

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

APRIL PARKS,  
Appellant,  
vs.  
DWIGHT NEVEN, WARDEN,  
Respondent.

No. 82876-COA

**FILED**

**MAR 04 2022**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING*

April Parks appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Parks argues the district court erred by denying her claims of ineffective assistance of counsel raised in her December 27, 2019, petition and later-filed supplement. Parks also argues the district court erred by conducting an evidentiary hearing only on her appeal-deprivation claim and should have also permitted her to present evidence and testimony concerning her additional claims at that hearing.

To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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*). To demonstrate prejudice regarding the decision to enter a

guilty plea, a petitioner must show a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry—deficiency and prejudice—must be shown, *Strickland*, 466 U.S. at 687, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle her to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Parks claimed her counsel was ineffective for advising her to reject a favorable plea offer. Parks rejected a plea offer that included a stipulated sentence of 8 to 20 years in prison and accepted an offer that permitted the parties to argue for any legal sentence. Parks contended counsel did not provide her with an accurate assessment of the risks and benefits of rejecting the stipulated-sentence offer versus accepting the right-to-argue offer or explain that the State would seek the maximum possible sentences.

“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." *Strickland*, 466 U.S. at 689. Parks claimed counsel should not have advised her to enter a plea before further investigating this matter because counsel was unable to properly assess the risks she faced at sentencing. Parks also claimed counsel should have known that the State would seek, and the sentencing court would impose, a longer sentence, because they wanted to make an example of her given the nature of the offenses and because she initially faced numerous charges.

However, the existence of these factors does not demonstrate that counsel's advice was objectively unreasonable, as there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* The right-to-argue offer permitted Parks to request a lenient sentence based on mitigation information developed to show that Parks was not responsible for much of the criminal activity and did not perform the actions to enrich herself. In light of the circumstances in this case, Parks did not show that counsel's performance fell below an objective standard of reasonableness by advising her to accept the right-to-argue offer.

In addition, at the sentencing hearing, the sentencing court noted the nature of Parks' offenses and the impact her actions had upon the victims, and it stated that it found Parks' crimes to be "downright offensive." The sentencing court also rejected the recommendation in the presentence investigation report that Parks become eligible for parole after she served 64 months in prison. It found that recommendation was not appropriate given the nature of Parks' crimes and instead imposed terms totaling 192

to 480 months in prison. In light of this record, Parks did not demonstrate a reasonable probability the district court would have imposed a sentence of 8 to 20 years in prison had she accepted the stipulated-sentence offer. See *Lafler v. Cooper*, 566 U.S. 156, 163-64 (2012); see also *Missouri v. Frye*, 566 U.S. 134, 147 (2012) (“To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.”). Accordingly, Parks failed to demonstrate a reasonable probability that she would have received a more lenient sentence had counsel offered different advice concerning the plea offers. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing.

Second, Parks claimed her counsel was ineffective for failing to challenge the restitution amount at the sentencing hearing. In the guilty plea agreement, Parks agreed to be responsible for paying more than \$500,000 in restitution for this case and a separate criminal case. At the sentencing hearing, counsel acknowledged that the restitution agreed to in the plea agreement encompassed this case and Parks’ additional case. The sentencing court subsequently imposed restitution in accordance with the guilty plea agreement. In light of the guilty plea agreement, Parks did not demonstrate that her counsel’s performance fell below an objective standard of reasonableness by failing to challenge the restitution amount at the sentencing hearing. Parks also failed to demonstrate a reasonable probability of a different outcome had counsel objected to the restitution amount. Therefore, we conclude that the district court did not err by denying this claim without considering it at the evidentiary hearing.

Third, Parks claimed her counsel was ineffective during the sentencing hearing because counsel failed to object when the State made improper arguments. Parks contends the State improperly asserted that she showed no remorse because she entered an *Alford*<sup>1</sup> plea and that some of the victims did not need guardianship services. Parks also contended counsel should have objected when the State argued that she should receive lengthy prison terms due to the number of charges she faced and when it asserted the Legislature intended to punish Parks' crimes with lengthy prison terms.

Parks did not demonstrate that the State's arguments at the sentencing hearing were improper. In her sentencing memorandum filed prior to the sentencing hearing, Parks contended that other persons had more responsibility for the commission of the crimes than she and asserted that "technically she never even admitted that she committed the specific crimes" for which she was to be convicted of. At the sentencing hearing, the State noted that Parks entered an *Alford* plea and did not admit that she was culpable. In addition, the State argued that some of the victims were not in need of the guardianship services that were provided by Parks. Moreover, the State noted that Parks was charged with numerous offenses but the charges were reduced due to the plea agreement. Finally, the State noted that the Legislature provided for a lengthier prison sentence for the exploitation charges than the theft charges and noted the discrepancy in possible sentences meant that the Legislature intended for lengthier sentences to be imposed for exploitation.

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<sup>1</sup>*North Carolina v. Alford*, 400 U.S. 25 (1970).

The State's arguments were reasonably based upon the facts of the offenses, Parks' sentencing memorandum, and the relevant sentencing statutes. Accordingly, Parks did not demonstrate that her counsel's performance fell below an objective standard of reasonableness by failing to object to the State's sentencing arguments or a reasonable probability of a different outcome had counsel objected. *See Denson v. State*, 112 Nev. 489, 492, 915 P.2d 286 (1996) ("Few limitations are imposed on a judge's right to consider evidence in imposing a sentence . . . . Possession of the fullest information possible concerning a defendant's life and characteristics is essential to the sentencing judge's task of determining the type and extent of punishment."). Therefore, we conclude that the district court did not err by denying this claim without considering it at the evidentiary hearing.

Fourth, Parks claimed her counsel was ineffective for failing to object when the State failed to provide advance notice of the victim impact testimony. This claim is belied by the record because counsel objected to the lack of notice. Accordingly, Parks did not demonstrate her counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel objected to the victim impact testimony based upon lack of notice. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing.

Fifth, Parks claimed her counsel was ineffective for failing to object when victims used pejorative terms when referring to her during their impact testimonies. A sentencing court "is capable of listening to the victim's feelings without being subjected to an overwhelming influence by the victim in making its sentencing decision," *Randell v. State*, 109 Nev. 5,

8, 846 P.2d 278, 280 (1993), and Parks did not demonstrate that the sentencing court relied upon any of the pejorative terms used by the victims when it imposed her sentence. Accordingly, Parks did not demonstrate a reasonable probability of a different outcome had counsel objected to use of pejorative terms during the victim impact testimonies. Therefore, we conclude that the district court did not err by denying this claim without considering it at the evidentiary hearing.

Sixth, Parks claimed her counsel was ineffective for failing to object when the victims did not accurately describe the facts of the offenses during their impact testimonies. Parks contended that the victims misinformed the sentencing court concerning her actions and the sentencing court relied upon that misinformation when it imposed sentence. Parks asserted that, as a result, the sentencing court imposed a lengthier sentence than was warranted.

The district court found that it was the seriousness of the allegations against Parks, rather than any allegedly inappropriate comments by victims, that merited the sentence imposed by the sentencing court. Substantial evidence supports the district court's decision. Counsel filed a lengthy memorandum prior to the sentencing hearing. In that memorandum, counsel offered extensive mitigation information and explained Parks' version of events at length. Counsel also filed letters from Parks' friends and family in which those persons requested leniency from the sentencing court. At the sentencing hearing, counsel also reiterated the mitigation information and asked the sentencing court to impose sentence based only upon Parks' actions and not on actions performed by others. Moreover, the sentencing court made no reference to any specific

statements made by the victims that did not accurately reflect the facts of the offenses. In light of the record in this matter, Parks failed to demonstrate a reasonable probability of a different outcome had counsel objected during the victim impact testimonies. Therefore, we conclude that the district court did not err by denying this claim without considering it at the evidentiary hearing.

Seventh, Parks claimed her counsel was ineffective for failing to argue that her sentence was not reasonable. Parks noted that the presentence investigation report recommended a shorter sentence and a comparison to similar cases shows that Parks' prison sentence is too long. Parks contended that counsel should have pursued a motion for reconsideration of sentence, a motion for new trial, or challenged the sentence on direct appeal.

A motion to reconsider Parks' sentence would not have been an appropriate vehicle for Parks to challenge her sentence. See NRS 34.724(2)(b) (stating a postconviction petition for a writ of habeas corpus "[c]omprehends and takes the place of all other common-law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them"). In addition, Parks did not demonstrate that a motion for new trial was available to her because she entered an *Alford* plea and was not convicted following a trial. See NRS 176.515 (stating the grounds upon which a defendant may seek a new trial). Moreover, "sentencing is an individualized process," *Nobles v. Warden*, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990), and thus, Parks did not demonstrate that her sentence should be reduced because other defendants received shorter sentences. Finally, Parks'



argument regarding direct appeal is addressed below. Accordingly, Parks did not demonstrate her counsel's performance fell below an objective standard of reasonableness by failing to assert that her sentence was not reasonable, or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude that the district court did not err by denying this claim without considering it at the evidentiary hearing.

Eighth, Parks claimed her counsel was ineffective for failing to properly prepare for the sentencing hearing and failing to adequately argue for a lesser sentence. As stated previously, counsel filed a lengthy sentencing memorandum that provided the sentencing court with mitigation information and Parks' version of events. Counsel also filed letters from Parks' friends and family in which those persons requested leniency. Counsel reiterated the mitigation information at the sentencing hearing and urged the sentencing court to impose sentence based only upon Parks' actions. In light of counsel's memorandum and argument at sentencing, Parks did not demonstrate her counsel's performance fell below an objective standard of reasonableness. Parks also failed to demonstrate a reasonable probability of a different outcome had counsel been further prepared or raised different arguments at the sentencing hearing. Therefore, we conclude that the district court did not err by denying this claim without considering it at the evidentiary hearing.

Ninth, Parks claimed her counsel was ineffective for failing to file a notice of appeal after she was sentenced. "[T]rial counsel has a constitutional duty to file a direct appeal in two circumstances: when requested to do so and when the defendant expresses dissatisfaction with his conviction, and that the failure to do so in those circumstances is

deficient for purposes of proving ineffective assistance of counsel.” *Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011). The Nevada Supreme Court has provided guidance as to the second circumstance: “[T]rial counsel has a duty to file a direct appeal when the client’s desire to challenge the conviction or sentence can be reasonably inferred from the totality of the circumstances, focusing on the information that counsel knew or should have known at the time.” *Id.* When considering whether a defendant wished to pursue a direct appeal, courts may consider whether the defendant received a sentence that was bargained for as part of a plea deal and whether the defendant indicated a wish to challenge the sentence within the period for filing an appeal. *Id.* at 979-80, 267 P.3d at 801.

Counsel testified to this issue at the evidentiary hearing and relayed the following information. Counsel met with Parks shortly after she was sentenced. Parks did not request that counsel file a direct appeal, but counsel would have regardless if he thought that Parks wished for him to do so. Parks received lengthier prison terms than either she or counsel expected. They discussed pursuing a motion to modify sentence, but counsel explained to Parks that he did not believe there were legitimate grounds to pursue such a motion. After the meeting but before the time to file a timely direct appeal had run, Parks wrote a letter to counsel asking him about modification of her sentence. Counsel wrote Parks a letter in response, clarifying their previous discussion and noting that counsel had previously explained to Parks that her best option to obtain relief from her sentence was via a postconviction petition for a writ of habeas corpus. Counsel also invited Parks to write to him if she had additional questions, but Parks did not respond to his letter.

The district court concluded that Parks failed to meet her burden to demonstrate that she asked counsel to pursue a direct appeal or that she expressed the type of dissatisfaction with her conviction that would have caused counsel to file a notice of appeal. However, not only did Parks receive a lengthier prison term than she expected, but she indicated both during the in-person discussion and in her letter to counsel that she wished for counsel to challenge her sentence. In light of those factors, we conclude that Parks' desire to challenge her sentence can be reasonably inferred from the totality of the circumstances and, therefore, counsel's failure to file a notice of appeal was unreasonable. Therefore, we conclude that the district court erred by finding that counsel did not have a duty to pursue a direct appeal. Because prejudice for this issue is presumed, the district court erred by denying this claim. Accordingly, we reverse the district court's decision to deny this claim, and we remand this matter to the district court to comply with NRAP 4(c).

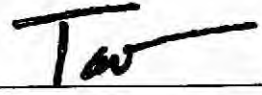
Finally, Parks claimed the district court closed its mind to the presentation of her evidence during the postconviction proceedings because it found that Parks' sentence would not have been altered had she presented additional information at the sentencing hearing. "[The] remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence." *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

The district court stated that it reviewed the information Parks submitted in support of her assertion that her counsel was ineffective during the sentencing hearing. The district court found that Parks did not

demonstrate a reasonable probability that she would have received a shorter sentence had her counsel presented the additional information during the sentencing hearing. The record demonstrates that the district court reviewed and considered Parks' claim and the information she submitted in support of that claim, and therefore, Parks does not demonstrate that the district court closed its mind to the presentation of all of the evidence. Accordingly, Parks is not entitled to relief based upon this claim, and we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Tierra Danielle Jones, District Judge  
Resch Law, PLLC d/b/a Conviction Solutions  
Attorney General/Carson City  
Clark County District Attorney  
Attorney General/Ely  
Eighth District Court Clerk