

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRETT WITZENBURG,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51197

**FILED**

JAN 14 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Brett Witzenburg's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On August 30, 2005, the district court convicted Witzenburg, pursuant to a bench trial, of one count of grand larceny. The district court adjudicated Witzenburg a habitual criminal and sentenced him to a prison term of 60 to 150 months. We affirmed the judgment of conviction on direct appeal. Witzenburg v. State, Docket No. 45997 (Order of Affirmance, February 17, 2006). The remittitur issued on March 15, 2006.

On February 20, 2007, Witzenburg filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent Witzenburg, and counsel supplemented Witzenburg's petition. The State responded to the petition, Witzenburg replied to the State's response, and the district court heard argument on the petition. Thereafter, the district court made factual findings, entered conclusions of law, and denied Witzenburg's petition. This appeal followed.

Witzenburg challenges the district court's ruling on two claims of ineffective assistance of counsel, and argues in each of them that the district court erred by finding trial counsel effective without the benefit of an evidentiary hearing. Accordingly, the following rules of law apply.

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. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). To demonstrate prejudice, the petitioner "must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Id. at 988, 923 P.2d at 1107 (citing Strickland, 466 U.S. at 694); see also Riley v. State, 110 Nev. 638, 648, 878 P.2d 272, 279 (1994) ("Prejudice in an ineffective assistance of counsel claim is shown when the reliability of the jury's verdict is in doubt."). The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong. See Strickland, 466 U.S. at 697.

"A post-conviction habeas petitioner is entitled to an evidentiary hearing 'only if he supports his claims with specific factual allegations that if true would entitle him to relief.' However, if the record belies the petitioner's factual allegations, the petitioner is not entitled to an evidentiary hearing." Means v. State, 120 Nev. 1001, 1016, 103 P.3d 25, 35 (2004) (quoting Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004)).

First, Witzenburg contends that trial counsel was ineffective for failing to completely discuss all of the aspects of his decision to testify on his own behalf. Witzenburg claims that trial counsel told him that he must testify, but failed to tell him that the prosecutor could ask him questions about prior convictions and require him to demonstrate various

methods of lifting a bucket full of coins. Witzenburg further claims that he was prejudiced by trial counsel's failure to properly advise him because the State was able to elicit damaging evidence on cross-examination.

"The accused has the ultimate authority to make certain fundamental decisions regarding the case, such as whether to plead guilty, waive a jury, testify on one's own behalf, or take an appeal." Raquepaw v. State, 108 Nev. 1020, 1022, 843 P.2d 364, 366 (1992), overruled on other grounds by DeRosa v. Dist. Ct., 115 Nev. 225, 985 P.2d 157 (1999).

Here, Witzenburg chose to testify on his own behalf after being canvassed by the district court. The district court advised Witzenburg that he could not be compelled to testify and, if he chose to testify, the State could subject him to cross-examination, ask him whether he had been convicted of a felony, and comment to the jury about his testimony. Additionally, Witzenburg was informed that the State had evidence of his prior felony convictions. Under these circumstances, Witzenburg has failed to show that counsel was deficient or that the district court erred by denying this claim without an evidentiary hearing.

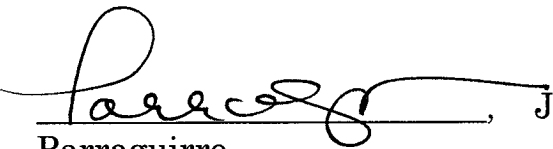
Second, Witzenburg contends that trial counsel was ineffective for "failing to request an instruction on, or argue for, lesser-included offenses." Specifically, Witzenburg claims that trial counsel was deficient for not arguing that the State had not proven beyond a reasonable doubt that money taken was in excess of \$250 and for not seeking instructions on the lesser-included offenses of attempted grand larceny and larceny.

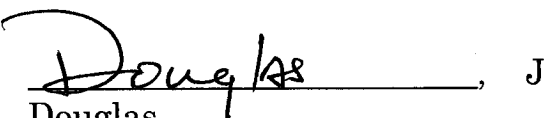
On direct appeal, we determined that there was sufficient evidence to establish beyond a reasonable doubt that Witzenburg committed the crime of grand larceny. See Witzenburg v. State, Docket No. 45997 (Order of Affirmance, February 17, 2006). And our review of the record on appeal reveals that the district court considered the issue of lesser-included offenses during closing argument when it questioned the

State as to whether Witzenburg had completed the offense of grand larceny or merely attempted a grand larceny. Under these circumstances, Witzenburg has not demonstrated a reasonable probability that the result of the trial would have been different if trial counsel had argued that the evidence regarding the monetary element of grand larceny was insufficient and sought instructions on lesser-included offenses. Accordingly, we conclude that Witzenburg failed to demonstrate that he was prejudiced by trial counsel's representation or that the district court erred by denying this claim without an evidentiary hearing.

Having considered Witzenburg's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

  
Parraguirre

  
Douglas

  
Pickering

cc: Hon. Lee A. Gates, District Judge  
Law Offices of Cynthia Dustin, LLC  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk