

IN THE SUPREME COURT OF THE STATE OF NEVADA

VICTOR MILLAN-RODRIGUEZ,  
Appellant,  
vs.  
WARDEN, NEVADA STATE PRISON,  
BILL DONAT,  
Respondent.

No. 57269

**FILED**

**MAY 26 2011**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Victor Millan-Rodriguez's post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

Millan-Rodriguez pleaded guilty to one count each of escape and battery by a prisoner in lawful custody with a deadly weapon. No direct appeal was filed. Millan-Rodriguez filed a timely post-conviction petition and amended petition for a writ of habeas corpus and his appointed counsel filed a supplemental brief in support of the petition. The district court held an evidentiary hearing and entered a detailed 23-page order denying the petition, making specific determinations regarding the credibility of Millan-Rodriguez and his trial counsel, Steve Cochran.

Millan-Rodriguez contends that the district court erred by denying his claims that Cochran was ineffective. "A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review," Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001), but the district court's purely factual findings are entitled to deference, Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004). To

establish a claim of ineffective assistance of counsel where a defendant has entered a guilty plea, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) prejudice, *i.e.*, but for counsel's errors there is a reasonable probability that the defendant would not have pleaded guilty. Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

First, Millan-Rodriguez contends that Cochran was ineffective for failing to file a motion to withdraw his guilty plea after learning that his codefendant, Anthony Hutson, took responsibility for the battery of the victim and admitted that Millan-Rodriguez had no involvement. Cochran testified that Millan-Rodriguez never requested that he file a motion to withdraw the guilty plea, wanted to take responsibility for what he had done, and admitted planning the escape—including the use of any force necessary—and personally striking the victim. Millan-Rodriguez's admissions were supported by testimony at the preliminary hearing and his admission at the change of plea hearing. And Cochran did not become aware that Hutson was taking "full responsibility" for the battery until three years after the entry of the guilty plea when Hutson testified at the evidentiary hearing on Millan-Rodriguez's petition. Under these circumstances, and despite Millan-Rodriguez's youth and lack of education, we conclude that Millan-Rodriguez failed to demonstrate that Cochran was deficient for failing to file a motion to withdraw the guilty plea. Thus, the district court did not err by denying this claim.

Second, Millan-Rodriguez contends that Cochran was ineffective for failing to advise him of his right to a direct appeal or file a direct appeal. Cochran testified at the evidentiary hearing that he

“imagine[d] [he] went over the standard rights discussion that [he] do[es] with every client” and went through the plea agreement, which contained an advisement regarding the right to appeal the conviction, line by line with Millan-Rodriguez. The district court specifically found Millan-Rodriguez’s testimony that he did not remember Cochran mentioning the right to appeal incredible. The district court’s credibility finding is entitled to deference on appeal and we conclude it did not err by determining that Cochran was not deficient in this regard.

Millan-Rodriguez also failed to demonstrate that Cochran was deficient for failing to file an appeal. Millan-Rodriguez’s status as a juvenile, limited ability to read English, and/or incomplete education did not impose a duty on Cochran to file an appeal and Millan-Rodriguez did not allege that he indicated to Cochran that he was dissatisfied with the conviction or asked Cochran to file an appeal on his behalf. See Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1990); see also Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (this court will affirm the decision of the district court if it reaches the right result for the wrong reason). Accordingly, the district court did not err by denying these claims.

Third, Millan-Rodriguez contends that Cochran was ineffective for failing to call his family members to testify at the sentencing hearing and present the forensic evidence and eyewitness testimony in a light favorable to him. Cochran testified that he attempted to call Millan-Rodriguez’s family to testify but their availability was difficult and they were “at the other end of the state.” Cochran described Millan-Rodriguez’s less-than-ideal childhood at sentencing and commissioned and introduced a psychological evaluation which also

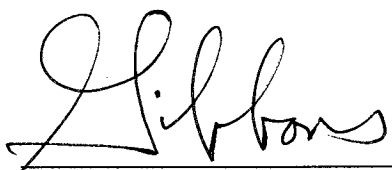
described his childhood. Under these circumstances, Millan-Rodriguez failed to demonstrate that counsel was deficient. Further, the district court determined that the testimony of any family member would have been unlikely to cause it to rule any differently at sentencing. Thus, Millan-Rodriguez also failed to demonstrate any prejudice from this alleged deficiency.

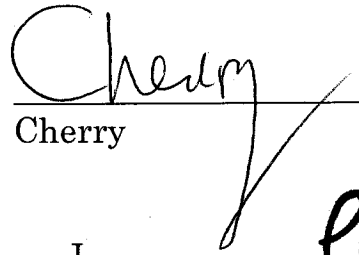
Millan-Rodriguez's claim that Cochran was deficient for failing to present the forensic and eyewitness evidence in a light favorable to him is belied by the record. At sentencing Cochran argued that no testimony indicated that Millan-Rodriguez had personally struck the victim and pointed out that he attempted to tape the victim's wounds after the attack. Thus, the district court did not err by denying this claim. See Reeves v. State, 113 Nev. 959, 962, 944 P.2d 795, 797 (1997) (concluding that the district court did not err by denying post-conviction habeas petitioner's claim that was belied by the record).


Finally, Millan-Rodriguez contends that Cochran was ineffective for not objecting to the district court's questioning at the change of plea hearing. Millan-Rodriguez changed his account of the facts of the offense several times during the plea canvass and the district court's questioning was a proper means of obtaining an admission to ensure that Millan-Rodriguez understood the nature of the charges he was pleading guilty to. See Bryant v. State, 102 Nev. 268, 270, 721 P.2d 364, 366 (1986), limited on other grounds by Smith v. State, 110 Nev. 1009, 1010-11 n.1, 879 P.2d 60, 61 n.1 (1994). Accordingly, the district court did not err by determining that Cochran was not ineffective for failing to object to the canvass.

Having considered Millan-Rodriguez's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

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

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Pickering

cc: Hon. J. Michael Memeo, District Judge  
Belanger & Plimpton  
Elko County District Attorney  
Elko County Clerk