

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY RONALD MILTON,

No. 34999

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

DEC 11 2000

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

After stabbing his parents to death, appellant Gregory Ronald Milton was convicted, pursuant to a jury verdict, of robbery, grand larceny, and two counts of first-degree murder. This court affirmed his judgment of conviction but vacated three sentence enhancements for use of a deadly weapon. *Milton v. State*, 111 Nev. 1487, 908 P.2d 684 (1995).

In a supplement to his proper person petition for a writ of habeas corpus, filed with the assistance of counsel in the district court, Milton claimed that two jury instructions created improper presumptions under NRS 47.230 and *Yates v. Evatt*, 500 U.S. 391 (1991), entitling him to a new trial. He reasserts these issues on appeal. Neither in the supplement to the petition below nor in the briefs to this court has Milton's counsel articulated any cause for failing to raise

these issues at trial or on direct appeal, as required by NRS 34.810.<sup>1</sup>

Nevertheless, we will treat the issues as raised within a claim of ineffective assistance of counsel because Milton alleged in his original proper person petition that his trial and appellate counsel were ineffective. A claim of ineffective assistance of counsel is properly raised for the first time in a post-conviction proceeding in district court. *Corbin v. State*, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995).

To establish ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that the attorney's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To establish prejudice, the defendant must show that but for the attorney's mistakes, there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 694.

Milton contends first that the jury instruction on implied malice set forth an improper presumption. The jury was instructed: "Malice may be implied when no considerable provocation appears, or when all the circumstances of the

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<sup>1</sup>NRS 34.810(1)(b) requires a court to dismiss a petition if the petitioner's conviction was the result of a trial and the grounds for the petition could have been presented at trial or raised in a direct appeal unless the court finds cause for the failure to present the grounds and prejudice to the petitioner.

killing show an abandoned and malignant heart." Milton's contention is without merit. We have held that this instruction simply defines malice and creates no improper presumption. See *Cordova v. State*, 116 Nev. \_\_\_, \_\_\_, 6 P.3d 481, 482-83 (2000).

Next he contends that the jury was improperly instructed that intent to kill could be presumed solely from his use of a knife in the killing. This misstates the instruction, which actually provided:

If a person, without legal justification or excuse, intentionally uses a deadly weapon upon the person of another at a vital part, and inflicts a mortal wound, under circumstances showing no considerable provocation, then intent to kill may be implied as an inference [of] fact from the act itself.

This court has also held that this instruction is sound: it simply permits jurors to infer intent on a defendant's part if they find the existence of certain facts.<sup>2</sup>


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<sup>2</sup>We also reject Milton's contention that the jury instruction defining "deadly weapon" contributed to error here. On direct appeal we vacated Milton's sentence enhancements because his jury received a "functional" definition of deadly weapon but at that time a weapon used in a crime had to be "inherently dangerous" in order to enhance a sentence for use of the weapon. *Milton*, 111 Nev. at 1494-95, 908 P.2d at 688-89 (applying *Zgombic v. State*, 106 Nev. 571, 798 P.2d 548 (1990), before *Zgombic* was superseded by NRS 193.165(5)). We conclude that the functional definition was erroneous only in regard to sentence enhancement, not in regard to the instruction in question, which concerns circumstances permitting jurors to find an intent to kill. Cf. *Zgombic*, 106 Nev. at 574, 798 P.2d at 550 (concluding that defining deadly weapon "for purposes of sentence enhancement is a different question" from defining it as an element of a crime, where a functional definition is proper).

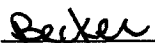
See Ricci v. State, 91 Nev. 373, 381 & n.5, 536 P.2d 79, 83-84 & n.5 (1975).

We conclude that counsel's failure to challenge these instructions did not prejudice Milton because the instructions were not erroneous. We therefore affirm the district court's order.

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Rose

  
\_\_\_\_\_, J.  
Young

  
\_\_\_\_\_, J.  
Becker

cc: Hon. Charles M. McGee, District Judge  
Attorney General  
Washoe County District Attorney  
Scott W. Edwards  
Washoe County Clerk