IN THE SUPREME COURT OF THE STATE OF NEVADA

TENNILLE RAE WHITAKER,

Appellant,

vs. CASE NO.83049

THE STATE OF NEVADA,

Respondent.

Appeal From The Fourth Judicial District Court
Of The State of Nevada
In And For The County Of Elko

RESPONDENT'S ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from an Order Denying Petition for Writ of Habeas Corpus filed in case DC-CV-20-69 in the Fourth Judicial District Court of the State of Nevada in and for the County of Elko on April 27, 2021. AA p. 290. There was a subsequent Motion for Reconsideration filed, but this too was denied by a written order filed May 24, 2021. AA p. 319. Thereafter, a Notice of Appeal was filed on May 27, 2021 in the district court. AA p. 323.

Appeals to the Supreme Court from Petitions for Writ of Habeas Corpus are permitted by NRS 34.575. Based upon the above filing dates this appeal appears timely and therefore this court has jurisdiction.

STATEMENT OF ISSUES

I. Whether the district court's order denying Whitaker's Petition for Writ of Habeas Corpus pursuant to NRS 34.810(1)(a) was appropriate in light of a recent Nevada Supreme Court decision.

II. Whether the district court's order denying Whitaker's Petition for Writ of Habeas Corpus without conducting an evidentiary hearing was proper; finding that the original Petition for Writ of Habeas Corpus did not contain sufficient specific factual allegations that if true would entitle Whitaker to relief and were not belied by the

record. Hargrove v. State, 100 Nev. 498, 503 (1984) citing Grondin v. State, 97 Nev. 454, 456 (1981).

III. Whether, after reviewing the entirety of the record available, the district court erred in finding that (1) defense counsel for Whitaker was not ineffective, or fell below an objective standard of reasonableness, or (2) that whatever errors he did make did not prejudice Whitaker in that the result at sentencing would not have been different.

STATEMENT OF THE CASE

Appellant Tennille Rae Whitaker was convicted of 4 counts of Sexual Conduct Between School Employee or Volunteer and a Pupil, Category C felonies as defined by NRS 204.540, by way of a Judgment of Conviction filed October 5, 2018. AA p. 219. Whitaker was sentenced by the Honorable Nancy Porter to serve 24 – 60 months on each count, consecutively, and was not granted probation. Id. At all stages of the proceedings through the Judgment of Conviction she was represented by Byron Bergeron. Id. Whitaker was originally charged with 12 counts of the same crime but by way of a plea agreement she pled no contest to only 4 counts. AA p. 6. Whitaker filed a direct appeal after sentencing. AA p. 225. On appeal she was represented by Karla Butko, her current counsel, in

Nevada Supreme Court Case 77294 wherein the judgment was affirmed in an order filed November 21, 2019 and the Remittitur was filed on February 12, 2020. RA p. 1-4. Thereafter the Petition for Writ of Habeas Corpus was filed on July 28, 2020. AA p. 258. The petition was denied by a written order without an evidentiary hearing and while a Motion for Reconsideration was filed, it was subsequently denied. AA p. 290, 302, 319.

STATEMENT OF THE FACTS

On April 30, 2018 Whitaker entered no contest pleas to the 4 counts referenced above. AA p. 118. Sentencing was set for October 4, 2018. AA p. 134. Prior to sentencing defense counsel filed with the court the psychosexual evaluation conducted by Mr. Ing. AA p. 19. The evaluation is a 14 page document that covers Whitaker's history and present situation, her sexual history and present sexual orientation, a general assessment, a DSM-5 diagnostic impression, recommendations for treatment, risk of dangerousness to the community assessment, and amenability to treatment and a prognosis for said treatment. Id. At the outset of the report Mr. Ing indicates that he has served as the treatment provider for Whitaker since July 5, 2017 which included "...13 one-hour sessions, 7 ninety-minute sessions, and one two hour session..." and her husband has attended some of these sessions with Whitaker. AA p. 20.

Prior to sentencing defense counsel also acquired 14 letters in support for Whitaker and provided those to the court. AA p. 60-76, 89-91. One of those letters is of particular note as it was written by Whitaker's husband. AA p. 62-63. The Presentence Investigation Report was prepared, and as received by the Division, letters from purported victims were also submitted to the Division which were in turn forwarded to the court by the Division. AA p. 77-88, 92-101. The division of parole and probation forwarded the "petition" to the court, it is not file stamped and should be attached to the PSI. Id.

The District Attorney's Office, upon receipt of letters from victims also forwarded them to the court and those are contained in the appendix. AA p.102-112. The District Attorney's office did NOT send the "petition" letter to the court as claimed by Whitaker in her opening brief. AA p. 77-84. The 3 letters that the State forwarded were from 2 family members of victims and a school board member, allowing the court to decide whether the school was a victim. AA p. 102-112. The late filing referenced at the time of sentencing that the State made on October 1, 2018 was a letter from the sister of a victim and was not the "petition." AA p. 109-112, 154-156. The State had received the letter from the sister on the 1st of October and filed it on the 1st, there was nothing nefarious about the filing. Id. All of the

submissions by the State were via filings of 'Notices of Victim Impact' to the court and counsel. AA p. 102-112. There was no ex parte communication with the court as alleged by Whitaker in her opening brief.

At the sentencing hearing all parties were in receipt of the PSI report. AA p. 138-139. Both sides were asked regarding errors or omission in the report and defense counsel went on for some time regarding perceived errors or omissions. AA p. 139-157. During much of the defense counsel's argument about errors he argued about the word "pupil" or "student aide" used throughout the PSI and it was during that interchange with the court that the court asked if he had looked up the legislative history and defense counsel stated, in answer to that pointed question, "No. And there may be a lot I didn't do." AA p. 142. The school at issue is referenced as the Wells Combined School on multiple occasions. AA p. 150, 165-166, 182.

During the sentencing argument defense counsel never once states that he is unprepared to go forward or had suffered an accident. AA p. 157-180. Defense counsel argued that he told Whitaker that she ought to go to trial. AA p. 159, 177. During his lengthy argument defense counsel asks for a break to review his notes. AA p. 160-161. Defense counsel did argue that the young men victims had initiated the contact with Whitaker. AA p. 168. Defense counsel did make argument about the "petition" and told the court

that it was improper and that, in so many words, he was not okay with the "petition." AA p. 174-175. The court responded by stating that the "petition" was "...not influencing me..." Id. Defense counsel did address the issue of the victim who had committed suicide and that it was 20 months later. AA p. 167-168.

There is nothing in the record that reflects that the sentencing hearing was anything other than a well-attended hearing with spectators who were respectful to the courthouse rules; there were no outbursts in the transcript and no record of anyone being removed, singled out specifically or contentious. AA p. 134-218. The State did not violate the plea agreement as alleged by Whitaker in her brief. The State argued for exactly what was allowed under the agreement. AA p. 6-13, 188. The State arguing that defense counsel was not ineffective and thereby requesting that the judgment of conviction be affirmed and the subsequent petition for writ of habeas corpus be denied, which solidifies the sentence of 8-20 that Whitaker received, is not a violation of the plea agreement. Id. The plea agreement states nowhere that the State must during any and all subsequent appeals or the like continue to argue for the 4-12 years maximum but rather clearly states that the agreement applies at sentencing only. Id. at 7.

In the original Petition for Writ of Habeas Corpus there is not a single citation to the record. AA p. 261-273. Further, there are no accompanying affidavits from would be witnesses and in particular not one from Whitaker. AA p. 273-274. The Petition alleges 7 areas that should have been covered more thoroughly at sentencing and with proper preparation of Whitaker and are as follows:

1- Whether Petitioner had deliberately initiated any of the relationships with the young men.

2- Whether Petitioner actually had mental health problems and if so, what they were.

3- Whether Petitioner refused treatment for her mental health problems.

4- Whether the young man Petitioner had sexual relations with who committed suicide around 2 years later did so as a result of his relationship with Petitioner.

5- Whether a significant number of residents in the community of Wells, Nevada feared and opposed Petitioner receiving lenient treatment and returning to the community.

6- Whether the male victims left their residences in and around Wells because of their humiliation at having engaged in sexual behaviors with Defendant.

7- Whether a victim impact statement can properly include the public's point of view about sentencing.

AA p. 263.

The district court in its order denying the writ addressed each of the concerns raised in the writ. AA p. 290.

Lastly, the State questions the inclusion within the appellant's appendix of pages 233-257, they are not a part of the record as far as the State can tell, bearing no district court stamp and are not even referenced in the opening brief.

SUMMARY OF ARGUMENT

1) Pursuant to Gonzales v. State, 137 Nev., Adv. Op. 40 (2021) the district court should not have denied the petition for writ of habeas corpus relying on NRS 34.810(1)(a).

2) The district court did not err in denying Whitaker an evidentiary hearing since her claims were bare or naked allegations unsupported by any references to the record or any affidavits or new evidence. Vaillancourt v. Warden, 90 Nev. 431, 432 (1974).

As her claims are based upon criticizing the way in which the defense counsel at sentencing presented the argument there is no factual dispute and an evidentiary hearing was unnecessary. Furthermore, any facts that may have appeared to be in dispute were repelled by the record even if the information was not portrayed in such a way as writ counsel might have done it.

