

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID CHARLES ADAMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43467

FILED

JAN 24 2005

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court denying appellant David Adams' post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On September 27, 2000, the district court convicted Adams, pursuant to a jury verdict, of two counts of trafficking in a controlled substance. The district court sentenced Adams to serve one prison term of 10 to 25 years and a second concurrent prison term of 10 years to life. This court affirmed Adams' judgment of conviction on direct appeal.¹ The remittitur issued on October 9, 2001.

On August 7, 2002, Adams filed a proper person post-conviction petition for a writ of habeas corpus. The district court

¹Adams v. State, Docket No. 36930 (Order of Affirmance, September 12, 2001).

appointed counsel to represent Adams, conducted an evidentiary hearing, and on June 8, 2004, denied Adams' petition. This appeal follows.²

Adams raises three claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate "(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense."³ "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one."⁴ To demonstrate prejudice, "the defendant must show a reasonable probability that, but for counsel's

²Adams' post-conviction counsel indicates in the opening brief that she is under the impression that this court retains the trial transcripts after considering a case on direct appeal and that it was therefore unnecessary to provide this court with those transcripts in the instant post-conviction appeal. Counsel is incorrect. NRAP 10(b) provides that for purposes of the appeal, the parties must submit copies of the trial court record to be used on appeal, including previously prepared transcripts, as appendices to their briefs. It is appellant's counsel's responsibility to provide the materials necessary for this court's review of the appeal. See Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975). Although appellant's counsel submitted an insufficient appendix, the State provided this court with an appendix containing the trial transcripts that were referenced in appellant's brief and necessary for this court's resolution of this appeal.

³Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

⁴Id. (citing Strickland, 466 U.S. at 697).

errors, the result of the trial would have been different."⁵ Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact and is therefore subject to independent review.⁶ However, the "purely factual findings of an inferior tribunal regarding a claim of ineffective assistance are entitled to deference on subsequent review of that tribunal's decision."⁷

First, Adams claims that trial counsel was ineffective for failing to subpoena Susan Birch's bank records because the records would have shown that Birch, Adams' girlfriend, was the real trafficker. He contends that had the jurors been provided with the suspicious bank records, they would have been inclined to acquit him of the drug trafficking count that was based on the drugs found in the motel room where he was staying. However, the district court found that trial counsel's "failure to uncover Birch's financial situation was not unreasonable" and that even if trial counsel had uncovered the omitted information and presented it at trial there was no reasonable probability of a different outcome. During the post-conviction evidentiary hearing, Adams' trial counsel testified that he understood the source of Birch's

⁵Id. at 988, 923 P.2d 1107 (citing Strickland, 466 U.S. at 694); see also Riley v. State, 110 Nev. 638, 648, 878 P.2d 272, 279 (1994) ("Prejudice in an ineffective assistance of counsel claim is shown when the reliability of the jury's verdict is in doubt.").

⁶Riley, 110 Nev. at 647, 878 P.2d at 278.

⁷Id.

money to be an inheritance, he did not talk to Birch about her income, and he did not believe Birch's bank records had any relevance in this case which was based on possession of trafficking amounts of drugs.⁸ Assuming the documents had been admitted at trial, Adams was unable to prove that Birch made the deposits recorded on the documents or that the money deposited in the accounts came from drug trafficking. Moreover, this evidence would not have proven that Adams did not possess the drugs found in the motel room. The district court's factual findings are supported by substantial evidence and, therefore, are not clearly wrong.

Second, Adams claims that trial counsel was ineffective for failing to call Susan Birch as a corroborating witness to testify about the true ownership of the drugs found in the truck driven by Adams. The district court found that trial counsel "conducted a reasonably complete investigation of the underlying facts of each count, including . . . whether the drugs Adams was alleged to possess were actually the property of a third party." During the post-conviction evidentiary hearing, trial counsel testified that he investigated the ownership of the truck and the ownership of the drugs found in the truck's console. He was able to establish that Craig Raleigh was the owner of the truck, but was unable to establish that someone else had possession of the drugs or that Adams did not know about the drugs. Trial counsel acknowledged that one of his investigators informed him that Birch witnessed Fred Chapman searching for drugs in the back of the truck. However, trial counsel stated that he

⁸See NRS 453.3385.

had no reliable evidence that the drugs in the console belonged to Chapman and he did not believe he could make a compelling argument to a jury that someone else left the drugs in the truck. Trial counsel's testimony demonstrates that the district court's factual findings are supported by substantial evidence and, therefore, are not clearly wrong. Moreover, we conclude that Adams failed to demonstrate a reasonable probability that the trial result would have been different if trial counsel had called Birch to testify as a corroborating witness.

Third, Adams claims that trial counsel was ineffective because he incorrectly advised Adams as to what constitutes substantial assistance under NRS 453.3405. He contends that trial counsel told him that the only way he would be found to have provided substantial assistance was if he provided the authorities with an amount of controlled substance equal to or greater than the amount described in the three counts with which he was charged. However, the district court found that Adams' failure to provide substantial assistance was not attributable to trial counsel's actions or inactions. During the evidentiary hearing, trial counsel testified that he explained to Adams the district attorney's offer to stipulate to probation in exchange for a plea of guilty to one count of level three trafficking and substantial assistance leading to controlled substances equal to the amount found in this case. Trial counsel stated that he advised Adams that the district attorney's offer did not limit Adams' ability to provide other substantial assistance and that the judge could consider any efforts Adams made to assist law enforcement. And trial counsel asserted that he created an opportunity for substantial

assistance by putting Adams and law enforcement together and that it was Adams' responsibility to effect the substantial assistance. Sergeant Detective Chad Hawkins testified that he advised Adams of statutory prerequisites for substantial assistance and told Adams to contact him anytime he wanted to talk about substantial assistance. Adams never contacted Hawkins. Adams testified that he pointed out two houses to Hawkins that were associated with drug activity. However, Adams does not claim that he provided substantial assistance; he merely states that he could have provided substantial assistance if he had known that helping officers find a lesser amount of drugs could qualify as substantial assistance. The testimony of trial counsel, Hawkins, and Adams demonstrates that the district court's factual findings are supported by substantial evidence and are not clearly wrong.

Having concluded that Adams has failed to demonstrate that the district court erred in denying his post-conviction petition for a writ of habeas corpus, we

ORDER the judgment of the district court AFFIRMED.

Becker, C.J.
Becker

Rose, J.
Rose

Hardesty, J.
Hardesty

cc: Hon. Connie J. Steinheimer, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk