

IN THE SUPREME COURT OF THE STATE OF NEVADA

ATIBA MALIK MOORE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48112

**FILED**

NOV 20 2007

JANE T. M. BLOOM  
CLERK OF SUPREME COURT  
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND  
REMANDING

This is a proper person appeal from an order of the district court denying appellant Atiba Malik Moore's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On April 19, 2004, the district court convicted Moore, pursuant to a jury verdict, of one count each of burglary, fraudulent use of a credit card, and possession of a credit card without the cardholder's consent. The district court adjudicated Moore as a habitual criminal and sentenced him to serve prison terms of 60 to 240 months for each count. The district court imposed two of the terms to run consecutively and one term to run concurrently.

Shortly thereafter, Moore filed a notice of appeal and a post-conviction petition for a writ of habeas corpus. On direct appeal, we reversed Moore's conviction for fraudulent use of a credit card, affirmed his convictions for burglary and possession of a credit card without the

cardholder's consent, affirmed his adjudication as a habitual criminal, and remanded the case to the district court.<sup>1</sup> The remittitur issued on February 28, 2006. The district court summarily denied Moore's proper person post-conviction petition for a writ of habeas corpus, and Moore did not appeal from the district court's order.

On April 14, 2006, the district court entered an amended judgment of conviction, reflecting that Moore stood convicted of one count of burglary and one count of possession of a credit card without the cardholder's consent, that he had been adjudicated as a habitual criminal and sentencing him to serve two consecutive prison terms of 60 to 240 months. We affirmed the district court's amended judgment of conviction on direct appeal.<sup>2</sup>

On May 18, 2006, while his appeal was pending in this court, Moore filed a proper person post-conviction petition for a writ of habeas corpus in the district court.<sup>3</sup> The State responded. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent Moore or to conduct an evidentiary hearing. Thereafter, the district court denied Moore's petition. This appeal follows.

---

<sup>1</sup>Moore v. State, 122 Nev. 27, 126 P.3d 508 (2006).

<sup>2</sup>Moore v. State, Docket No. 47155 (Order of Affirmance, April 6, 2007).

<sup>3</sup>We note that Moore's previous petition was not decided on the merits.

In his petition, Moore presented several claims that could have been raised on direct appeal. NRS 34.810(1)(b) requires a court to dismiss a petition if the petitioner's conviction was the result of a trial and the grounds for the petition could have been raised in a direct appeal unless the court finds cause for the failure to present the grounds and prejudice to the petitioner. Moore did not allege good cause for failing to raise his claims for relief on direct appeal, nor did he demonstrate that he would be prejudiced by the district court's failure to consider the claims on the merits. Accordingly, we conclude that the district court did not err in denying the following claims: (1) the information was constitutionally infirm because it did not contain the essential elements for felony fraudulent use of a credit card; (2) the information alleged a burglary charge that was different than the burglary for which Moore was convicted; (3) the district court abused its discretion by denying Moore's post-conviction motion to set aside the jury verdict and enter a directed verdict or, in the alternative, grant a new trial; (4) the district court erred by sentencing Moore before the remittitur issued in his appeal from an order of the district court denying his motion to enter a directed verdict or, in the alternative, grant a new trial;<sup>4</sup> and (5) Moore's Fourteenth Amendment rights were violated when he was convicted of burglary even though the underlying felony offense did not occur.

---

<sup>4</sup>See Moore v. State, Docket No. 43002 (Order Dismissing Appeal, April 23, 2004) (concluding that this court lacked jurisdiction to consider Moore's appeal).

Moore also presented a claim that was raised on direct appeal. Specifically, Moore claimed that the district court abused its discretion by adjudicating him as a habitual criminal. Our decision in Moore's direct appeal is the law of this case, and further litigation of this issue is not permitted.<sup>5</sup> Accordingly, the district court did not err in denying this claim.

Finally, Moore presented several claims of ineffective assistance of trial 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 was deficient and that the petitioner was prejudiced by counsel's performance.<sup>6</sup> The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong.<sup>7</sup> To demonstrate prejudice, "the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different."<sup>8</sup>

First, Moore claimed that trial counsel were ineffective for failing to submit a jury instruction on attempted fraudulent use of a credit card. Moore contended that all the evidence suggested that he attempted to fraudulently use the credit card and that if he had been found guilty of

---

<sup>5</sup>Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

<sup>6</sup>Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

<sup>7</sup>Strickland, 466 U.S. at 697.

<sup>8</sup>Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

that charge he would have been convicted of a misdemeanor instead of a felony. On direct appeal, we reversed Moore's conviction for the crime of fraudulent use of a credit card. Accordingly, Moore has failed to demonstrate prejudice, and we conclude that the district court did not err in denying this claim.

Second, Moore claimed that trial counsel were ineffective for failing to notice that Moore was convicted of both the primary offense and the lesser included offense. Moore contended that trial counsel should have noticed that possession of a credit card without the cardholder's consent was necessarily a lesser included offense of fraudulent use of a credit card and requested a jury instruction that stated that Moore could be convicted of either one offense or the other, but not both. However, on direct appeal we reversed Moore's conviction for the crime of fraudulent use of a credit card. Accordingly, Moore has failed to demonstrate prejudice, and we conclude that the district court did not err in denying this claim.

Third, Moore claimed that trial counsel were ineffective for failing to move to dismiss the information. Moore contended that the information did not contain all of the elements of the crime of fraudulent use of a credit card or specify which section of NRS 205.760 he was alleged to have violated. On direct appeal, we concluded that the information improperly charged Moore with the crime of fraudulent use of a credit card and reversed his conviction for that crime. Accordingly, Moore has failed to demonstrate prejudice, and we conclude that the district court did not err in denying this claim.

Fourth, Moore claimed that trial counsel were ineffective for instructing his witness, Delana Butler, to be in court on the day that the jury was selected and for not seeking a continuance when she failed to appear the following day, after the State had rested. Moore contended that trial counsel knew that Butler could provide testimony that would tend to prove his theory of the case. And Moore asserted that Butler would have testified that Moore did not know that the credit card was stolen, he had permission to use the credit card, and he received the card from a person who represented herself as the owner of the card. Because this claim was not addressed in the district court's findings of fact, was not belied by the record, and may entitle Moore to relief, we ordered the State to show cause why this appeal should not be remanded to the district court for further proceedings.<sup>9</sup> We have considered the State's response, and we conclude that the district court erred by not conducting an evidentiary hearing.<sup>10</sup> Therefore, this appeal must be remanded for an evidentiary hearing on this claim.

Fifth, Moore claimed that trial counsel were ineffective for failing to investigate his claim that he and Alma Rangel used the card earlier in the day. Moore contended that,

If my counsel would have investigated my claim that I was with Alma, the person who gave me the credit card, earlier in the day when we

---

<sup>9</sup>Moore v. State, Docket No. 48112 (Order to Show Cause, July 5, 2007).

<sup>10</sup>Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

used it to buy gas and food. It would have proved that there was usage on the card by Alma around 7:30 pm at a gas station to buy gas, food, and a newspaper. And I would not have had that information unless I was there when the card was used. If counsel would have subpoenaed the credit card statement printout for that day it would have been the piece of evidence that I needed to prove my theory of the case. And show doubt in the DA's case.

Our review of the trial transcript reveals that Alma Rangel, the victim, testified that she did not know Moore; did not owe him money; did not leave her house on the night of September 16, 2003, to purchase gas; and did not give anyone permission to have, possess, or use her credit card. Based on this testimony, we conclude that Moore failed to demonstrate a reasonable probability that the trial result would have been different if counsel had investigated his claim that he and Rangel used the card earlier in the day. Accordingly, the district court did not err in denying this claim.

Sixth, Moore claimed that trial counsel were ineffective for failing to object to Las Vegas Metropolitan Police Officer Jason Lafreniere's testimony that "he verified who [Moore] was by running [him] through records, SCOPE, NCIC, and other physical descriptors." Moore contended that this testimony impermissibly informed the jurors of his prior bad acts and allowed them to conclude that he had the requisite intent to commit burglary. We note that counsels' decision not to object may have been a tactical decision so as not to draw attention to Moore's criminal history. Moreover, we conclude that Moore has not demonstrated a reasonable probability that the trial result would have been different if

counsel had objected to this allegedly prejudicial testimony or sought a limiting instruction. Accordingly, the district court did not err in denying this claim.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.<sup>11</sup> Accordingly, we


ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.<sup>12</sup>

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

Gibbons

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

Cherry

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

Saitta

---

<sup>11</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>12</sup>We have considered all proper person documents filed or received in this matter. We conclude that Moore is only entitled to the relief described herein. Any subsequent appeal from an order of the district court regarding Moore's ineffective assistance of counsel claim shall be docketed as a new matter.



cc: Hon. Michelle Leavitt, District Judge  
Atiba Malik Moore  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk