SUPREME COURT OF THE STATE OF NEVADA

D'VAUGHN KEITHAN KING,

Appellant,

No. 74703

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Elizabeth A. Brown
Clerk of Supreme Court

v.

THE STATE OF NEVADA,

Respondent.

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RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. Statement of the Issue

An evidentiary hearing on a post-conviction claim of ineffective assistance of counsel is warranted when the petitioner alleges a claim that demonstrates, by specific facts, that his counsel was deficient under an objective standard of reasonableness and resulting prejudice. King alleged that his counsel was ineffective at the sentencing hearing for failing to present evidence that he was amenable to rehabilitation, that he abused drugs, and that he had ADHD and learning disabilities; but King failed to allege specific facts showing why a reasonable lawyer would have presented

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that evidence in light of the mitigating evidence that his counsel did present. Did the district court properly dismiss King's claim without a hearing?

II. Statement of Facts

This is an appeal from an order dismissing a postconviction petition and supplemental petition for a writ of habeas corpus without a hearing.

After the district court convicted King of second-degree murder with the use of a deadly weapon, pursuant to his guilty plea, this Court affirmed the judgment of conviction on direct appeal. *King v. State*, Docket No. 64983 (Order of Affirmance, November 12, 2014). King filed a timely postconviction petition for a writ of habeas corpus, and appointed counsel filed a supplemental petition (Appellant's Appendix, 82-129) ("AA").

The district court dismissed the petition without a hearing. *Id.* at 141-46. One of King's claims—and the only one he raises on appeal—alleges that his counsel was ineffective at the sentencing hearing for failing to present a Dr. Martha Mahaffey, who would have testified that King was a low risk to reoffend, he was amenable to rehabilitation, and he had ADHD, learning disabilities, and drug abuse issues. *Id.* at 125. The district court dismissed the claim because King failed to make a sufficient showing that his counsel's performance fell below an objective standard of reasonableness. *Id.* at 135.

The district court noted that King's counsel presented mitigating evidence at the sentencing hearing and counsel's approach was reasonable. *Id.* at 135. Because King failed to show that his counsel's approach was unreasonable, the district court dismissed the claim.

III. Summary of the Argument

After King was convicted of second-degree murder with the use of a deadly weapon and this Court affirmed the judgment of conviction, King filed a postconviction petition for a writ of habeas corpus. He alleged his trial counsel was ineffective at the sentencing hearing for failing to present evidence that he was a low risk to reoffend, he was amenable to treatment and rehabilitation, and he had ADHD, learning disabilities, and abused drugs. But King did not plead anything to show that the prevailing professional norms required his counsel to present this type of information, in view of the fact that counsel presented mitigating evidence in the form of family support and certificates of classes he had completed during incarceration. King failed to overcome the presumption that his counsel acted reasonably and that counsel's strategic approach was not reasonable. King also failed to plead specific facts demonstrating his learning disabilities and drug abuse.

IV. Argument

King argues he was entitled to a hearing on his claim that his counsel was ineffective for failing to present mitigating evidence at the sentencing hearing. The State disagrees.

To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432–33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697. An evidentiary hearing is warranted where a petitioner raises a claim supported by specific facts that are not belied by the record and that, if true, would entitle him to relief. *Hathaway v. State*, 119 Nev. 248, 255, 71 P.3d 503, 508 (2003). An evidentiary hearing is not warranted, however, where the petitioner presents bare or naked claims. *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

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Here, King alleged his counsel was ineffective for failing to present mitigating evidence at the sentencing hearing that King was a low risk to reoffend, he was amenable to treatment and rehabilitation, and he had ADHD, learning disabilities, and abused drugs (AA, 125). The district court dismissed the claim, reasoning that King failed to show that his counsel's performance was not reasonable, given that counsel presented King's wife to explain how King "had found a purpose in life and wanted to help prevent people from making the same horrible decisions Petitioner made." *Id.* at 135. The district court observed that, "[p]etitioner's mother, father, and brother traveled from Mississippi and California for the sentencing hearing as well." *Id.* The district court concluded that "[g]iven the circumstances, trial counsel's investigation and presentation of mitigating evidence was reasonable and he did not need to 'investigate every conceivable line of mitigating evidence.'" *Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 522 (2003)).

The district court's order is correct. An analysis of a claim of ineffective assistance of counsel under *Strickland* begins with the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The "defendant must

overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’ ” *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Tactical decisions “are virtually unchallengeable absent extraordinary circumstances.” *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Here, King’s counsel provided mitigating evidence at the sentencing hearing as well as a presentence memorandum, which included certificates of classes that King had completed in jail (State’s Supplemental Appendix, 7-12). King’s wife testified about the change she had seen in her husband, and other family members came from different parts of the country to support King.

King did not overcome the presumption that his counsel’s approach was reasonable. That is, King never explained in his petitions why the failure to present the purported evidence from Dr. Mahaffey amounted to deficient conduct by his counsel according to prevailing professional norms—even if it were new and different evidence. *See Strickland*, 466 U.S. at 688, 690 (the performance inquiry must be whether trial counsel's assistance was reasonable considering all the circumstances and under the prevailing professional norms at the time of the conduct at issue). Additional mitigating evidence can always be uncovered; but counsel does not have a

duty to find every possible piece of such evidence. *See Wiggins*, 539 U.S. at 533 (a thorough investigation is one that is reasonable given the circumstances; counsel is “not require[d] . . . to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.”). King should have pleaded why the approach his counsel took in presenting the mitigating evidence was deficient in relation to the approach King now advances.

Moreover, King failed to specifically describe the evidence that Dr. Mahaffey would have presented. In other words, King did not specify what learning disabilities he had, what his drug abuse was like, and why he was amenable to treatment. *See Hargrove*, 100 Nev. at 502, 686 P.2d at 225 (1984) (noting that a petitioner's allegation that certain witnesses could establish his innocence “was not accompanied by the witness[es]' names or descriptions of their intended testimony” and thus was just a bare or naked claim without any specific factual assertions). Accordingly, the district court properly dismissed King’s postconviction habeas petition without a hearing.

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V. Conclusion

For the foregoing reasons, the Court should affirm the order denying the postconviction petition for a writ of habeas corpus.

DATED: June 1, 2018.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JOSEPH R. PLATER
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Constantia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: June 1, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on June 1, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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