

IN THE SUPREME COURT OF THE STATE OF NEVADA

REX LEWIS ARTHUR,

No. 36797

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

JAN 03 2002

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a 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. Therefore, briefing and oral argument are not warranted in this case.<sup>1</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

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

*Agosti*  
\_\_\_\_\_, J.  
Agosti

*Leavitt*  
\_\_\_\_\_, J.  
Leavitt

cc: Hon. Lee A. Gates, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Rex Lewis Arthur  
Clark County Clerk

<sup>1</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>2</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

1 **ORDR**  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

**FILED**  
SEP 8 2 15 PM '00  
*Shirley B. Pungina*  
CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,  
8 Plaintiff,

9 -vs-

10 REX LEWIS ARTHUR,  
11 #0606475  
12 Defendant.

Case No.. C128992  
Dept. No. VIII

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER

DATE OF HEARING: 8-10-00  
TIME OF HEARING: 9:00 A.M.

16 THIS CAUSE having come on for hearing before the Honorable LEE GATES, District  
17 Judge, on the <sup>25<sup>th</sup></sup> 10th day of August, 2000, the Petitioner not being present, in forma pauperis, the  
18 Respondent being represented by STEWART L. BELL, District Attorney, by and through  
19 JAMES J. MILLER, Chief Deputy District Attorney, and the Court having considered the  
20 matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now  
21 therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

23 1. Rex L. Arthur, was married to, but living apart from Mrs. Pamela Arthur. Mr.  
24 Arthur had maintained contact with the defendant, but was residing at the Los Casitas Mobil  
25 Home Park, which she kept secret from Arthur. The victim in this case, Mr. Lawrence  
26 Sharleville, also resided at the Los Casitas Mobile Home Park where he became friends with  
Mrs. Arthur.

2. On the morning of June 2, 1995, Arthur arrived at Mrs. Arthur's mobile home

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1 where an initial conversation commenced through the kitchen window, at which time Arthur  
2 asked Mrs. Arthur to allow him entrance into the mobile home. Mrs. Arthur refused. At about  
3 this time, Mr. Sharleville arrived at the mobile home because he and Mrs. Arthur had agreed to  
4 run errands together.

5 3. Arthur again asked for entrance into Mrs. Arthur's mobile home and asked her to  
6 go with him somewhere else. While this conversation was occurring, Mr. Sharleville entered  
7 the mobile home, locking the door behind him. After refusing Arthur entry into the mobile home,  
8 repeatedly, Mrs. Arthur feared Arthur might try to break into the mobile home. She took the keys  
9 out of the front door, and proceeded to the back of her trailer where she placed the key in  
10 bathroom cupboard.

11 4. While Mrs. Arthur was in the bathroom, Arthur fired three gunshots into the trailer  
12 from outside the trailer. At this point, Mrs. Arthur immediately dropped to the floor and yelled  
13 to Mr. Sharleville to do the same. Despite Mrs. Arthur's warning, Mr. Sharleville remained in  
14 the standing position where he attempted to call the police.

15 5. Immediately thereafter, while still lying on the floor, Mrs. Arthur looked up to see  
16 Arthur standing inside the mobile home. Mrs. Arthur then heard three more gunshots fired  
17 inside the trailer, resulting in Mr. Sharleville's death.

18 6. Having heard six shots, Mrs. Arthur assumed that there were no rounds left in  
19 Arthur's gun and initiated a conversation with him. Mrs. Arthur then noticed that Mr. Sharleville  
20 was lying over the chair in front of her. She saw blood and noticed that Arthur had become  
21 upset. Mrs. Arthur then persuaded Arthur to put the gun down. Shortly thereafter, the police  
22 arrived and the defendant was arrested.

23 7. Arthur was indicted on Count I, Invasion of the Home While in Possession of  
24 Firearm, Counts II and III, Discharging a Firearm at or Into an Occupied Structure, Count IV,  
25 Attempted Murder with Use of a Deadly Weapon, and Count V, Murder With Use of a Deadly  
26 Weapon.

27 8. Arthur filed a Petition for Writ of Habeas Corpus on August 22, 1995. On October  
28 2, 1995, the district court granted the writ as to Count III only and dismissed that count. C

1 March 13, 1996, the State then filed an Amended Indictment charging Count I, First Degree  
2 Murder, Count II, Invasion of the Home While in Possession of a Firearm, and Count III, Assault  
3 with a Deadly Weapon.

4 9. On March 13, 1996, a Guilty Plea Agreement was filed in open court. Arthur  
5 pleaded guilty, pursuant to negotiations, to First Degree Murder without Use of a Deadly  
6 Weapon and the parties stipulated to life with the possibility of parole under the old sentencing  
7 statute with a ten-year eligibility for parole. Arthur also pleaded guilty to Invasion of the Home  
8 While in Possession of a Firearm and Assault With Use of a Deadly Weapon with any sentence  
9 imposed on the Home Invasion to run consecutive to the murder and the parties were free  
10 to argue for concurrent or consecutive time for the assault count. The guilty plea as to the Assault  
11 with Use of a Deadly Weapon was entered pursuant to North Carolina v. Alford, 400 U.S. 2  
12 91 S.Ct. 160 (1970).

13 10. Arthur then filed a pro per motion on May 15, 1996, to Dismiss Counts I, II, and III,  
14 Withdraw Guilty Plea(s), and Motion to Dismiss. This motion was heard on May 20, 1996,  
15 which time the district judge ordered a psychiatric evaluation to be conducted to determine  
16 Arthur's competency at the time of entering his guilty plea. The district court postponed future  
17 proceedings until this issue was resolved.

18 11. On June 19, 1996, two psychiatric evaluations were submitted. Both the defense  
19 and the prosecution agreed that the psychiatrists believe that Arthur was competent. The  
20 district court then held the matter in abeyance until additional psychiatric reports were submitted  
21 to the court and ordered Arthur admitted to Lakes Crossing for that purpose. Arthur was sent  
22 to Lakes Crossing not because psychiatrists found him incompetent, but rather for a more  
23 thorough evaluation.

24 12. Arthur then returned from Lakes Crossing on September 30, 1996, at which time  
25 the district court found him competent and capable of assisting in his own defense. Also at that  
26 time, the district court judge granted the Public Defender's Motion to Withdraw and appoint  
27 the State Public Defender to represent the defendant on October 2, 1996.

28 13. On December 20, 1996, the State Public Defender filed a Motion to Withdraw

1 Guilty Plea. Arthur then retained private counsel, and on January 6, 1997, new private  
2 (appointed) counsel was substituted as counsel of record.

3 14. Arthur, on April 2, 1997, filed for an evidentiary hearing to determine the validity  
4 of the psychiatric evaluations. On May 16, 1997, an evidentiary hearing commenced, and  
5 continued for additional hearings held on June 10, 1997, June 27, 1997, and August 4, 1997.  
6 Psychiatric evidence was presented and Arthur's public defender also testified. The deputy  
7 public defender testified about discussing the plea negotiations with Arthur, about how much  
8 time he would serve on all the sentences before becoming parole eligible approximately 11 to  
9 14 years, that he spoke with additional witnesses that Arthur requested he talk to before Arthur  
10 decided on whether to take the offer and that he believed that Arthur was fully aware of the  
11 consequences of pleading guilty to the charges. The deputy public defender further testified that  
12 the answers to the district court judge's questions during the plea canvass, were Arthur's own  
13 words. Defense counsel explained that he would not have provided the answers for Arthur.

14 15. At a hearing on August 4, 1997, the district court denied the motion to withdraw  
15 plea. The district court found that the plea was knowingly and voluntarily given, that Arthur  
16 understood the elements of the offenses and the consequences of the plea.

17 16. Arthur was then sentenced on August 18, 1997, to Count I - Life with the  
18 Possibility of Parole; Count II, seven years to run consecutive to Count I; and Count III, five  
19 years to run concurrent to Counts I and II with 809 days credit for time served.

20 17. On May 1, 1998, Arthur filed an appeal to the Nevada Supreme Court contending  
21 the district court erred in denying his motion to withdraw his guilty plea. The Nevada Supreme  
22 Court dismissed the appeal on July 6, 1999. The Court stated:

23 The district court elicited from appellant at  
24 plea entry an unequivocal admission to committing  
25 the acts constituting the crimes. Further, appellant  
26 acknowledged understanding the constitutional  
27 rights set forth in the plea agreement, and  
28 confirmed that he wished to waive those rights. We  
conclude the district court did not abuse its  
discretion in finding that the appellant was  
competent to enter his plea, in denying his motion  
to withdraw his plea. At the August 4 hearing,  
Arthur's deputy public defender testified about his

1 discussions with Arthur regarding the plea  
2 negotiations and the consequences of either  
3 accepting or rejecting the offer. The Court  
4 concluded that the district court did not abuse its  
5 discretion in finding Arthur was competent and  
6 understood the consequences of changing his plea.

7 18. Arthur filed this current Petition for Writ of Habeas Corpus (Post-Conviction) on  
8 June 14, 2000. He again alleges that he was not competent to understand the elements of the  
9 offenses for which he was charged. Arthur contends that because of this lack of understanding  
10 of the elements of the offenses, he did not appreciate that the state would not be able to prove  
11 all the elements of the offenses, i.e., he could not be guilty of home invasion and felony murder  
12 because he could not break into a home he owned as community property with his wife. Arthur  
13 also asserts that the plea canvass was inadequate in that the court failed to determine the facts  
14 basis. Finally, Arthur asserts that defense counsel, apparently all three that represented him at  
15 various stages, were ineffective because they failed to inform him about the insufficiencies of  
16 the change of plea, what actual sentence he would receive and failed to raise all these issues on  
17 appeal.

#### 18 CONCLUSIONS OF LAW

19 1. A defendant may challenge the validity of his guilty plea by raising it either in  
20 motion to withdraw plea or in a post-conviction petition for writ of habeas corpus. Bryant v. State,  
21 102 Nev. 268, 272, 721 P.2d 364, 368 (1986). Arthur chose to file a motion to withdraw  
22 his plea back in 1997.

23 2. In Hart v. State, \_\_\_ Nev. \_\_\_, 1 P.3d 969 (2000), the Nevada Supreme Court  
24 affirmed the availability of a motion to withdraw plea. The Court stated that a post-conviction  
25 petition for writ of habeas corpus had not subsumed the motion, but that either may be used  
26 to challenge the validity of a change of plea. Id. at 971-72. However, the Court went on to place  
27 some limitations on the motion.

28 [W]here a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.

1 We recognize that similar concerns underlie  
2 the procedural default rules of NRS chapter 34.  
3 Generally, a defendant must show cause and  
4 prejudice for filing an untimely or a successive  
5 petition.

6 Id. at 972.

7 3. Nevada Revised Statute 34.801(3) and Phelps v. Director, 104 Nev. 565, 764 P.2d  
8 1303 (1988), imposes the burden upon Arthur of proving specific facts that demonstrate good  
9 cause for his failure to present these claims in the earlier proceedings and showing actual  
10 prejudice to himself by the manner in which his plea and/or direct appeal were conducted.  
11 Arthur has failed to present any reason for not raising these claims in his original motion  
12 to withdraw plea. Therefore, these issues are waived.

13 4. Arthur claimed in his direct appeal that his plea was involuntarily and unknowingly  
14 entered because he was unable to understand the elements of the offense. These issues are  
15 barred by the law of the case doctrine and will not be considered. Dawson v. State, 108 Nev.  
16 112, 825 P.2d 593 (1992) (court will not address issue it had rejected as merit less); Bejarno  
17 State, 106 Nev. 840, 801 P.2d 1388 (1990) (a prior ruling is the law of the case and will not be  
18 disturbed); Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975) (the first ruling became the law of  
19 the case and the defendant could not later revive the issue).

20 5. The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 103  
21 S.Ct. 2052 (1984), established the standard to use in order to determine when counsel's  
22 assistance is so ineffective that it violates the Sixth Amendment of the United States  
23 Constitution. Strickland laid out a two-pronged test to decide the merits of a defendant's claim  
24 of ineffective assistance of counsel:

25 First, the defendant must show that counsel's  
26 performance was deficient. This requires a  
27 showing that counsel made errors so serious that  
28 counsel was not functioning as the "counsel"  
guaranteed the defendant by the Sixth Amendment.  
Second, the defendant must show that the deficient  
performance prejudiced the defense. This requires  
showing that counsel's errors were so serious as to  
deprive the defendant of a fair trial, a trial whose  
result is reliable. Unless a defendant makes both

1 showings, it cannot be said that the conviction  
2 . . . resulted from a breakdown in the adversary  
process that renders the result unreliable.

