IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY MARK FRANCIS,

Appellant,

vs.

WARDEN, ELY STATE PRISON, E.K. MCDANIEL,

Respondent.

No. 35299

FILED

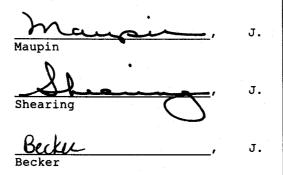
JUN 12 2000 CLERK OF SUPREME GOURT BY HIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

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

We have reviewed the record on appeal and for the reasons stated in the attached order of the district court, we conclude that the district court properly denied appellant's petition. Accordingly, we

ORDER this appeal dismissed.¹



¹In the Fast Track Statement, appellant raises five issues on appeal that were not presented to the district court. Because these issues were not part of appellant's original petition, and not considered in the district court's order denying the petition, they need not be considered by this court. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). cc: Hon. David A. Huff, District Judge Attorney General Lyon County District Attorney Williams & Emm Lyon County Clerk

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1	Case No. CR4144 FILE
2	99 DEC - 9 AM 8: 52
3	Department No. I
4	JANUA LIGENTYIIIO
5	IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6	IN AND FOR THE COUNTY OF LYON
7	* * * *
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9	GREGORY MARK FRANCIS,
10	Petitioner,
11	vs. ORDER DENYING
12	WARDEN, NEVADA STATE PRISON, <u>OF HABEAS CORPUS</u>
13	E.K. MCDANIELS, (POST CONVICTION)
14	Respondent.
15	Statement of the Case
16	The Petitioner filed a Petition for Writ of Habeas Corpus (Post Conviction) in the
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18	Third Judicial District Court on July 14, 1998. This Court issued an Order on August 6, 1998,
	appointing Robert W. Witek as counsel, allowing the Petitioner to proceed without costs,
20	requiring the State to respond to the Petition, and allowing Petitioner time to reply to the State's
21	response. On September 1, 1998, Robert W. Witek filed a Notice of Conflict and Motion to be
22 23	Relieved as Appointed Counsel. On September 21, 1998, the State filed a Motion to Extend
23 24	Time. This Court issued an Order Granting Motion to Extend Time on September 22, 1998. On
2 1 25	September 24, 1998, this Court issued an Order appointing Cheri K. Emm as counsel and
26 26	relieving Robert W. Witek from further representation of Petitioner. On May 3, 1999, Petitioner
20 27	filed a Supplemental Petition for Writ of Habeas (Post Conviction). On May 18, 1999, the State
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filed a Second Motion to Extend Time. This Court issued an Order Granting Motion to Extend
Time on May 26, 1999. On May 28, 1999, the State filed an Answer to Petition for Writ of
Habeas Corpus (Post Conviction) and Response to Supplemental Petition. A hearing was held
on November 5, 1999. This Court has considered all documents on file, arguments of counsel,
and makes the following order :

6 Facts 7 8 The State of Nevada filed an information on July 22, 1994, charging Petitioner 9 with : Count I - Ex-Felon in Possession of a Firearm, a felony violation of NRS 202.360; Count 10 II - Escape With the Use of a Deadly Weapon, a felony violation of NRS 212.090; Count III -11 Battery by a Prisoner in Lawful Custody, a felony violation of NRS 200.481; Count IV -12 Attempted Murder With the Use of a Deadly Weapon, a felony violation of NRS 200.010 and 13 NRS 193.330; Count V - Robbery, a felony violation of NRS 200.380; Count VI - Possession of 14 a Stolen Motor Vehicle, a felony violation of NRS 205.273. Pursuant to plea negotiations, 15 16 Petitioner pled guilty to Escape With the Use of a Deadly Weapon, Battery by a Prisoner in 17 Lawful Custody, and Robbery. 18 On June 17, 1994, the State filed a Notice of Intent to Seek Enhancement Penalty.

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21 On June 20, 1994, Petitioner pled guilty to the charges as contained in the plea agreement.
21 On July 19, 1994, Petitioner filed a Motion to Withdraw Guilty Pleas. The State
22 filed an opposition on July 22, 1994. On August 10, 1994, Petitioner filed an in proper person
23 Motion to Withdraw Guilty Pleas. On September 9, 1994, Petitioner's counsel filed a Response
24 to the State's Notice of Intent to Seek Enhancement Penalty.

25 A hearing was held on the pending motions on September 21, 1994. The Court
26 denied Petitioner's motions to withdraw his guilty pleas.
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2	On September 26, 1994, Petitioner filed an in proper person Motion to Remove
- 3	Counsel. The Motion was granted on October 3, 1994, and Robert W. Witek was appointed to
4	represent Petitioner in the sentencing phase of the proceedings.
5	On November 14, 1994, Petitioner was pronounced guilty and sentenced to
6	twenty years for Escape With Use of Deadly Weapon, twenty years for Battery by a Prisoner in
7	Lawful Custody, and fifteen years for Robbery. The Court denied the State's request to sentence
8	Petitioner under the habitual criminal statute.
9	Petitioner appealed the matter to the Supreme Court. The Order Dismissing
10	Appeal was filed on May 13, 1998, and the Remittitur was issued on June 2, 1998.
11	Discussion
12	Claims of ineffective assistance of counsel are reviewed under the two part test as
13 14	set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). First, Petitioner
15	must establish that his attorney's representation fell below an objective standard of
16	reasonableness. Second, Petitioner must establish that the substandard performance prejudiced
17	Petitioner to the extent that the outcome of the case would have been different but for the
18	ineffective assistance of counsel.
19	As to the first requirement, courts inquire as to whether counsel's performance
2 0	was "reasonable considering all the circumstances." Id. at 466 U.S, 104 S.Ct. 2065.
21 92	As to the second requirement, courts inquire as to whether any error in counsel's
22 23	performance was deficient to the extent that the defendant was prejudiced. Id. The Petitioner
20 24	must allege "specific facts supporting the claims of the petition." NRS 34.735. Failure on
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26	Petitioner's part to allege specific facts is grounds for dismissal of the petition. Id.
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Ground I - Ineffective Assistance of Counsel

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2 Petitioner asserts that trial counsel's failure to investigate and pursue a self-3 defense theory constituted ineffective assistance of counsel. This Court finds that trial counsel's 4 performance in this regard was reasonable under the circumstances because self-defense is not a 5 defense to the charges to which the Petitioner ultimately pled guilty. Petitioner testified that after 6 awaking from the skirmish with Sergeant Lange in the holding cell he "hit him in the temple." 7 (Transcript at 21:19.) Petitioner went on to testify that after he retrieved the Sergeant's pistol, he 8 9 "clipped him trying to get him to let go of his keys." (Transcript at 21:23-24.) This testimony 10 belies any theory of self-defense because the elements of the crime Petitioner pled guilty to, i.e., 11 Battery by a Prisoner in Lawful Custody, are met by Petitioner's actions subsequent to the time 12 he was allegedly attacked. In addition, self-defense does not constitute a defense to the 13 remaining charges, i.e., Escape With the Use of a Deadly Weapon and Robbery. 14 15 **Ground II - Ineffective Assistance of Counsel** 16 17 Petitioner asserts that sentencing counsel's failure to investigate victim's violent 18 character and present such evidence at sentencing and failure to present mitigating evidence at 19 sentencing on behalf of Petitioner prejudiced Petitioner at sentencing and constituted ineffective 20 assistance of counsel. This Court finds that sentencing counsel's performance at sentencing was 21 reasonable under the circumstances because Petitioner failed to specifically identify any 22 evidence regarding the victim's dangerous propensities and Petitioner was not prejudiced by 23 24 counsel's performance. Petitioner submitted no evidence regarding the victim's violent character. 25 Petitioner submitted no evidence to demonstrate that had his witnesses, which consisted of 26 various prison officials and parole officers, been allowed to attest to his good character that his 27

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1	sentences would have been any different than those imposed by Judge Recanzone. In addition,
2	Petitioner testified that sentencing counsel did a good job of arguing against imposition of the
3	habitual criminal statute. (Transcript at 39:21-22.) The Court at sentencing declined to impose
4	the habitual criminal statute and thus Petitioner was not prejudiced.
5	Ground III - Ineffective Assistance of Counsel
6	Petitioner asserts that appellate counsel's failure to perfect an adequate appeal
. 8	constituted ineffective assistance of counsel. This Court finds that appellate counsel's
9	performance was reasonable under the circumstances because he raised the only viable appellate
10	issue. Petitioner testified that he understood what issues were available for direct appeal and
11	which issues were reserved for writs of habeas corpus. (Transcript at 25:15-25 and 26:1-3.)
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13	Conclusions of Law
14	1. This Court has jurisdiction over this matter.
15	2. Petitioner has not met his burden of establishing ineffective assistance of
16 17	counsel.
17	3. Petitioner's claims of ineffective assistance of counsel are without merit.
19	Decision
20	Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) has been fully
21	considered, and this Court finds the allegations are without merit.
22	Good cause appearing,
23	IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, the writ is denied.
24	Dated this day of December, 1999
25	DAVID A. HUFF
26 27	DISTRICT COURT JUDGE
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