

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIO JOHNSTON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49348

**FILED**

OCT 11 2007

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On April 20, 2005, the district court convicted appellant, pursuant to a jury verdict, of one count of conspiracy to sell a controlled substance and one count of sale of a controlled substance. The district court sentenced appellant to serve in the Nevada State Prison a term of 12 to 32 months on the conspiracy count and a concurrent term of 12 to 48 months on the sale count. The district court further ordered that this sentence run consecutively to a sentence imposed in district court case number C205494. This court affirmed the judgment of conviction on appeal, but remanded the matter for correction of a clerical error in the judgment of conviction.<sup>1</sup> The remittitur issued on March 15, 2006.

On January 22, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

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<sup>1</sup>Johnston v. State, Docket No. 45280 (Order of Affirmance and Limited Remand to Correct Judgment of Conviction, February 17, 2006).

State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On May 8, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received 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 in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable or that there was a reasonable probability of a different outcome in the proceedings.<sup>2</sup> The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.<sup>3</sup>

First, appellant claimed that his trial counsel was ineffective for failing to file a motion to dismiss based on inaccuracies in the criminal complaint and information. Specifically, the State mistakenly switched the defendants' names when describing the conduct that formed the basis for count 2, sale of a controlled substance. Appellant failed to demonstrate that he was prejudiced by trial counsel's failure to file a motion to dismiss. On the day that the trial was to begin, the State sought and was granted permission to file an amended information correcting the mistake

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

<sup>3</sup>Strickland, 466 U.S. at 697.

regarding the defendants. Appellant failed to demonstrate that a motion to dismiss filed prior to trial would have had a reasonable probability of success under these circumstances.<sup>4</sup> Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective in failing to have a juror removed from the panel because it was revealed during voir dire that the juror's daughter had overdosed on methamphetamine. Appellant claimed that this likely caused the juror to be biased against him. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced by trial counsel's failure to have the juror removed. In his petition, appellant acknowledged that the district court canvassed the juror on whether the juror could be fair and impartial, and the juror responded in the affirmative. Appellant failed to demonstrate a reasonable probability of a different result had trial counsel had this juror removed from the panel. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to conduct a more thorough and complete pretrial investigation. Appellant appeared to claim that a more thorough review of the police reports and preliminary hearing testimony of the police officers would have revealed the following discrepancies with the trial testimony: (1) Officer Miller's report did not describe a hand-to-hand transaction as testified to by Officer Miller; (2) the arresting officers testified that they did not see appellant and the co-defendant together before the transaction,

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<sup>4</sup>See NRS 173.095(1).

yet the police report indicated that the arresting officers did see them together before the transaction; and (3) Officer Laneve did not recall seeing a hand-to-hand transaction despite the fact that Officer Miller's report indicates that he saw such a transaction. Appellant appeared to claim that had trial counsel investigated the documents and prior statements more thoroughly that trial counsel would have been able to successfully impeach the testimony of the officers given the fact that the co-defendant testified that he did not get the drugs from appellant.

Appellant failed to demonstrate that there was a reasonable probability of a different result had trial counsel further investigated these alleged inconsistencies based on the testimony presented at trial. Officers Miller and Menzie testified that acting in an undercover capacity they were approached by the co-defendant in the parking lot of a 7-11 store and were told by the co-defendant he could get them some crack cocaine when asked "Where's a guy go around here to go party?" When Officers Miller and Menzie refused to simply hand the buy money to the co-defendant to retrieve the drugs from another location and bring them to the parking lot, the co-defendant told them that the "guy over there" [indicating appellant] had the drugs. The co-defendant told the officers to wait, and he approached appellant. The co-defendant and appellant had a brief conversation and a quick hand-to-hand transaction.<sup>5</sup> When the co-defendant approached the officers he handed over the drugs and took the

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<sup>5</sup>Although no one saw if anything changed hands during this transaction, the officers testified that the contact between appellant and the co-defendant did not appear to be a matter of "dapping" or handshakes.

buy money from Officer Miller. The co-defendant then walked towards appellant and they began to walk away together. One of the officers surveilling the scene indicated that there was a second hand-to-hand transaction at this time between the individual in the alley (appellant) and the individual directly dealing with the officers (co-defendant). The verbal "bust" signal was given to the arrest teams and the police converged upon the parking lot. The co-defendant was arrested in the parking lot and appellant was arrested after a chase. The buy money was never recovered from either man. Officer Miller's testimony regarding the hand-to-hand transaction did not substantively differ from the police report, but rather was more detailed in describing the conversation that occurred between appellant and the co-defendant. Finally, even assuming that there were inconsistencies between the reports and the testimony regarding Officer Laneve's observations and whether appellant and co-defendant were viewed together prior to the sale, appellant failed to demonstrate that any impeachment on these points would have had a reasonable probability of a different result given the totality of the testimony presented at trial. Although appellant's co-defendant testified that he did not get the drugs from appellant, it was for the jury to determine the weight and credibility of the witnesses.<sup>6</sup> Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to safeguard appellant from false accusations by the State. Appellant claimed that the State falsely accused him during the trial of

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<sup>6</sup>See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

evading officers to dispose of the buy money even though no testimony was presented that any officer saw him discard anything during the approximately three minute chase. Appellant further claimed that trial counsel should have presented appellant's "own recognizance" release papers from another case to show that he could not violate the orders given to him by the Justice Court. Appellant failed to demonstrate that he was prejudiced. The testimony at trial indicated that after the co-defendant received the buy money from Officer Miller, the co-defendant approached appellant and appellant and the co-defendant had a hand-to-hand transaction. As the police converged upon the parking lot, appellant's co-defendant was never out of sight of the police and arrested in the parking lot. Notably, appellant's co-defendant did not have the buy money on his person when he was arrested. Appellant, who led the police on a two to three minute chase, also did not have the buy money on his person when he was apprehended. The testimony presented at trial indicated that appellant was not in view of all of the officers at all times during the chase and that the police did not begin to search for the money until ten to fifteen minutes after the transaction.<sup>7</sup> Appellant's trial counsel's decision not to inform the jury that appellant was released on his own recognizance in another case when this incident happened was a reasonable tactical decision.<sup>8</sup> Therefore, we conclude that the district court did not err in denying this claim.

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<sup>7</sup>The testimony at trial further indicated that other people were in the area of the 7-11 store and parking lot during this period.

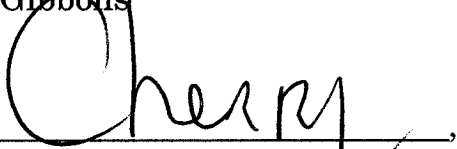
<sup>8</sup>See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>9</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

Gibbons

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

Cherry

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

Saitta

cc: Hon. Jackie Glass, District Judge  
Mario Johnston  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>9</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).