

IN THE SUPREME COURT OF THE STATE OF NEVADA

JONATHAN HUGH BANTA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36804

FILED

JAN 22 2001

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

ORDER OF AFFIRMANCE

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 documents filed in this appeal, and for the reasons stated in the attached order of the district court, conclude that the district court properly denied appellant's petition. Accordingly, we affirm the order of the district court.

It is so ORDERED.

Maupin, C.J.
Maupin

Shearing, J.
Shearing

Leavitt, J.
Leavitt

cc: Hon. Jerome M. Polaha, District Judge
Attorney General
Washoe County District Attorney
Richard F. Cornell
Washoe County Clerk

FILED

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE

* * *

JONATHAN HUGH BANTA,

Petitioner,

v.

Case No. CR97P1182

THE STATE OF NEVADA,

Dept. No. 3

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT

This matter came before the court on Banta's Petition for Writ of Habeas Corpus (Post-Conviction). The court, now having had the benefit of an evidentiary hearing, is fully advised of the premises, and hereby denies the relief requested.

FINDINGS OF FACT

I. On March 31, 1997, Banta was arrested and charged with felony DUI, third offense within seven years, and related misdemeanor offenses, including driving on a revoked driver's license due to a prior DUI charge and/or conviction.

A. Banta's first offense occurred on August 6, 1992.

1 B. Banta's second offense occurred on August 25, 1996.

2 Banta entered his plea to this offense on January 9,

3 1997, and was sentenced on this offense on April 4,

4 1997, five days after the present DUI took place.

5 Banta underwent a treatment program in conjunction with
6 the second offense.

7 II. At all relevant times, Banta was represented by David
8 Houston.¹

9 A. Owing to his training and experience, Houston was
10 well-qualified to represent Banta.

11 B. Houston not only represented Banta on the present
12 DUI charge, he also defended Banta on the second
13 offense.

14 III. At the habeas proceeding, Houston testified credibly that
15 the first time he learned of Banta's present DUI was on April 4,
16 1997, after Banta was sentenced on the second offense.

17 A. Between March 31, 1997, when the present DUI
18 offense occurred, and April 4, 1997, when Banta would
19 be sentenced in Reno Justice Court on the second
20 offense, Houston spoke with Banta several times.

21
22 ¹Banta retained new counsel, Arnold Brock, in December of
23 1997. Although Houston represented Banta when Banta entered his
24 plea to the present offense on November 6, 1997, and in Reno
25 Justice Court when Banta entered his plea to the driving without
26 insurance and driving on a revoked driver's license on November 20,
1997, Brock represented Banta thereafter in both the District Court
and Reno Justice Court proceedings. Banta's petition and other
moving papers do not raise any specific challenges to the
effectiveness of Brock's representation.

1 whether Banta's blood alcohol level, which was over a
2 .20, could be created, artificially inflated, or
3 artificially maintained at a high level due to a slowed
4 metabolism, but concluded the defense, in any version,
5 would not succeed.³

6 1. Houston testified credibly that his
7 investigation included conversation and contact with
8 his client.

9 a. Houston testified credibly that Banta
10 presented his medicine bottles for investigation
11 and examination, and Houston discovered that each
12 one contained an explicit warning not to drink
13 alcohol.

14 i. No reasonably competent defense
15 attorney in a DUI case would discount the
16 importance of these explicit warnings in
17 evaluating the viability of Banta's proposed
18 theory of defense, as stated.

19 ii. The presence of these
20 warnings, Houston correctly concluded, would
21 undermine Banta's credibility as a witness in
22 a jury trial (just as it did in the habeas
23 corpus proceeding on the same issue).

24
25 ³Houston was also well aware that knowledge of one's blood
26 alcohol level is not an element of the offense of driving under the
influence. Slinkard v. State, 106 Nev. 393, 793 P.2d 1330 (1990).

1 b. No jury acting reasonably would have
2 found Banta's claim that he was unaware of
3 the warning credible.

4 2. Houston testified credibly that he personally
5 consulted with pharmacists regarding Banta's proposed
6 theory of defense, including Banta's hand-picked
7 expert, Charles Sass.

8 a. Houston's consultation with these
9 experts was reasonable under prevailing
10 professional norms.

11 b. Houston's decision to forego the
12 involuntary intoxication defense, following a
13 consultation with these experts, was
14 reasonable under prevailing professional
15 norms.

16 c. It must be noted explicitly, that,
17 while Dr. Sass' testimony tended to support
18 Banta's version of involuntary intoxication,
19 in that the combination of his prescribed
20 medications and alcohol would slow the
21 metabolism of alcohol by the human body, the
22 court finds that, in light of Dr. Sass'
23 conclusions, Banta did not tell the whole
24 truth regarding the number of drinks he had
25 on March 31, 1997. Even by Dr. Sass' lights,
26 in order for Banta's blood alcohol level to

1 reach the .208-.219 levels, Banta must have
2 had much more alcohol to drink than the three
3 beers he claimed to have consumed between
4 2:00 and 3:30 on the afternoon of March 31,
5 1997, and the three glasses of wine he
6 claimed to have consumed between 6:00 and
7 7:30 that same evening.

8 i. The court finds that Banta
9 failed to tell the truth about the number of
10 drinks he had on March 31, 1997.

11 ii. The court finds that, in
12 addition to believing that Banta's ignorance
13 of the alcohol warning on each of his
14 medicine bottles is not credible, Banta, in
15 fact, did drink more alcohol than he claims
16 to have consumed.

17 iii. No reasonably competent
18 counsel would have presented the testimony of
19 Dr. Sass, where, as here, Dr. Sass' testimony
20 could not be reconciled with, or would
21 otherwise substantially undermine Banta's
22 sworn testimony and the credibility of that
23 testimony.

24 d. There is no reasonable probability
25 that, had Houston actually presented the
26 evidence from these experts in a trial,

1 particularly that of Dr. Sass, Banta would
2 have been found not guilty on the basis of
3 his experts' testimony alone or in
4 conjunction with other evidence.

5 3. Houston testified credibly that once he
6 completed his investigation into a defense premised on
7 involuntary intoxication, he discussed his conclusions
8 with Banta, who agreed this defense should not be
9 pursued. Banta's testimony to the contrary is not
10 credible.

11 C. In addition to telling Houston about a theory of
12 defense based on involuntary intoxication, Banta also
13 told Houston that he had a witness, Carmelynn Sweet,
14 who could support certain parts of this theory.

15 1. It is undisputed that Houston never spoke with
16 Sweet.

17 2. Houston's failure to speak with Sweet was not
18 unreasonable under any prevailing professional norm.

19 a. Houston testified credibly that,
20 given what Banta claimed Sweet would provide,
21 he determined no contact with Sweet was
22 necessary.

23 b. The information contained in Sweet's
24 proffered testimony, pursuant to her
25 affidavits, is not what Banta claimed Sweet
26 would provide in his defense.

1 3. Had Houston contacted Sweet and had Sweet
2 testified in Banta's defense just as she averred in her
3 affidavits, there is no reasonable probability that
4 Banta would have been found not guilty on the basis of
5 this omitted testimony alone or in conjunction with the
6 other available evidence.

7 V. Prior to advising a plea to the present felony DUI offense,
8 a third offense, Houston conducted a reasonably complete
9 investigation of the applicable law in order to determine whether
10 Banta's 1992 offense, the second offense, could be challenged
11 thus transforming, as a matter of law, the present offense to a
12 "second offense." Houston concluded that the 1992 offense was a
13 "second offense" for purposes of elevating the present offense to
14 a felony.

15 A. Houston's failure to make a motion to strike or
16 suppress the 1992 offense was not unreasonable under
17 prevailing professional norms.

18 1. Houston's failure to consider challenging the
19 1992 offense on the theory that the enhancement scheme
20 under Chapter 484 of the Nevada Revised Statutes is,
21 and therefore should be, treated the way habitual
22 criminal proceedings under Chapter 207 are treated, was
23 not unreasonable under prevailing professional norms.

24 2. No reasonably competent defense lawyer would
25 have made an argument analogizing enhancement
26 proceedings under Chapter 484 to habitual criminal

1 proceedings under Chapter 207, given the vast and
2 discernible differences in the two statutory schemes,
3 the case law interpreting these statutory schemes, and
4 the legislative intent behind them.

5 B. Had Houston presented the omitted argument, there
6 is no reasonable probability that it would have
7 succeeded in striking out or suppressing Banta's 1992
8 offense.⁴

9 C. Houston credibly testified that he discussed the
10 results of this legal research with Banta, who agreed
11 to forego the motion to strike or suppress. Banta's
12 testimony to the contrary is not credible.

13 VI. To the extent that this claim is not procedurally barred,
14 the State did not breach the plea agreement into which Banta and
15 the State entered in Reno Justice Court as it related to the
16 misdemeanor offenses filed in that court.⁵

17 A. On November 20, 1997, Banta entered a plea,
18 pursuant to negotiations, to one count of failure to
19 comply with Nevada's Motor Vehicle Insurance Act, and
20 one count of operating a motor vehicle while driver's

21
22 ⁴To the extent that Banta contends that Houston should have
23 litigated the motion, lost and reserved the issue for appeal
24 following the plea, this court believes that, on appeal, our
25 Supreme Court would have affirmed the trial court order denying the
26 motion.

⁵This court will assume, for purposes of this case, that it
has jurisdiction to hear and rule upon this aspect of Banta's
petition even though it arose in a different court, and in a
different judicial proceeding. Contra, NRS 34.738(1).

1 license was suspended due to alcohol or drug related
2 offense. It is undisputed that the latter was alleged
3 in the criminal complaint as a violation of Washoe
4 County Code 70.3863, not NRS 483.560.

5 B. The negotiations stipulated, in salient part, that
6 the parties would recommend that the sentence Banta
7 would receive on the revocation offense be served
8 concurrent to whatever sentence Banta received on the
9 felony DUI. Sentencing on the felony was set for
10 January 23, 1998.

11 C. Once the negotiations were recited, again on
12 November 20, 1997, the Magistrate, the Honorable John
13 Kadlic, interrupted, noting that the agreement may not
14 be such as could be carried out, and would depend,
15 ultimately, on whether Banta received a sentence in
16 excess of one year on the felony. Judge Kadlic
17 canvassed Banta, accepted his plea to the revocation
18 charge and ordered that sentencing in the misdemeanor
19 case take place after sentencing on the felony.⁶

20 D. On January 23, 1998, following an unsuccessful
21 attempt to withdraw his plea to the felony charge, an
22

23 ⁶The precise origin of Judge Kadlic's interpretation of the
24 applicable sentencing scheme is not entirely clear, though it is
25 apparent, given Houston's habeas testimony, that he shared the same
26 opinion. What is clear, however, is that Washoe County Code
70.3863, unlike NRS 483.560(4) and NRS 484.3792(5), does not
prohibit the imposition of concurrent sentences. Consequently, a
concurrent sentence was always a possibility in this case.

1 attempt pursued by a new lawyer, Banta was sentenced to
2 12-30 months in prison on the felony. No mention of
3 the revocation charge was made at that time. This
4 omission has not been explained.

5 E. On June 12, 1998, after an unsuccessful attempt to
6 withdraw his plea to the revocation charge, Banta was
7 sentenced to six months in jail to be "satisfied by
8 house arrest." No request was made for a concurrent or
9 consecutive sentence. No mention was made of credit
10 for time served nor was any mention made of credit for
11 time served on the misdemeanor and whether it would be
12 awarded in the felony case.⁷ The judgment of
13 conviction from the Justice Court did not order a
14 consecutive sentence.

15 1. It is undisputed that Banta served the six-
16 month sentence in house arrest.

17 2. It is undisputed that, unlike the felony
18 proceeding, Banta never tried to stay the imposition of
19 the sentence in the misdemeanor case pending an appeal
20 of that judgment.

21 3. It is undisputed that Banta never appealed
22

23 ⁷Part of Banta's claim here is that he is entitled to six
24 months of credit for time served on the misdemeanor, and that it
25 should be awarded on the felony. While NRS 34.738(3) prohibits
26 challenging the computation of time served in the same petition
which challenges a judgment or sentence, the court deems it
advisable here to address the joint claims in one proceeding rather
than dismiss this aspect of Banta's petition without prejudice.

1 from the judgment of conviction, in the justice court,
2 nor has he attempted to explain this omission under any
3 recognized theory of cause and prejudice.

4 a. No impediment external to the
5 defense prohibited such an appeal.

6 b. Each of the issues Banta asserts
7 that addresses the revocation charge alone or
8 in conjunction with the felony case could
9 have been raised in an appeal from the
10 judgment of conviction in the justice court.

11 F. Banta has not be credited in the felony case for
12 the time served on the revocation case.

13 VII. Although Banta spent one day in jail on the present DUI
14 charge, March 31, 1997, to April 1, 1997, he failed to prove
15 that, alone or in conjunction with the fact he has been on an own
16 recognizance release or bail throughout the pendency of this
17 criminal charge, the appeal and the present litigation, this
18 period of incarceration established such a break in the course of
19 his daily life that his subsequent conduct "reintegrated" him
20 into society.

21 A. After he was sentenced on the felony DUI charge,
22 Banta, who had been on an own recognizance release
23 following his arrest, was placed on bail pending his
24 appeal from the judgment of conviction and Judge
25 Agosti's prior ruling on his motion to withdraw his
26 guilty plea in the felony DUI case.

1 B. After the Nevada Supreme Court affirmed Banta's
2 conviction, the State did not attempt to revoke Banta's
3 bail, nor did Banta attempt to turn himself in.

4 C. Banta filed the present petition on June 3, 1999,
5 one year after the Nevada Supreme Court entered its
6 Order Dismissing Appeal, and, on August 13, 1999, this
7 court, over the State's objection, granted bail pending
8 the litigation of the present petition.

9 D. While Banta was awaiting trial and while his cases
10 have been pending both in the Supreme Court and with
11 this court, Banta has remained integrated into society
12 and been a relatively productive and responsible member
13 of the community.

14 CONCLUSIONS OF LAW

15 1. Banta was not deprived of the right to the effective
16 assistance of counsel as contemplated within Strickland v.
17 Washington, 466 U.S. 668 (1984), Hill v. Lockhart, 474 U.S. 52
18 (1985), and their local progeny.

19 2. Banta's right to due process of law as construed in Gibson v.
20 State, 111 Nev. 1450, 907 P.2d 166 (1995), was not violated.

21 3. Banta's claim that the State breached the plea bargain is
22 procedurally barred, or otherwise lacks merit.

23 4. Banta is not entitled to credit for time served.

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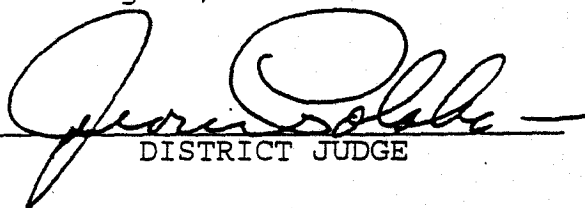
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JUDGMENT

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2 It is hereby the order and judgment of the court that
3 Banta's Petition for Writ of Habeas Corpus (Post-Conviction), is
4 DENIED.

5 DATED this 31st day of August, 2000.

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8 DISTRICT JUDGE
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