

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH M. ANDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35251

FILED

AUG 15 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Relande*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is a proper person appeal from an order of the district court dismissing appellant Joseph M. Anderson's post-conviction petition for a writ of habeas corpus.

Anderson was convicted, pursuant to a jury verdict, of one count each of sexual assault and kidnapping in the first degree. The district court sentenced Anderson to serve two consecutive terms of life in prison with the possibility of parole after ten years for the sexual assault, and after five years for the kidnapping. Anderson was further ordered to pay restitution in the amount of \$1,989.33. Anderson's direct appeal from the judgment of conviction was dismissed by this court.¹ The remittitur issued on October 31, 2000.

On August 2, 1999, Anderson filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition and filed a motion to dismiss. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to

¹Anderson v. State, Docket No. 34620 (Order of Affirmance, October 3, 2000).

represent Anderson or conduct an evidentiary hearing. On November 2, 1999, the district court dismissed Anderson's petition. This timely appeal followed.

First, Anderson raised numerous claims that should have been pursued in his direct appeal. Anderson contended that: (1) he was deprived of "compulsory process to evidence" due to being detained in California for seven months prior to extradition; (2) exculpatory security surveillance videotapes were lost; (3) law enforcement failed to preserve material evidence, collect the clothing of one of the witnesses, and preserve recorded telephone conversations between himself and the victim; (4) the prosecution improperly suppressed certain 9-1-1 telephone calls and a police officer's report; (5) there was juror misconduct; (6) the jury saw him being escorted out of the courthouse in prison garb; and (7) a Spanish language interpreter was sworn in during the trial proceedings "for unknown reasons."

A court must dismiss a habeas petition if it presents claims that could have been presented in an earlier proceeding unless the court finds both good cause for failing to present the claims earlier and actual prejudice to the petitioner.² This court may excuse the failure to show cause where the prejudice from a failure to consider the claim amounts to a "fundamental miscarriage of justice."³ Anderson failed to demonstrate good cause for not raising the above claims on direct appeal, and he has failed to demonstrate that he is the victim of a fundamental miscarriage of

²See NRS 34.810(1)(b)(2); NRS 34.810(3).

³Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

justice.⁴ We therefore conclude that the district court properly rejected these claims.

Second, Anderson raised numerous claims of ineffective assistance of trial counsel. Anderson contended that his trial counsel: (1) met with him only at court, and failed to communicate and request evidence; (2) failed to file motions to suppress evidence and reduce bail; (3) misled him regarding the reasons for requesting a continuance; (4) was not prepared to defend against the sexual assault allegation; (5) failed to withdraw as counsel despite his numerous requests; (6) failed to communicate with him about, introduce, and elicit "potential" impeachment evidence; (7) failed to object to the admission of tainted photographic evidence offered by the prosecution; (8) failed to discover the sexual assault forensic examination test results; (9) despite his requests, failed to introduce the victim's pants into evidence; (10) failed to call a material witness who would have testified to the presence of blue paper towels in the truck used by Anderson, which may have caused the victim's vaginal and anal injuries; (11) failed to suppress a letter he wrote to the victim after he was taken into custody; and (12) failed to present witnesses to testify to the fact that the victim was intoxicated during the time of the alleged sexual assault and kidnapping.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance fell below an objective standard of reasonableness; and (2) that but for

⁴Cf. Murray v. Carrier, 477 U.S. 478, 496 (1986) (holding that a federal habeas court may grant the writ in the absence of a showing of cause for the procedural default "where a constitutional violation has probably resulted in the conviction of one who is actually innocent").

counsel's deficient performance, the outcome of the proceedings would have been different.⁵ A 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.⁶ A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.⁷ Further, the tactical decisions of defense counsel are "virtually unchallengeable absent extraordinary circumstances."⁸

Our review of the record on appeal reveals that the district court did not err in denying Anderson's ineffective assistance of counsel claims Nos. (1)-(11). The district court determined that Anderson's claims of ineffective assistance of trial counsel consisted of unsupported allegations lacking the necessary factual specificity, and that Anderson failed to demonstrate how his allegedly ineffective counsel prejudiced his defense.⁹ Although we conclude that Anderson's claim No. (11) was presented with sufficient specificity, we further conclude that it was reasonable trial strategy for counsel not to oppose the admission of that portion of the letter in question because it arguably demonstrated

⁵Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996); see also Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁶Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁷Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁸Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691), modified on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

⁹See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Anderson's remorse, and it is unlikely that the verdict would have been different if the letter in its entirety had been suppressed.


We also conclude that Anderson's ineffective assistance of counsel claim No. (12) was alleged with sufficient factual specificity, and that the district court erred in not conducting an evidentiary hearing on this issue. The victim's level of intoxication was in dispute at trial, and contradictory evidence was presented. This issue was central to Anderson's defense to the sexual assault charge, and his counsel may have been deficient in failing to call material witnesses specified by Anderson in his petition to testify, and by impeaching the victim with her own preliminary hearing testimony. Therefore, we reverse the district court's order dismissing Anderson's claim No. (12), and remand this matter for an evidentiary hearing on the sole issue of trial counsel's alleged ineffectiveness in presenting evidence relating to the victim's level of intoxication.

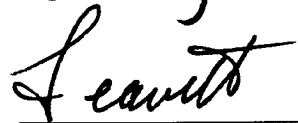
Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.¹⁰ Accordingly, we

¹⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹¹

 _____, J.
Young

 _____, J.
Agosti

 _____, J.
Leavitt

cc: Hon. Peter I. Breen, District Judge
Joseph M. Anderson
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

¹¹We have considered all proper person documents filed or received in this matter. We conclude that Anderson is entitled only to the relief described herein.