3 Id. at 687, 104 S.Ct. at 2064.

4 6. The Nevada Supreme Court has held that “claims of ineffective assistance of  
5 counsel must be reviewed under the ‘reasonably effective assistance’ standard articulated by the  
6 [United States Supreme] Court in Strickland, . . . which requires a defendant to show that  
7 counsel’s assistance was ‘deficient’ and that the deficiency prejudiced the defense.” Bennett v.  
8 State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995). “In meeting the ‘prejudice’ requirement  
9 the defendant must show a reasonable probability that, but for counsel’s errors, the result of the  
10 trial would have been different. . . . ‘A reasonable probability is a probability sufficient to  
11 undermine confidence in the outcome.’” Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102  
12 1107 (1996).

13 7. In Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984), the Nevada  
14 Supreme Court held that a defendant is not entitled to relief based primarily on “naked” or  
15 “bare” allegations or those belied or repelled by the record. The record belies Arthur’s claim that  
16 the Presentence Investigation Report contained errors. Arthur agrees he left the trailer area, went  
17 out to the street and returned. In addition, the report accurately reflects that his wife was behind  
18 Mr. Sharleville. The district court was well aware that Arthur claimed that he was not trying to  
19 harm his wife, which is why the court accepted an Alford plea as to the assault charge. The  
20 court was not left with any inaccurate picture of what happened from the report. Arthur has  
21 failed to meet his burden of showing that these were in fact inaccurate statements and therefore  
22 has failed to show that his state public defender was incompetent for not raising these issues  
23 during sentencing.

24 8. The same reasoning applies to appellate counsel’s failure to raise similar claims  
25 on appeal. There were no inaccurate statements. Even if the report’s statements were  
26 inaccurate, the district court sentenced Arthur according to the terms of the plea agreement.  
27 Arthur cannot establish that if these issues were raised on appeal there would have been a  
28 different outcome.



1 9. As to the claim that certain issues should have been raised on appeal, appellate  
2 counsel raised the only issues that seemed appropriate -- whether Arthur was competent to  
3 understand the elements of the offenses and whether Arthur's plea was entered voluntarily and  
4 unknowingly. It is well within the discretion of appellate counsel to determine which issue  
5 should be raised on appeal. Strategy or decisions regarding the conduct of defendant's case are  
6 "virtually unchallengeable absent extraordinary circumstances." Doleman v. State, 112 Nev.  
7 843, 848, 921 P.2d 278, 280 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175  
8 180 (1990)).

9 10. In order to prove that appellate counsel's performance was ineffective, a defendant  
10 must show that the omitted issue would have had a reasonable probability of success on appeal.  
11 See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath v. Jones, 941 F.2d 1126, 113  
12 (11th Cir. 1991). The Nevada Supreme Court has fully addressed the issue of Arthur's  
13 competency and determined that the plea was entered voluntarily and knowingly. Arthur has not  
14 met his burden of showing that appellate counsel failed to raise an issue that would have been  
15 successful on appeal.

16 ORDER

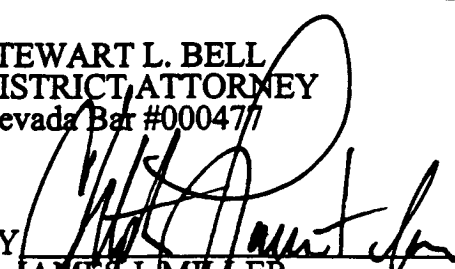
17 IT IS HEREBY ORDERED THAT Arthur's Petition for Writ of Habeas Corpus (Post  
18 Conviction) be DENIED.

19 DATED this 5 day of <sup>Sept</sup> ~~August~~, 2000.

20  
21   
22 DISTRICT JUDGE sc

23 STEWART L. BELL  
24 DISTRICT ATTORNEY  
25 Nevada Bar #000477

LEE A. GATES

26 BY   
27 JAMES J. MILLER  
28 Chief Deputy District Attorney  
Nevada Bar #000047

msf