

IN THE SUPREME COURT OF THE STATE OF NEVADA

WARDEN, HIGH DESERT STATE  
PRISON, J. M. SCHOMIG,  
Appellant,  
vs.  
DAVID JOSEPH BRUFFETT,  
Respondent.

No. 51285

FILED

APR 08 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *A. Inghra*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting in part respondent David Joseph Bruffett's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Bruffett was convicted, pursuant to a jury verdict, of one count each of robbery with the use of a firearm and conspiracy to commit robbery. The district court sentenced Bruffett to serve concurrent prison terms of 26-120 months and 28-72 months. Bruffett did not pursue a direct appeal from the judgment of conviction and sentence.

On January 14, 2005, Bruffett 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 to represent Bruffett, conducted an evidentiary hearing, and on November 7, 2005, entered an order denying Bruffett's petition. On appeal, this court reversed and remanded the matter to the district court to conduct an evidentiary hearing to determine whether Bruffett was

improperly denied his right to a direct appeal. Bruffett v. State, Docket No. 46452 (Order of Reversal and Remand, July 25, 2006).

On remand, the district court found that Bruffett was entitled to the remedy provided by Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). Bruffett retained private counsel who filed a supplemental petition. The State opposed the petition and filed a motion to dismiss. Bruffett opposed the motion to dismiss the petition. The district court conducted an evidentiary hearing and, on February 20, 2008, entered an order granting in part Bruffett's petition and finding that trial counsel's performance "fell below the standard of reasonable practice found in Strickland v. Washington, 466 U.S. 668 (1984) due to the fact that trial counsel were operating under an actual conflict of interest as they had represented . . . co-defendants in this case, in the past." As a result, the district court found that Bruffett was entitled to a new trial. The district court rejected Bruffett's remaining claims. The State has now filed this timely appeal.

The State contends that the district court erred by granting in part Bruffett's petition. Specifically, the State claims that trial counsel did not have an actual conflict of interest that adversely prejudiced Bruffett's defense at trial. Although the record does not support the district court's finding that Bruffett's trial counsel operated under an actual and prejudicial conflict of interest, we nonetheless conclude that the district court reached the correct result, albeit for the wrong reason. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) ("If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal.").

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 reasonableness, and that counsel's errors were so severe that there was a reasonable probability that the outcome would have been different. See Strickland v. Washington, 466 U.S. 668, 688 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984). “[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference upon appellate review. See Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004).

We conclude that Bruffett received ineffective assistance of counsel at trial. The witness list filed prior to trial by defense counsel, Jack Alian, included Bruffett's former codefendants. Alian explained at the evidentiary hearing on Bruffett's habeas petition that when he filed the witness list, it was his intention “to list everyone I knew that maybe be [sic] willing to help.” Codefendants Randall May and Jacob Swift pleaded guilty prior to the start of Bruffett's trial. Nevertheless, at trial, defense counsel did not call any witnesses to the stand. The theory of the defense was that Bruffett was present at the scene but not involved in the robbery.

At the evidentiary hearing on Bruffett's habeas petition, May testified that he met with an investigator hired by Alian prior to the start of Bruffett's trial and told him that he would testify on Bruffett's behalf.

Swift testified at the evidentiary hearing and similarly stated that he would have testified on Bruffett's behalf had he been called to the stand as a defense witness. Alian testified that he did not call May or Swift to the stand because they were awaiting sentencing at the time and counsel refused to allow him to speak with them beforehand. Alian also stated that he did not recall whether May was interviewed by his investigator prior to the start of Bruffett's trial.

The district court found the evidentiary hearing testimony of Bruffett, May, and Swift more credible than the testimony of Bruffett's trial counsel. In its order granting in part Bruffett's petition, the district court made the following finding:

This Court believes the result of the trial would have been different if the defense had provided the jury with witnesses who supported Mr. Bruffett's version of facts. Notably, the testimony of Mr. May and Mr. Swift at the evidentiary hearing was consistent with Mr. Bruffett's explanation for being at the location of the incident, i.e. to retrieve either a car or keys to a car possessed by witness [and victim] Thomas Shea. Mr. Shea testified [at the evidentiary hearing] that Mr. Bruffett was at the apartment to retrieve either a car or keys to a car. Without some additional evidence to dispute the contents of the video tape of the fact setting, Mr. Bruffett was unable to adequately defend himself.

As we noted above, the district court's factual findings are entitled to deference when reviewed on appeal. The State on appeal has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Therefore, based on the above, we conclude that Bruffett received ineffective assistance of

counsel at trial and the district court did not err by granting in part Bruffett's habeas petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.  
Cherry

Saitta, J.  
Saitta

Gibbons, J.  
Gibbons

cc: Hon. Steven P. Elliott, District Judge  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Karla K. Butko  
Washoe District Court Clerk