

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS FERGUSON A/K/A THOMAS
C. FERGUSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47093

FILED

SEP 07 2006

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant Thomas Ferguson's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

The district court convicted Ferguson, pursuant to a guilty plea, of one count of second-degree murder. The district court sentenced Ferguson to a term of life imprisonment with the possibility of parole. No direct appeal was taken.

Ferguson filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court declined to appoint counsel.¹ Following an evidentiary hearing, the district court denied Ferguson's petition. This appeal follows.

In his petition, Ferguson presented two claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel

¹See NRS 34.750.

sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient, and that the petitioner was prejudiced by counsel's performance.² To show prejudice, a petitioner who has entered a guilty plea must demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."³ The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong.⁴

First, Ferguson claimed that defense counsel was ineffective for failing to adequately explain the nature of malice aforethought. Ferguson contended that since his conviction he has learned "that malice imports an evil intent." Ferguson does not believe that malice was present when he killed his mother, and he argued that he would not have pleaded guilty to second-degree murder if had he understood all of the elements of the crime.

Even assuming that defense counsel was deficient for not adequately explaining the words "malice aforethought," Ferguson has not demonstrated that he was prejudiced by this deficiency. Ferguson was initially charged with open murder with the use of a deadly weapon. He therefore faced the possibility of being convicted of first-degree murder, second-degree murder, or manslaughter. Defense counsel testified that he

²Kirksey v. State, 122 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1987)).

³Id. at 988, 923 P.2d at 1107 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

⁴See Strickland, 466 U.S. at 697.

covered the elements that he believed were necessary to adequately explain these crimes to Ferguson. Defense counsel explained to Ferguson that they would have a difficult time defending against the State's allegation of premeditation, and that they were unlikely to demonstrate the provocation necessary to get a jury instruction on voluntary manslaughter.

Given the the testimony of his defense counsel, and the fact that he avoided the deadly weapon enhancement by pleading guilty, we conclude that Ferguson has not demonstrated a reasonable probability that he would have insisted on going to trial if counsel had thoroughly explained "malice aforethought." We therefore conclude that Ferguson failed to demonstrate that counsel was ineffective and that the district court erred in denying his petition on this ground.

Second, Ferguson claimed that trial counsel was ineffective for advising him that a psychological evaluation was unnecessary. Ferguson contended that as a result of his psychological condition and his ignorance of the legal issues involved, he was not fully capable of aiding in his own defense. Ferguson argued that he believes that his psychological condition and complete reliance on trial counsel resulted in an involuntary guilty plea.

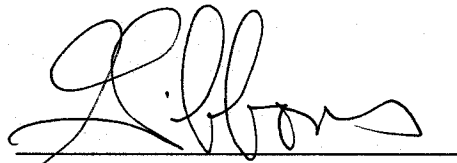
A defendant is competent to enter a plea if he has: (1) "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and (2) "a rational as well as factual understanding of the proceedings against him."⁵ During the evidentiary

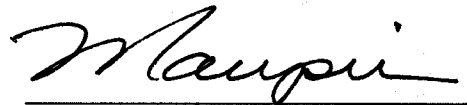
⁵Godinez v. Moran, 509 U.S. 389, 396 (1993) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)); see also NRS 178.400(2).

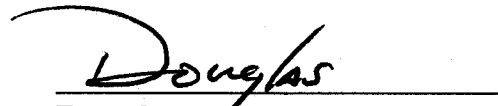
hearing, Ferguson's defense counsel testified that Ferguson was alert and responsive to all of his questions, Ferguson did not have any difficulty understanding things he was told about the law, and that he believed that Ferguson "totally understood the choices he was making." Based on defense counsel's testimony and Ferguson's failure to provide specific facts in support of his claim, we conclude that Ferguson failed to demonstrate that counsel was ineffective and that the district court erred in denying his petition on this ground.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that Ferguson is not entitled to relief and that briefing and oral argument are unwarranted.⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Thomas Ferguson

⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk