

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHANE DEE JOHNSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51946

**FILED**

JUL 07 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Shane Dee Johnson's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On May 10, 2005, the district court convicted Johnson, pursuant to a jury verdict, of one count of felony driving while under the influence. The district court sentenced Johnson to serve a prison term of 28 to 72 months and ordered him to pay a \$2,000 fine. We affirmed the judgment of conviction on direct appeal. Johnson v. State, Docket No. 45391 (Order of Affirmance, January 19, 2006).

On June 29, 2006, Johnson filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Thereafter, the district court appointed counsel to represent Johnson, and counsel filed a supplemental petition. The State moved to dismiss both the petition and the supplemental petition. Johnson filed a notice of investigation in support of his supplemental petition, an opposition to the State's motion to dismiss, and a supplemental opposition. The district

court granted an evidentiary hearing on Johnson's claim of ineffective assistance of appellate counsel and dismissed the remaining claims.

On August 20, 2007, after the evidentiary hearing was continued, Johnson filed a motion for reconsideration of the other claims raised in his original petition. The State opposed the motion. Johnson filed a reply and requested an evidentiary hearing regarding the dismissed claims. The district court denied Johnson's motion to reconsider; concluded the evidentiary hearing on the claim of ineffective assistance of appellate counsel; and entered findings of fact, conclusions of law, and an order denying the habeas petition. On appeal, Johnson seeks review of one of the claims the district court dismissed prior to the evidentiary hearing and declined to reconsider.

Johnson contends that the district court abused its discretion by finding that he received effective assistance of trial counsel. Johnson specifically claims that trial counsel was ineffective for failing to call three witnesses and subpoena his medical records. Johnson argues that the three witnesses would have corroborated his necessity defense and that his medical records would have impeached his own testimony by demonstrating that a head injury impaired his memory. Johnson asserts that if trial counsel had presented this evidence, he would have been entitled to a jury instruction on his theory of the case—that he drove the vehicle while intoxicated out of necessity.

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,



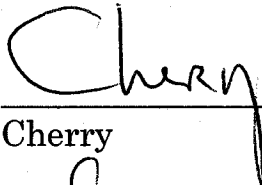
923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). To demonstrate prejudice, the petitioner “must show a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” Id. at 988, 923 P.2d at 1107 (citing Strickland, 466 U.S. at 694). The court need not consider both prongs of the test if the petitioner makes an insufficient showing on either prong. See Strickland, 466 U.S. at 697. Further, a petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).


Johnson has not demonstrated that the trial result would have been different if the jury had been instructed on the necessity defense. Johnson claims that if trial counsel had called three witnesses, they would have testified to the effect that a fight broke out in an apartment building, someone kicked open the door to an apartment, someone in the apartment fired a gun, ~~Johnson~~<sup>someone</sup> ran out of the apartment building, got into ~~his~~<sup>their</sup> vehicle, drove into a staircase, and then backed into a parked car. The defense of necessity (or duress) only arises when a defendant has been forced to commit a criminal act to avoid an immediate threat of bodily harm. See generally NRS 194.010(7); Jorgensen v. State, 100 Nev. 541, 688 P.2d 308 (1984). Johnson could have avoided the danger posed by the fight through other reasonable and legal alternatives—such as walking away. Accordingly, he has not demonstrated a reasonable probability that the jury would have found that he acted out of necessity when he drove his vehicle while under the influence of alcohol.

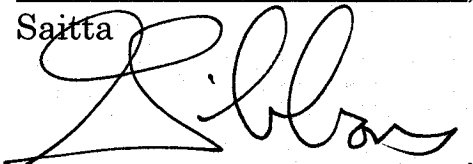
Corrected  
per 8-3-09  
order -  
JC

We conclude that Johnson has failed to show that the district court abused its discretion by finding that he received effective assistance of counsel, and we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Jerome Polaha, District Judge  
Mary Lou Wilson  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk