

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50595

FILED

MAR 05 2008

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY T. W. Wada
DEPUTY CLERK

This is an appeal from a district court order denying appellant Ferrill Joseph Volpicelli's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Volpicelli was convicted, pursuant to a jury verdict, of one count each of indecent exposure and open or gross lewdness. The district court sentenced Volpicelli to serve two concurrent prison terms of 12-48 months and ordered him to pay a fine of \$10,000. This court affirmed the judgment of conviction and sentence on direct appeal.¹

On October 7, 2004, Volpicelli filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The State moved to dismiss the petition. Volpicelli filed a proper person

¹Volpicelli v. State, Docket No. 42603 (Order of Affirmance, May 12, 2004).

supplemental petition and an opposition to the State's motion to dismiss. The district court appointed counsel to represent Volpicelli, and counsel filed a response to the State's motion to dismiss, and the State filed a reply to the response. On June 8, 2007, the district court, without conducting an evidentiary hearing, entered an order denying Volpicelli's petition. This timely appeal followed.

Volpicelli contends that the district court erred by finding that he did not receive ineffective assistance of counsel at trial. Volpicelli argues that counsel was ineffective for failing to present a medical necessity defense. Specifically, Volpicelli claims that "if his trial attorney had presented evidence that he was applying prescription medication, the jury would have been more inclined to find the exposure of his penis unintentional, rather than a lewd act perpetrated in clear public view," and the jury would have been more likely to "have excused his penile exposure." We disagree with Volpicelli's contention.²

To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of

²Detective Patricia Allen of the Reno Police Department testified at trial that she observed Volpicelli masturbating in the backseat of his vehicle while parked in a busy parking lot in the middle of the afternoon.

reasonableness, and that counsel's errors were so severe that there was a reasonable probability that the outcome would have been different.³

We conclude that the district court did not err by finding that Volpicelli's trial counsel was not ineffective. As we noted in Volpicelli's direct appeal, a conviction for both indecent exposure and open or gross lewdness requires intentional public sexual conduct or exposure.⁴ Therefore, even if counsel had presented a medical necessity defense, thus conceding that Volpicelli intentionally exposed his penis in the backseat of his car while parked in a busy parking lot in the middle of the afternoon, the elements of the charged offenses still would have been satisfied by the evidence adduced by the State.⁵ Accordingly, we conclude Volpicelli failed to demonstrate that there was a reasonable probability that the outcome of the trial would have been different but for counsel's failure.

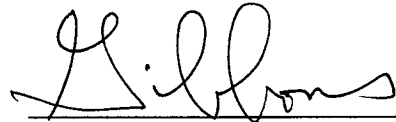
³See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

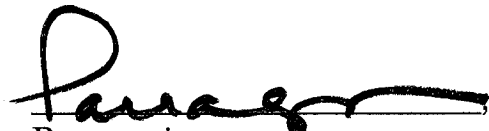
⁴See Young v. State, 109 Nev. 205, 215, 849 P.2d 336, 343 (1993); Ranson v. State, 99 Nev. 766, 767-68, 670 P.2d 574, 575 (1983).

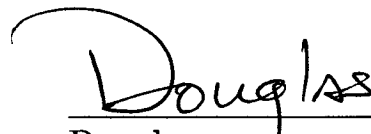
⁵NRS 201.220(1)(b) (“[a] person who makes any open and indecent or obscene exposure of his person . . . is guilty . . . [f]or any subsequent offense, of a category D felony”); NRS 201.210(1)(b) (“[a] person who commits any act of open or gross lewdness is guilty . . . [f]or any subsequent offense, of a category D felony”).

Having considered Volpicelli's contention and concluded that it is without merit, we

ORDER the judgment of the district court AFFIRMED.⁶


_____, C.J.
Gibbons


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Robert H. Perry, District Judge
Scott W. Edwards
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁶We also conclude that Volpicelli has not demonstrated that the district court erred as a matter of law in rejecting his claim of ineffective assistance of counsel without conducting an evidentiary hearing. See NRS 34.770; Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004) (stating that a habeas petitioner "is not entitled to an evidentiary hearing if the factual allegations are belied or repelled by the record"); Mann v. State, 118 Nev. 351, 354-55, 46 P.3d 1228, 1230 (2002).