

IN THE SUPREME COURT OF THE STATE OF NEVADA

CURTIS L. DOWNING A/K/A CURTIS
LUNDY DOWNING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37473

FILED

APR 11 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
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.¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Young J.
Young

Agosti J.
Agosti

Leavitt J.
Leavitt

¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General/Carson City
Clark County District Attorney
Curtis L. Downing
Clark County Clerk

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

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Christina...
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,
8 Plaintiff,

9 -vs-
10 CURTIS L. DOWNING,
11 #0682068

12 Defendant.

Case No.. C119521
Dept. No. V
Docket H

14 FINDINGS OF FACT, CONCLUSIONS OF
15 LAW AND ORDER

16 DATE OF HEARING: 1/25/01
17 TIME OF HEARING: 9:00 A.M.

18 THIS CAUSE having come on for hearing before the Honorable JEFFREY D. SOBEL,
19 District Judge, on the 25th day of January, 2001, the Petitioner not being present, represented
20 in proper person, the Respondent being represented by STEWART L. BELL, District Attorney,
21 by and through VICKI J. MONROE, Chief Deputy District Attorney, and the Court having
22 considered the matter, including briefs, transcripts, arguments of counsel, and documents on file
23 herein, now therefore, the Court makes the following findings of fact and conclusions of law:

24 **FINDINGS OF FACT**

25 1. On April 20, 1994, Petitioner was charged by way of Information with three counts of Sexual
26 Assault, occurring on January 18, 1993. At his arraignment on April 21, 1994, Petitioner,
27 represented by the Clark County Public Defender, pleaded not guilty and set the matter for trial.
28 On July 5, 1994, Petitioner changed his pleas to guilty to counts I & II of the Information
pursuant to a Guilty Plea Memorandum.

1 2. However, on July 25, 1994, Petitioner filed a proper person petition for writ of habeas corpus
2 and motion to withdraw his guilty plea. On September 6, 1994, the Court granted Petitioner's
3 motion to withdraw his guilty plea, without objection from the State.

4 3. On May 5, 1995, Petitioner filed a motion to exclude DNA evidence, to which the State filed
5 an opposition on May 23, 1995, followed by a Supplemental Statement of Facts on August 29,
6 1995. No hearing was had or ruling made on this motion, which the Court eventually took off
7 calendar on May 15, 1997.

8 4. On September 12, 1995, the Clark County Public Defender withdrew, and on September 26,
9 1995, the State Public Defender was appointed. On March 20, 1997, at Petitioner's request and
10 following a canvass by the Court, Petitioner was found competent to waive legal counsel, and
11 did so. The State Public Defender remained appointed as Petitioner's legal advisor.

12 5. On April 16, 1997, Petitioner filed a proper person motion for fees for expert services, which
13 was denied without prejudice on April 29, 1997.

14 6. On May 22, 1997, Dean Kajioka was appointed by the Court to substitute for the State Public
15 Defender as Petitioner's stand-by counsel. On June 17, 1997, Petitioner agreed to representation
16 by Peter Christiansen, who confirmed as trial counsel.

17 7. On November 20, 1997, Petitioner's new trial counsel, Peter Christiansen, filed his
18 Supplement to Defendant's Pro Per Pretrial Motions, to which the State filed its response on
19 December 22, 1997. On January 12, 1998, this Court entered its order denying same.

20 8. On March 9, 1998, the trial of this case commenced. On March 12, 1998, the jury returned
21 guilty verdicts on all three counts.

22 9. On April 30, 1998, the Court sentenced Petitioner to three consecutive terms of life
23 imprisonment, running consecutively to Petitioner's sentence in case C114390. In addition,
24 Petitioner was sentenced to pay \$250 restitution and a \$25 administrative assessment. The
25 Judgment of Conviction (Jury Trial) was entered on May 20, 1998.

26 10. On May 19, 1998, Petitioner filed his notice of appeal of these convictions, and on May 26,
27 1998, the Court appointed JoNell Thomas to represent Petitioner on appeal. Following a full
28 briefing by the parties, the Nevada Supreme Court concluded that Petitioner's issues on appeal

1 lacked merit. On March 2, 2000, the Supreme Court filed its Order Dismissing Appeal in
2 Docket No. 32394. Remittitur issued on March 28, 2000.

3 11. On June 8, 2000, Petitioner filed with the U.S. District Court for the District of Nevada a
4 Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody
5 (Not Sentenced to Death). On September 5, 2000, the Nevada Attorney General filed its motion
6 to dismiss the federal petition.

7 12. On September 25, 2000, Petitioner filed the instant Petition for Writ of Habeas Corpus
8 (Post-Conviction), to which the Court ordered the State to respond.

9 13. Neither Petitioner's trial nor his appellate counsel provided him with ineffective assistance
10 of counsel warranting reversal of his conviction. They both met or exceeded the standard of
11 "reasonably effective assistance," and Petitioner was not prejudiced by their representation.

12 14. Petitioner specifically states in his memorandum in support of the Petition that he "was
13 pleased with the performance and representation of trial counsel in the District Court." (Mem.
14 at 4:2-3.) Petitioner's own statement belies his allegation that his trial counsel fell below an
15 "objective standard of reasonableness."

16 15. The testimony adduced from Melissa Weber, the State's DNA expert, was that she had
17 employed RFLP, a more discriminating and more specific type of DNA test than PCR.
18 Therefore, trial counsel would not have prevailed in an attempt to renew the Motion to Exclude
19 DNA Evidence, so Petitioner suffered no prejudice.

20 16. Petitioner failed to allege how a DNA expert for the defense could have rebutted the
21 testimony of the State's expert or what favorable testimony he might have offered; nor has he
22 alleged what contribution might have been made by an attorney more familiar with DNA
23 evidence.

24 17. Substantial evidence of Petitioner's guilt was adduced at trial.

25 18. Petitioner's appellate counsel was not ineffective by failing to state "exactly" which state
26 rights had allegedly been violated as opposed to "exactly" which federal constitutional rights had
27 allegedly been violated. The failure to do so had no effect on the outcome of the appeal.

28 19. Petitioner has failed to rebut the presumption that his trial and appellate counsel provided

1 constitutionally effective representation.

2 **CONCLUSIONS OF LAW**

3 20. Neither Petitioner's trial nor his appellate counsel provided him with ineffective assistance
4 of counsel warranting reversal of his conviction. See Strickland v. Washington, 466 U.S. 668,
5 687 (1984); Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505
6 (1984) (adopting Strickland two-part test in Nevada); Jackson v. Warden, Nevada State Prison,
7 91 Nev. 430, 432, 537 P.2d 473, 474 (1975); McMann v. Richardson, 397 U.S. 759, 771, 90
8 S.Ct. 1441, 1449 (1970); Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991)
9 (rebuttable presumption that counsel is effective).

10 21. Petitioner's counsel was not ineffective for not supplementing and renewing the Motion to
11 Exclude DNA Evidence or for not filing motions for DNA expert witness fees and appointment
12 of counsel familiar with DNA evidence. Trial counsel would not have prevailed in an attempt
13 to renew the Motion to Exclude DNA Evidence, so Petitioner suffered no prejudice. See Bolin
14 v. State, 114 Nev. 503, 528, 960 P.2d 784, 800 (1998).

15 22. Petitioner has not alleged how a DNA expert for the defense could have rebutted the
16 testimony of the State's expert or what favorable testimony he might have offered; nor has he
17 alleged what contribution might have been made by an attorney more familiar with DNA
18 evidence. Without more, these "naked" allegations did not even warrant an evidentiary hearing.
19 Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

20 23. Petitioner's appellate counsel was not ineffective by failing to state "exactly" which state
21 rights had allegedly been violated as opposed to "exactly" which federal constitutional rights had
22 allegedly been violated. The failure to do so had no effect on the outcome of the appeal. See
23 Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden, Nevada State Prison v. Lyons, 100
24 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada); Jackson
25 v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975); McMann v.
26 Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970); Davis v. State, 107 Nev. 600, 602,
27 817 P.2d 1169, 1170 (1991) (rebuttable presumption that counsel is effective).

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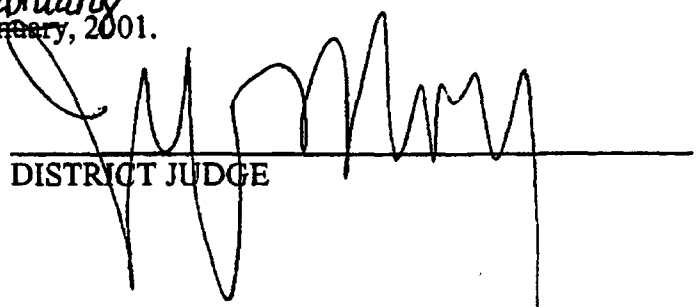
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ORDER

Based on the Findings of Fact and Conclusions of Law herein contained, it is hereby:

ORDERED, ADJUDGED AND DECREED that Petitioner CURTIS LUNDY DOWNING's Petition for Writ of Habeas Corpus (Post-Conviction) is DENIED.

DATED this 10th day of February, 2001.



DISTRICT JUDGE

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY Vicki J. Monroe
VICKI J. MONROE
Chief Deputy District Attorney
Nevada Bar #003776

FERGUSON/gmr