

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM E. FERGUSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43662

**FILED**

MAY 04 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
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; Valorie Vega, Judge.

On May 19, 1999, appellant William E. Ferguson was convicted, pursuant to a jury verdict, of one count each of burglary and grand larceny. The district court sentenced Ferguson to serve two consecutive prison terms of 24 to 72 months. Ferguson filed a direct appeal, and this court dismissed the appeal.<sup>1</sup> The remittitur issued on July 11, 2000.

On November 21, 2000, Ferguson filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district declined to appoint counsel to represent Ferguson. The district court conducted an evidentiary hearing without Ferguson being present, and then denied the petition. Ferguson appealed, and this court reversed and remanded the case to a different district court judge,

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<sup>1</sup>Ferguson v. State, Docket No. 34287 (Order Dismissing Appeal, June 13, 2000).

concluding that the hearing was conducted in violation of Ferguson's statutory rights.<sup>2</sup>

On remand, Ferguson filed an amended proper person post-conviction petition. The district court appointed counsel to represent Ferguson, and counsel supplemented the petition. The State opposed the petition, and Ferguson filed a reply to the State's opposition. The district court conducted an evidentiary hearing and, thereafter, denied the petition. Ferguson filed this timely appeal.

On appeal, Ferguson raises five allegations 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 that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors prejudiced the defense.<sup>3</sup> To establish prejudice based on the deficient assistance of trial counsel, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the outcome of the trial would have been different.<sup>4</sup>

First, Ferguson claims that his trial counsel, Jim Gubler, was ineffective for failing to advise him of the negative consequences of rejecting the plea agreement. Ferguson contends that his trial counsel

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<sup>2</sup>Ferguson v. State, Docket No. 37679 (Order of Reversal and Remand, August 22, 2002) (citing Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (2002)).

<sup>3</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>4</sup>Strickland, 466 U.S. at 694.

only visited him one time in jail, and he "did not receive the kind of meaningful discussions and explanations that are required under the Sixth Amendment for him to have a full appreciation of the plea bargain before rejecting it." We conclude that Ferguson's contention lacks merit.

Ferguson was originally charged with burglary, grand larceny, and possession of a credit card without the cardholder's consent in connection with a purse-snatching occurring in a Las Vegas casino. Prior to trial, Ferguson unconditionally waived his right to a preliminary hearing and agreed to plead guilty to one count of possession of a credit card without the cardholder's consent in exchange for the State's promise to dismiss the remaining charges. Thereafter, Ferguson changed his mind, rejected the plea bargain and proceeded to a jury trial on the original charges.

At the post-conviction hearing, trial counsel testified that he met with Ferguson numerous times and advised him of the consequences of not accepting the State's plea offer. Additionally, trial counsel advised Ferguson that he should accept the plea and warned him that the trial judge had a reputation for imposing harsh sentences. Despite trial counsel's advice, Ferguson was dissatisfied with the plea bargain and decided to go trial. Although Ferguson testified that his trial counsel failed to discuss the plea bargain with him, the district court found trial counsel's testimony to the contrary more credible. Ferguson has failed to show that the district court's finding that trial counsel provided effective

representation with regard to the plea negotiations was not supported by substantial evidence or clearly wrong.<sup>5</sup>

Second, Ferguson claims that his trial counsel was ineffective for failing to argue that the search of Ferguson conducted by a casino security officer in the casino bathroom violated the Fourth Amendment of the United States Constitution. The search was initiated when two casino security officers observed two individuals quickly enter the casino and go directly to the restroom. The security officer believed that the men were acting suspiciously and called for another security officer to assist him. After the first man exited the restroom, the security officers questioned the man and then asked him to leave the casino premises because he had no identification. The security officers then entered the restroom to confront the second man. They peeked through the crack in the restroom stall and peered over the top of the stall, observing a man later identified as Ferguson going through a woman's purse and placing cash in his pockets. At that point, Ferguson was detained and the police were notified.

The district court found that a challenge to the search by casino security would not have been successful because casino security officers are not state agents and, thus, are not subject to the constitutional restraints that govern the conduct of police officers. The district court did not err in so ruling. This court has recognized that the Fourth Amendment is inapplicable to searches or seizures conducted by a private

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<sup>5</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

individual who is not acting as an agent of the government.<sup>6</sup> Moreover, this court has also concluded that two casino supervisors who questioned a defendant were "not officers of the law nor their agents."<sup>7</sup> Because the casino security officer that detained Ferguson was not an agent of the government, Ferguson's challenge to the legality of the search would have been rejected. Accordingly, Ferguson cannot show that he was prejudiced by trial counsel's failure to challenge the legality of the search and seizure.

Third, Ferguson claims that his trial counsel was ineffective for failing to challenge the overly suggestive show-up identification of Ferguson. We conclude that Ferguson's contention lacks merit.

The applicable standard for pretrial identifications is whether, considering the totality of the circumstances, "the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law."<sup>8</sup> This court analyzes this issue in a two-step inquiry: (1) whether the procedure was unnecessarily suggestive; and (2) whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure.<sup>9</sup> The relevant factors for determining whether an identification is reliable include: "the witness' opportunity to

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<sup>6</sup>State v. Miller, 110 Nev. 690, 696, 877 P.2d 1044, 1048 (1994) (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

<sup>7</sup>Schaumberg v. State, 83 Nev. 372, 374, 432 P.2d 500, 501 (1967).

<sup>8</sup>Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) (quoting Stovall v. Denno, 388 U.S. 293, 301-02 (1967)).

<sup>9</sup>Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 550 (1990).

view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."<sup>10</sup>

Here, shortly after the robbery, the victim was transported to the casino where Ferguson was detained and, during the course of a one-on-one show-up, identified him as one of the men who stole her purse. Even assuming that the identification was suggestive, a motion to suppress the identification evidence would have been denied because the identification was reliable. The identification occurred shortly after the crime occurred, and there is no evidence in this case that the victim was uncertain with respect to the identification. Moreover, we note that, at trial, defense counsel thoroughly cross-examined the victim with respect to the one-on-one show-up, thereby exposing any deficiencies in the procedure to the jurors charged with evaluating the weight and credibility of such testimony. Finally, the State presented other evidence in support of Ferguson's convictions, including testimony that Ferguson was found in a neighboring casino shortly after the crime occurred with the victim's purse and cash in his possession. Accordingly, we conclude that Ferguson failed to demonstrate that he was prejudiced by counsel's failure to challenge the show-up identification.

Fourth, Ferguson claims that his trial counsel was ineffective for failing to properly investigate and prepare for trial. In particular, Ferguson contends that his counsel failed to interview him, ascertain the

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<sup>10</sup>Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980).

identity of the second man involved in the purse-snatching, perform a background check on the security guards, and subpoena the casino surveillance tapes. We conclude that his contention lacks merit.

At the post-conviction hearing, trial counsel testified that he discussed the nature of the case with Ferguson, including possible defenses. Trial counsel explained that the defense theory at trial was that Ferguson merely found that abandoned purse after it was stolen and was not the one who took it from the victim. Trial counsel also explained that he had the assistance of an investigator who went to the casino property and spoke to the casino security guards. Although trial counsel did not specifically recall whether the investigator prepared a written report, trial counsel testified that he reviewed the entire case file prior to trial, as well as the State's discovery in the case. The prosecutor testified at the post-conviction hearing that the State's discovery file included a casino surveillance videotape, but no videotape existed showing the individuals who took the purse from the victim. Ferguson has failed to show that further investigation or trial preparation would have uncovered exculpatory evidence that would have changed the outcome of the trial. Accordingly, the district court did not err in rejecting Ferguson's claim that his trial counsel was ineffective for failing to investigate.

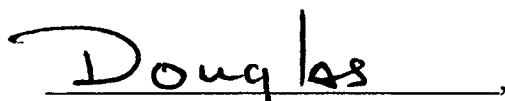
Finally, Ferguson claims that his trial counsel was ineffective for failing to prepare for the sentencing hearing. In particular, Ferguson contends that trial counsel "did not do anything to provide mitigating factors at sentencing such as employment [or] check for favorable letters of recommendation on behalf of client."

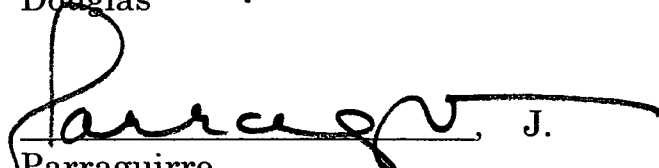
At the post-conviction hearing, trial counsel testified that he reviewed the presentence investigation report with Ferguson to determine whether there were any necessary deletions or corrections. Although trial counsel admitted that he did not discuss the possibility of presenting mitigating evidence with Ferguson, Ferguson failed to establish that he was prejudiced by counsel's failure to do so. Ferguson did not identify with adequate specificity the mitigating evidence that should have been presented at sentencing.<sup>11</sup> Accordingly, the district court did not err in rejecting Ferguson's contention.

Having considered Ferguson's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Maupin

 J.  
Douglas

 J.  
Parraguirre

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<sup>11</sup>Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).



cc: Hon. Valorie Vega, District Judge  
Dan M. Winder  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk