

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM ORLO FILLMORE,  
Appellant,  
vs.  
WARDEN, NEVADA STATE PRISON,  
MICHAEL BUDGE,  
Respondent.

No. 42873

FILED

OCT 06 2004

JANETTE M BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

Appellant was originally convicted, pursuant to a jury verdict, of one count of attempted murder with the use of a deadly weapon. The district court sentenced appellant to a prison term of 32 to 144 months, with an equal and consecutive term for the use of a deadly weapon. The judgment of conviction was entered on November 2, 2001. On appeal, this court affirmed the judgment of conviction.<sup>1</sup>

On May 30, 2003, appellant filed a proper person petition for a writ of habeas corpus. The district court appointed counsel, and after conducting an evidentiary hearing, denied the petition.

In the petition, appellant presented claims of ineffective assistance of counsel. Specifically, appellant argued that: (1) trial counsel failed to raise the issue of appellant's competency; (2) trial counsel failed to call witnesses or present mitigating evidence at sentencing; (3) trial counsel failed to have appellant testify; (4) trial counsel failed to properly

---

<sup>1</sup>Fillmore v. State, Docket No. 38820 (Order of Affirmance, November 5, 2002).

investigate the case; (5) trial counsel failed to move for a mistrial when one of the State's witnesses commented on appellant's post-arrest silence; (6) trial counsel failed to object to the improper enhancement of his sentence for the use of a deadly weapon; and (7) appellate counsel failed to raise issues on direct appeal.

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>2</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.

Appellant also argued in the petition that: (1) his sentence was illegal because it was improperly enhanced;<sup>3</sup> (2) NRS 193.165 is unconstitutionally vague; and (3) the cumulative effect of prosecutorial misconduct warrants reversal. These claims could all have been raised on direct appeal and the district court therefore correctly denied the petition as to those claims.<sup>4</sup>

---

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


<sup>3</sup>As to this issue, counsel for appellant states, "Fillmore's analysis in his pro per post conviction petition in District Court is compelling. See AA, page 207-222. The analysis and supporting authorities is incorporated herein by reference." Counsel is reminded that NRAP 28(e) specifically prohibits such incorporation by reference.

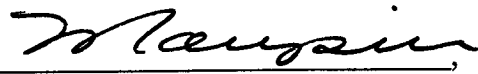
<sup>4</sup>NRS 34.810(1)(b)(2); see also, Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (holding that direct appeal claims not raised on direct appeal are waived in subsequent proceedings), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

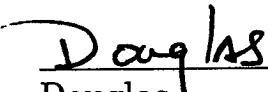
Finally, appellant argued in his petition that: (1) improper comments were admitted regarding his post-arrest silence; (2) the district court erred by allowing prior bad act evidence; and (3) there was insufficient evidence to support the verdict. These issues were raised and considered on direct appeal. They are thus barred by the doctrine of the law of the case.<sup>5</sup>

Having concluded that the district court did not err by denying the petition, we

ORDER the judgment of the district court AFFIRMED.<sup>6</sup>

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

---

<sup>5</sup>Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

<sup>6</sup>Although this court has elected to file the appendix submitted, it is noted that it does not comply with the arrangement and form requirements of the Nevada Rules of Appellate Procedure. See NRAP 3C(e)(2); NRAP 30(c); NRAP 32(a). Specifically, the documents in the appendix are not arranged in chronological order. Additionally, the petition itself and the supplemental points and authorities are inexplicably not presented in their entirety in one place in the appendix. Rather, portions of those documents are included in three different sections of the appendix. Counsel is cautioned that failure to comply with the requirements for appendices in the future may result in the appendix being returned, unfiled, to be correctly prepared. See NRAP 32(c). Failure to comply may also result in the imposition of sanctions by this court. NRAP 3C(n).

cc: Hon. J. Michael Memeo, District Judge  
Matthew J. Stermitz  
Attorney General Brian Sandoval/Carson City  
Elko County District Attorney  
Elko County Clerk