

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARSHALL BURGESS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45659

**FILED**

**FEB 23 2006**

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge. Appellant Marshall Burgess pled guilty to robbery with use of a deadly weapon and trafficking in a controlled substance. Burgess was sentenced to a prison term of 48-156 months for the robbery count, with an equal and consecutive term for the use of a deadly weapon. On the trafficking count, Burgess was sentenced to a consecutive prison term of 35-156 months. Burgess appealed, and this court affirmed the judgment of conviction.<sup>1</sup>

Burgess filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent Burgess, and counsel filed a supplement to the habeas petition. The State filed a motion to dismiss the petition, alleging it was not properly verified as required by NRS 34.730. Burgess filed a reply to the State's motion to dismiss the petition. The district court summarily dismissed the petition, ruling that Burgess had failed to file a properly verified petition within the

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<sup>1</sup>Burgess v. State, Docket No. 38050 (Order of Affirmance, August 24, 2001).

one-year time period set forth in NRS 34.726. On September 4, 2003, this court reversed and remanded the matter, directing the district court to consider the claims in both petitions on the merits.<sup>2</sup> On August 18, 2004 and March 10, 2005, the district court held an evidentiary hearing. On July 6, 2005, the district court denied Burgess' habeas petition on the merits.

Burgess contends the district court abused its discretion in denying his claim of ineffective assistance of counsel and therefore his convictions must be overturned.<sup>3</sup> Burgess testified at the evidentiary hearing, that his counsel was hostile, used profanities and racial slurs towards him. Further, Burgess testified counsel promised if the case went to trial he would "wave his ass bye bye." Burgess contends that when the district court failed to appoint new counsel for him, he was forced to choose between incompetent counsel and no counsel at all.

"[W]hen a guilty plea is challenged for ineffective assistance, the defendant must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going

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<sup>2</sup>Burgess v. State, Docket No. 41358 (Order of Reversal and Remand, September 4, 2003).

<sup>3</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)(vi); Specifically, counsel failed to provide any pinpoint citation in the fast track statement. 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).

to trial."<sup>4</sup> Burgess has not insisted he would have went to trial. Additionally, Burgess made admissions he committed the crime to obtain drugs. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced the defense.<sup>5</sup> Burgess satisfied neither prong of Strickland v. Washington.<sup>6</sup>

During the plea canvass, Burgess made no mention of his dissatisfaction with his attorney. Burgess stated he had enough time to discuss the evidence and possible defenses. Burgess indicated he had previous experience with the court system. Although Burgess wrote letters to the court expressing his displeasure with his attorney, he never verbalized his concerns to the court during his plea canvass. At sentencing, Burgess apologized to the victim, and he acknowledged involvement in the crime. Burgess further received the benefit of dismissal of two counts of armed robbery and one count of possession of stolen property in exchange for his plea of guilty.

Burgess also complained his counsel would not communicate and would use profanity and racial slurs. The record belies this assertion by Burgess.<sup>7</sup> The district court found Burgess' credibility to be lacking in support of his contention. "[P]urely factual findings of an inferior tribunal

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<sup>4</sup>Kirksey v. State, 112 Nev. 980, 994, 923 P.2d 1102, 1111 (1996).


<sup>5</sup>See Strickland v. Washington, 466 U.S. 668 (1984); accord Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>6</sup>466 U.S. 668 (1984).

<sup>7</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

regarding a claim of ineffective assistance are entitled to deference on subsequent review of that tribunal's decision."<sup>8</sup> Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.<sup>9</sup> For all these reasons, we

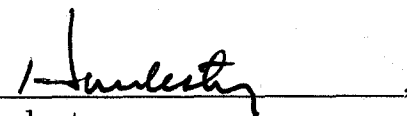
ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Hon. Janet J. Berry, District Judge  
Nathalie Huynh  
Attorney General George Chanos/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>8</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994); see Strickland v. Washington, 466 U.S. 668, 698 (1984).

<sup>9</sup>Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).