

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS R. BRAND, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 37027

THOMAS R. BRAND, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 37028

FILED

OCT 29 2002

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

ORDER OF AFFIRMANCE

These are consolidated proper person appeals from an order of the district court denying appellant Thomas R. Brand, Jr.'s post-conviction petition for a writ of habeas corpus and motion.<sup>1</sup>

On March 24, 1995, in district court case no. CR94-2922, Brand was convicted, pursuant to a jury verdict, of one count of robbery with the use of a deadly weapon against the elderly. The district court sentenced Brand to serve two consecutive prison terms of 15 years, and ordered him to pay restitution in the amount of \$170.00.

<sup>1</sup>Brand titled the motion: "Motion for rehearing or reconsideration of this court's order denying request for appointment of counsel or request for rescheduling the date for evidentiary hearing to allow petitioner time to amend or supplement his new claims and prepair [sic] to defend in if he is forced to do so." We conclude that the district court did not err in denying this motion. See NRS 34.750; McKague v. Warden, 112 Nev. 159, 163-64, 912 P.2d 255, 257-58 (1996).

On the same date, in district court case no. CR94-2923, Brand was convicted, pursuant to a jury verdict, of three counts of robbery with the use of a deadly weapon (counts I, III-IV) and one count of attempted robbery with the use of a deadly weapon (count II). The district court sentenced Brand to serve two consecutive prison terms of 15 years for count I; two consecutive prison terms of 7 years and 6 months for count II; two consecutive prison terms of 15 years for count III; and two consecutive prison terms of 15 years for count IV. Counts II-IV were ordered to run consecutively to count I, and all of the sentences were ordered to run consecutively to those imposed in district court case no. CR94-2922. The district court also ordered Brand to pay restitution in the amount of \$681.25. Brand's direct appeals from the judgments of conviction were dismissed by this court.<sup>2</sup>

On November 16, 1998, Brand filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel to represent Brand, however, counsel was allowed to withdraw prior to the evidentiary hearing.<sup>3</sup> Brand filed three unsuccessful motions for the

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<sup>2</sup>Brand v. State, Docket Nos. 27131 & 27132 (Order Dismissing Appeals, September 15, 1998).

<sup>3</sup>In his motion to withdraw as counsel, Attorney Scott W. Edwards stated, "Without divulging the specifics of communications with Mr. Brand by your undersigned, counsel represents that Mr. Brand is under the mistaken impression that undersigned counsel is engaged in a criminal conspiracy to alter evidence in this case and has even on occasion referred to undersigned counsel as 'Asshole.'" We note that Brand also submitted a motion requesting that counsel withdraw from his case.

appointment of counsel. On October 16, 2000, after conducting an evidentiary hearing, the district court denied Brand's petition. These timely appeals followed.

In his petition, Brand contended that he received ineffective assistance of trial and appellate counsel. Brand argued that trial counsel was ineffective in failing to: (1) file pretrial motions; (2) investigate potential alibi witnesses; (3) interview witnesses pertaining to the theory of the defense; (4) investigate or subpoena witnesses to present at trial and for purposes of mitigation at sentencing; (5) prepare for trial or develop a theory of defense; (6) object to the identification procedure and photo lineup; and (7) form a working relationship with him. Brand argued that appellate counsel was ineffective in failing to raise meritorious issues in his direct appeal from the judgment of conviction, such as: (1) the untimeliness of the State's motion to add the "elderly" enhancement to the robbery count; (2) the Brady<sup>4</sup> violations committed by the State; (3) the violation of the exclusionary rule; (4) prosecutorial misconduct; and (5) counsel failing to discuss the appellate process with him.

At the evidentiary hearing on the petition, Brand sought a continuance, stating that certain documents were not transported with him from prison to court, and that his witnesses were not present. Brand told the district court that he instructed his witnesses not to appear because he believed the district court was going to postpone the hearing. Brand also told the district court that because he was incarcerated he was unable to contact the witnesses and arrange for their presence at the

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<sup>4</sup>Brady v. Maryland, 373 U.S. 83 (1963).

hearing. The district court denied Brand's request for a continuance, stating in its order:

[T]he truth was that Brand was aware of the hearing and aware that he would be proceeding without counsel but that he made no effort to secure the attendance of the witnesses. In fact, the court finds it difficult to believe Mr. Brand when he claims that he ever intended to present any evidence. The court is persuaded that Brand is merely attempting to manipulate the judicial system for his own purposes, whatever they might be.

When Brand was given the opportunity to present evidence relating to his habeas petition, he stated that: (1) it was his intent to call witnesses to testify to the fact that they were coached to lie by the deputy district attorney, and that his counsel was ineffective in failing to bring this to the attention of the court; (2) his trial counsel did not present a defense; (3) a search warrant was forged; and (4) the prosecutor referred to evidence that did not exist. Brand finished his presentation by stating, "I don't know what else to bring before the Court. I have nothing here with me. And that's not my fault."

The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>5</sup> The district court found that Brand did not testify to any complete ground for relief, and that his testimony at the evidentiary hearing was false and lacked credibility. Brand cannot demonstrate that the district court erred as a matter of law. Therefore, we conclude that the

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<sup>5</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

district court did not err in denying Brand's allegations of ineffective assistance of counsel.

Finally, Brand raised several claims that should have been pursued in his direct appeal. Brand contended that the prosecutor committed misconduct, effectively denying him due process, by (1) not producing exculpatory evidence; (2) intimidating witnesses into testifying falsely; (3) knowingly violating the rule of exclusion; and (4) colluding with witnesses in order to taint the identification procedure and a photo lineup.

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.<sup>6</sup> 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."<sup>7</sup> Brand 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 justice.<sup>8</sup> We therefore conclude that the district court properly rejected these claims.

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<sup>6</sup>See NRS 34.810(1)(b); NRS 34.810(3).


<sup>7</sup>Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

<sup>8</sup>Cf. 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").

Having reviewed the record on appeal and for the reasons set forth above, we conclude that Brand is not entitled to relief and that briefing and oral argument are unwarranted.<sup>9</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>10</sup>

 J.  
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Shearing

 J.  
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Leavitt

 J.  
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Becker

cc: Hon. Steven R. Kosach, District Judge  
Thomas R. Brand Jr.  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk

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<sup>9</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>10</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.