

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRENT DIRDEN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43588

**FILED**

JAN 12 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant Trent Dirden was convicted, pursuant to a jury verdict, of one count of second-degree murder with the use of a deadly weapon. The district court sentenced Dirden to serve two consecutive prison terms of 10 to 25 years. Dirden appealed, and this court affirmed the judgment of conviction.<sup>1</sup> The remittitur issued on November 19, 2002.

On November 13, 2003, Dirden filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district court appointed counsel to represent Dirden, and counsel supplemented the petition. Without conducting an evidentiary hearing, the district court denied the petition. Dirden appealed, and this court remanded the matter to the district court for an evidentiary hearing on Dirden's allegation that trial counsel was ineffective for failing to challenge the prosecutor's explanation for striking a Hispanic juror from

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<sup>1</sup>Dirden v. State, Docket No. 39537 (Order of Affirmance, October 23, 2002).

the venire.<sup>2</sup> After conducting the evidentiary hearing, the district court denied the petition. Dirден filed this timely appeal.

Dirден contends that the district court erred by rejecting his claim that trial counsel was ineffective for failing to adequately challenge the peremptory strike of a Hispanic juror.<sup>3</sup> In particular, Dirден alleges that trial counsel should have argued that the prosecutor's justification for the peremptory challenge -- namely, that the juror was obese like Dirден -- was pretextual because there were other similarly-situated Caucasian, overweight people on the jury who were not challenged.<sup>4</sup> Dirден argues that the fact that the only person challenged due to weight was Hispanic proves Dirден's claim that the juror was excluded based on her race. We conclude that Dirден's contention lacks merit.

In this case, after hearing testimony from the prosecutor and trial counsel, the district court found that trial counsel was not ineffective,

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<sup>2</sup>See Dirден v. State, Docket No. 43588 (Order of Remand, June 2, 2005).

<sup>3</sup>See Batson v. Kentucky, 476 U.S. 79 (1986). Dirден also contends that his constitutional rights were violated because the jury selection process resulted in minorities being systematically excluded and underrepresented. We decline to consider Dirден's contention because he waived his right to raise this issue by failing to pursue it on direct appeal. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) ("claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings"), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

<sup>4</sup>See U.S. v. Joe, 928 F.2d 99, 102 (4th Cir. 1991) ("If the government offers explanations [for a peremptory challenge] that are facially neutral, a defendant may nevertheless show purposeful discrimination by proving the explanations pretextual.").

under the standard enunciated in Strickland v. Washington,<sup>5</sup> for failing to adequately challenge the peremptory strike of a Hispanic juror. We conclude that the district court's finding is supported by substantial evidence.<sup>6</sup> In particular, prosecutor Marc Digiacommo testified at the post-conviction hearing that he challenged the Hispanic juror for a race-neutral reason -- namely, because he believed that she would be overly sympathetic to Dirden because they were both morbidly obese.<sup>7</sup> Digiacommo denied challenging the Hispanic juror based on race, testifying that (1) he did not know the challenged juror belonged to a suspect class at the time he made the peremptory challenge because she was light-skinned; (2) there were other non-Caucasian jurors seated on the jury who were not challenged; and (3) there were no other similarly-situated, severely overweight Caucasian people on the jury.

Additionally, trial counsel Peter Christiansen testified at the post-conviction hearing that, at the time he objected to the peremptory challenge, he did not believe the prosecutor was systematically trying to exclude people of a suspect classification from the jury, but only objected to preserve the record. Christiansen explained:

[I]t may have been the first preempt, or early on and there had not been the pattern of, you know, directed preempts at either a gender or an

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<sup>5</sup>466 U.S. 668 (1984).

<sup>6</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).


<sup>7</sup>See Purkett v. Elem, 514 U.S. 765, 768 (1995) (The prosecutor's explanation for the race-neutral peremptory challenged does not need to be "persuasive, or even plausible"); Hernandez v. New York, 500 U.S. 352, 360 (1991) ("Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.").


ethnicity, but I was trying to make the record so if [the prosecutor] continued it . . . [if the prosecutor] were to kick another ethnic person or female [from the jury] that I could have made a further record that there was a pattern.

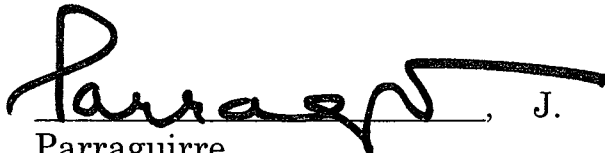
In light of the substantial testimony that the prosecutor's peremptory challenge was race-neutral, the district court did not err in finding that trial counsel was not ineffective in failing to argue the prosecutor's explanation for the peremptory challenge was pretextual. Accordingly, the district court did not err in denying the petition.

Having considered Dirden's contention and concluded that it lacks merit, we

ORDER the judgment of the district court AFFIRMED.

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

 \_\_\_\_\_, J.  
Becker

 \_\_\_\_\_, J.  
Parraguirre

cc: Honorable Jackie Glass, District Judge  
Law Office of Betsy Allen  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk