

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

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
CHIEF 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

Maupin J.

Maupin

Shearing J.

Shearing

Becker J.

Becker

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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Case No. CR4144
Department No. I

FILE

99 DEC -9 AM 8:52

NIKKI A. BRYAN
LYON COUNTY CLERK

Janya Scerrine

**IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON**

GREGORY MARK FRANCIS,

Petitioner,

vs.

WARDEN, NEVADA STATE PRISON,
E.K. MCDANIELS,

Respondent.

**ORDER DENYING
PETITION FOR WRIT
OF HABEAS CORPUS
(POST CONVICTION)**

Statement of the Case

The Petitioner filed a Petition for Writ of Habeas Corpus (Post Conviction) in the 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, requiring the State to respond to the Petition, and allowing Petitioner time to reply to the State's response. On September 1, 1998, Robert W. Witek filed a Notice of Conflict and Motion to be Relieved as Appointed Counsel. On September 21, 1998, the State filed a Motion to Extend Time. This Court issued an Order Granting Motion to Extend Time on September 22, 1998. On September 24, 1998, this Court issued an Order appointing Cheri K. Emm as counsel and relieving Robert W. Witek from further representation of Petitioner. On May 3, 1999, Petitioner filed a Supplemental Petition for Writ of Habeas (Post Conviction). On May 18, 1999, the State

1 filed a Second Motion to Extend Time. This Court issued an Order Granting Motion to Extend
2 Time on May 26, 1999. On May 28, 1999, the State filed an Answer to Petition for Writ of
3 Habeas Corpus (Post Conviction) and Response to Supplemental Petition. A hearing was held
4 on November 5, 1999. This Court has considered all documents on file, arguments of counsel,
5 and makes the following order :

7 Facts

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 Petitioner pled guilty to Escape With the Use of a Deadly Weapon, Battery by a Prisoner in
16 Lawful Custody, and Robbery.

18 On June 17, 1994, the State filed a Notice of Intent to Seek Enhancement Penalty.
19 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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Ground I - Ineffective Assistance of Counsel

Petitioner asserts that trial counsel's failure to investigate and pursue a self-defense theory constituted ineffective assistance of counsel. This Court finds that trial counsel's performance in this regard was reasonable under the circumstances because self-defense is not a defense to the charges to which the Petitioner ultimately pled guilty. Petitioner testified that after awaking from the skirmish with Sergeant Lange in the holding cell he "hit him in the temple." (Transcript at 21:19.) Petitioner went on to testify that after he retrieved the Sergeant's pistol, he "clipped him trying to get him to let go of his keys." (Transcript at 21:23-24.) This testimony belies any theory of self-defense because the elements of the crime Petitioner pled guilty to, i.e., Battery by a Prisoner in Lawful Custody, are met by Petitioner's actions subsequent to the time he was allegedly attacked. In addition, self-defense does not constitute a defense to the remaining charges, i.e., Escape With the Use of a Deadly Weapon and Robbery.

Ground II - Ineffective Assistance of Counsel

Petitioner asserts that sentencing counsel's failure to investigate victim's violent character and present such evidence at sentencing and failure to present mitigating evidence at sentencing on behalf of Petitioner prejudiced Petitioner at sentencing and constituted ineffective assistance of counsel. This Court finds that sentencing counsel's performance at sentencing was reasonable under the circumstances because Petitioner failed to specifically identify any evidence regarding the victim's dangerous propensities and Petitioner was not prejudiced by counsel's performance. Petitioner submitted no evidence regarding the victim's violent character. Petitioner submitted no evidence to demonstrate that had his witnesses, which consisted of various prison officials and parole officers, been allowed to attest to his good character that his

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
6 **Ground III - Ineffective Assistance of Counsel**

7 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 counsel.
17 3. Petitioner's claims of ineffective assistance of counsel are without merit.

18
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 9th day of December, 1999.

25 
26 _____
27 DAVID A. HUFF
28 DISTRICT COURT JUDGE