3) The district court did not err in denying the petition for writ of habeas corpus after reviewing the record, in particular the sentencing transcript, the psi and other documents that were before the sentencing court and then determining that defense counsel did not provide ineffective assistance of counsel at sentencing and furthermore, even if he had presented the sentencing argument as suggested the result would not have been different.

ARGUMENT

I. With regards to the first issue the State concedes that pursuant to the recent Nevada Supreme Court case Gonzales v. State, 137 Nev. Adv. Op. 40 (2021), NRS 34.810(1)(a) is not a bar to the Petition for Writ of Habeas Corpus and thus the writ should not have been denied on that basis.

II. "A defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record."

Hargrove v. State, 100 Nev. 498, 503 (1984) citing Grondin v. State, 97 Nev. 454 (1981). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354 (2002). The original Petition for Writ of Habeas Corpus did not contain sufficient specific factual allegations that if true would entitle Whitaker to relief and the claims that were made, were belied by the record. Hargrove at 503 citing Grondin at 456.

In this case Whitaker is claiming that her defense counsel was ineffective because he did not present the argument or sentencing evidence as she would have liked him to do. However, each of the topics that she complains about was addressed in some form or another the sentencing presentation. Using hindsight as one's guide is both unfair to the attorney of record, but also not the law in determining an ineffective assistance of counsel (IAC) claim.

In deciding IAC claims, "Judicial scrutiny of counsel's performance must be highly deferential," and "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland v. Washington, 466 U.S. 668, 689-690 (1984). As that court explained:

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> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. This is precisely the concern with this case. Whitaker now claims that sentencing arguments should have been done differently even though defense counsel did address each area that she now claims he should have. This is unfair to defense counsel.

For example, Whitaker claims that defense counsel was ineffective for not going further into detail regarding the young man who committed suicide and what was the cause. AA p. 263. What defense counsel did do, was very respectfully approach the issue, note that it occurred 20 months later and argue it more cautiously. AA p. 167-168. This strategy cannot be said to be ineffective and Strickland allows for differing strategies to exist. Strickland at 693. Attacking a victim, a defenseless one in particular, carries with it the concern that the court might take a harder stance against a defendant. It is highly likely that had defense counsel chosen this tack, and

she had received the same sentence, Whitaker would then be arguing that defense counsel should have utilized the soft shoe approach instead. The truth of the matter is that both could be deemed sound strategies.

Other examples include that defense counsel did argue that the young men victims had initiated the contact with Whitaker. AA p. 168. Defense counsel did make argument about the "petition" and told the court that it was improper and that, in so many words, he was not okay with the petition. AA p. 174-175. The court responded by telling everyone that the "petition" was "...not influencing me..." Id. It was not ineffective assistance of counsel to take the sentencing judge at her word, that she would not consider anything that was not a statutory victim impact statement.

Whitaker did have the opportunity to address the sentencing court. AA p. 180-181. There is no evidence that she was bridled or restricted in any way from exercising her right. She chose brevity and sincerity in her remarks. Id. Whitaker now asks for another shot where she would like to speak much longer about a myriad of topics. None of this rises to the level of ineffective assistance of counsel or warrants an evidentiary hearing.

Whitaker was able to produce all manner of evidence regarding her mental health via the evaluation by Mr. Ing who by all accounts appears to be very qualified to render the opinions he did. AA p. 19-39. Whitaker

avers that defense counsel should have obtained an updated report for sentencing since it occurred months later, but Whitaker did not bother to get an updated report to attach it to the Petition to indicate to the court what it might say that would have been so invaluable for the court to consider at sentencing. This is yet another example of the bald assertions contained within the petition that was rightly denied an evidentiary hearing as Whitaker made no effort to put forth any evidence or affidavits. Mr. Ing's report was a comprehensive analysis and it is hard to imagine what he might have said differently in any supplemental and Whitaker doesn't bother to enlighten the court in her petition as to what he might have said.

Defense counsel presented 14 letters in support of Whitaker to include members of her community which addresses the issue of whether a "significant number of residents... opposed Petitioner receiving lenient treatment." AA p. 60-76, 89-91, 263. Noted above, defense counsel did express his disapproval of the "petition" and obtained the court's 'nod' that they would not consider such information. AA p. 167-168, 174-175. The State made no argument in behalf of the "petition" recognizing it as improper and did not provide it to the court. This also addresses the, "whether a victim impact statement can properly include the public's point of view..." and clearly it is not allowed by the statute. NRS 176.015. The

court disregarded it and attributed no weight to it.

To say that the court should have been asked to be recused from the case because of the "petition" goes too far. Courts routinely decipher what is and is not admissible and are able to sift through the evidence provided and disregard that which ought to be disregarded and consider that which ought to be admitted.

> ""The general rule of law is that what a judge learns in his official capacity does not result in disqualification." Goldman, 104 Nev. at 653, 764 P.2d at 1301. In other words, the party asserting the challenge must show that the judge learned prejudicial information from an extrajudicial source. See id.
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> However, an opinion formed by a judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, constitutes a basis for a bias or partiality motion where the opinion displays "a deep-seated favoritism or antagonism that would make fair judgment impossible." See Liteky v. United States, 510 U.S. 540, 114 S. Ct. 1147, 1157, [***48] 127 L. Ed. 2d 474 (1994)."

Kirksey v. State, 112 Nev. 980, 1007, 923 P.2d 1102, 1119 (1996).

Clearly, the sentencing judge learned of the petition through the current proceedings and discerned that they were not appropriate. There is no basis for recusal based on the above and failure of defense counsel to request recusal based on the above case law is not ineffective assistance of counsel. What is more, even if the "petition" reached the judge in a manner deemed outside of the proceedings, the judge manifested no deep-seated favoritism

or antagonism due to it. Defense counsel was not ineffective for failing to object to the judge remaining on the case for sentencing.

Defense counsel called witnesses, two of whom spoke of her marriage and that Whitaker was working through it with her husband. AA p. 195, 199. Again, Whitaker states that defense counsel didn't bring up this fact, but in fact he did through these witnesses. Furthermore, Whitaker seems to have forgotten that one of the 14 letters in support of her was written by her husband. AA p. 62-63. It is stunning in the face of this letter which was provided to the court by defense counsel that Whitaker can claim in her brief, "Perhaps the most devastating failure by trial counsel was his failure to demonstrate to the Court that Ms. Whitaker's husband stood by her..." Appellant's Opening Brief p. 21. As far as her claim that he was willing to move her from the Wells area...that isn't in the letter. AA p. 62-63.

The substance of Whitaker's petition is nothing more than a request that since her first sentencing hearing strategy did not go her way she would like another shot in front of the judge with hopes that if she presents herself differently that perhaps the sentence might be different. She is having buyer's remorse about the strategy employed at sentencing, nothing more. They are baseless claims belied by the record and an evidentiary hearing was not necessary. The district court did not err in denying the writ without

an evidentiary hearing.

III. Finally, the district court did not err after reviewing the petition with no citations to the record, the answer put forth by the State, and the record before the court, and finding that Whitaker had not met her burden for the petition to be granted. Whitaker's defense counsel's performance did not fall below an objective standard of reasonableness. Strickland, at 687-688. With the presumption afforded defense counsel, the reviewing district court had to be deferential in its analysis. Id. at 689-690. Defense counsel chose a strategy at sentencing and used an expert, testifying witnesses, letters in support of the defendant, oral argument, and remarks by the defendant to carry out that strategy. The sentencing district court found the crime outweighed the strategy, nothing more. Whitaker is where she is by her own actions, not because of anything her defense counsel did. The district court addressed her and stated:

> "I'm sorry for your family, your children, your parents. You are their only child. But you did this to these people, to your family, and to the victims, nobody else. You have hurt other peoples' children, not just your own. You are not the victim here. These four boys are the victims here, and their families." AA p. 214.

The record is clear and Whitaker's petition only seeks to readdress at an evidentiary hearing her sentencing arguments with a different spin. The

district court was not required to grant Whitaker an evidentiary hearing under these circumstances. Whitaker's petition therefore must be read to argue that based on the record it was plain on its face that defense counsel was ineffective and that she was therefore prejudiced. The district court did such a review and did not find that defense counsel was ill prepared and the sentencing strategy to be so poorly conceived as to be ineffective or prejudicial. The district court disagreed with Whitaker's assessment of defense counsel for the same reasons that it did not grant the evidentiary hearing above and this court should so affirm that decision.

CONCLUSION

While the district court should not have denied the petition based upon NRS 34.810(1)(a), the petition was properly refused an evidentiary hearing and after a review of the record the petition was appropriately denied as defense counsel was not ineffective and Whitaker was not prejudiced. As a whole, the appeal should be denied and the decision of the district court should be affirmed.

RESPECTFULLY SUBMITTED this 7 day of October, 2021.

TYLER J. INGRAM
Elko County District Attorney

By: _____
Chad B. Thompson
Deputy District Attorney
State Bar Number: 10248

CERTIFICATE OF COMPLIANCE

I hereby certify that this Respondent's Answering 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). This Respondent's Answering Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, in size 14 point Times New Roman font.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Respondent's Answering Brief exempted by NRAP32(a)(7)(C), because it contains 3,816 words.

I hereby certify that I have read the Respondent's Answering 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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7 day of October, 2021.

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CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 4th day of October, 2021. Electronic Service of the Respondent's Answering Brief shall be made in accordance with the Master Service List as follows:

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