

IN THE SUPREME COURT OF THE STATE OF NEVADA

TAM CONG NGUYEN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38415

FILED

OCT 14 2002

ORDER OF AFFIRMANCE

W. NEV. M. BLOOM  
CLERK OF SUPREME COURT  
*W. Bloom*

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On January 12, 1999, the district court convicted appellant, pursuant to a jury verdict, of first degree murder with the use of a deadly weapon. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility to parole, plus an equal and consecutive sentence for the use of a deadly weapon. This court dismissed appellant's direct appeal.<sup>1</sup>

On February 22, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to

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<sup>1</sup>Nguyen v. State, Docket No. 33724 (Order Dismissing Appeal, July 7, 2000).

conduct an evidentiary hearing. On September 13, 2001, the district court denied appellant's petition. This appeal followed.

Appellant raised fifteen claims of ineffective assistance of trial counsel. To establish ineffective assistance of counsel, a petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.<sup>2</sup> To show prejudice, a petitioner must show a reasonable probability that but for counsel's errors the result of the trial would have been different.<sup>3</sup> "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."<sup>4</sup> A court may consider the two test elements in any order and need not consider both prongs if an insufficient showing is made on either one.<sup>5</sup>

First, appellant claimed that trial counsel was ineffective for failing to request that appellant be examined by a court-appointed psychiatrist and failing to request a competency hearing. This claim is not supported by specific factual allegations that would, if true, entitle

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<sup>2</sup>Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>3</sup>Strickland, 466 U.S. at 694.

<sup>4</sup>Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691) abrogation on other grounds recognized by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

<sup>5</sup>Strickland, 466 U.S. at 697.

appellant to relief.<sup>6</sup> Appellant did not state what psychiatric condition he suffered from which rendered him incompetent or any facts known to his counsel which should have alerted them that appellant may have been incompetent. Appellant did not even allege that he was in fact incompetent. Therefore, appellant failed to show that counsels' performance fell below an objective standard of reasonableness, and the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to file "proper meaningful pre-trial motions beneficial to the defense." This claim is not supported by specific factual allegations which would, if true, entitle appellant to relief.<sup>7</sup> Appellant failed to state which pretrial motions counsel should have filed and how he was prejudiced by counsels' failure to do so. Therefore, appellant failed to show that counsel was ineffective in this regard and the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to communicate to appellant all of the evidence against him and the results of any independent investigation. This claim is not supported by factual allegations which would, if true, entitle appellant to relief.<sup>8</sup> Appellant failed to specify what information counsel should have provided

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<sup>6</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

<sup>7</sup>See id.

<sup>8</sup>See id.

appellant and how his failure to do so resulted in prejudice to the defense. Therefore, appellant failed to show that counsel was ineffective in this regard and the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for attempting to coerce appellant into accepting a plea bargain. This claim is without merit. Appellant did not accept a plea bargain, therefore, he cannot show a reasonable probability that but for counsels' alleged error the result of the trial would have been different. Therefore, appellant failed to show that counsel was ineffective in this regard and the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to request that appellant be provided an interpreter. This claim is without merit. The record reflects that appellant had a satisfactory command of the English language, and was able to understand the proceedings and communicate with the court and his attorneys. In fact, during the proceedings appellant rejected the use of an interpreter. At the preliminary hearing the justice court asked appellant if he needed an interpreter to which appellant replied, "Not really sir." The court told appellant, "Okay. We have one here now, if you want her. If you don't want her, I'll send her on her way." Appellant responded, "No." Therefore, appellant failed to show that counsel was ineffective in this regard and the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to call witnesses. Specifically, appellant claimed that counsel

should have called witnesses who would have "corroborated suicide accusations." Apparently, appellant contended that counsel should have called witnesses to refute the testimony of appellant's wife that appellant threatened to kill himself and his family after a fist-fight he had with the decedent, and that counsel should have called witnesses to corroborate appellant's testimony that he wanted to kill himself after the murder. To the extent that this claim is supported by factual allegations, it is belied by the record.<sup>9</sup> The jury heard testimony refuting and corroborating these assertions. Appellant testified that he did not threaten to kill himself or his family after getting into a fist-fight with the decedent. Appellant testified that he was so "distressed" over the possibility that his wife might be having an affair with the decedent, that he told her "why don't you go take a gun and shoot me. Kill me. Kill all my kids. I can't live like this." Appellant's son testified that when appellant returned home after the murder he was despondent, and stated while holding the gun used as the murder weapon, that there was "no reason for me to live anymore." Appellant's son testified that he believed his father wanted to kill himself because of the murder, and that that he took the gun away from appellant so that appellant could not shoot himself. Therefore, appellant failed to show that counsel was ineffective in this regard and the district court did not err in denying this claim.

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<sup>9</sup>See id.

Seventh, appellant claimed that trial counsel was ineffective for failing to file a "Motion for Experts" to obtain a second opinion as to appellant's state of mind. Appellant failed to state what kind of expert should have been called and what that expert would have testified to.<sup>10</sup> Moreover, Dr. Daniel Lee, a psychologist, neuropsychologist, and forensic psychologist with extensive experience working with Vietnamese refugees, conducted a comprehensive psychological assessment and clinical in-depth interview of appellant. Dr. Lee testified at trial that he believed that appellant was not in control of his actions when he shot the victim. Therefore, appellant failed to show that counsel's performance fell below an objective standard of reasonableness or that he was prejudiced. Accordingly, the district court did not err in denying this claim.

Eighth, appellant claimed that trial counsel was ineffective for failing to file a motion for continuance on the second day of the trial. Appellant claimed that counsel should have requested a continuance to allow time to "investigate" the burglary while in possession of a firearm charge "levied" against appellant on that date.<sup>11</sup> This claim is belied by

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<sup>10</sup>See id.

<sup>11</sup>Appellant was originally charged with both murder with the use of a deadly weapon and burglary while in possession of a firearm. The jury could not reach a verdict on the burglary charge. The district court declared a mistrial on that count and granted the defense motion to dismiss it.

the record.<sup>12</sup> The original information filed on May 13, 1998, contained the charge in question. The amended information filed on November 10, 1998 amended the wording of the murder charge. In addition, the jury did not convict appellant of the burglary charge and it was dismissed. Therefore, appellant failed to show that counsels' performance fell below an objective standard of reasonableness or that the result of the trial would have been different. Accordingly, the district court did not err in denying this claim.

Ninth, appellant claimed that trial counsel was ineffective for failing to file a motion to dismiss the burglary charge. As discussed, appellant cannot establish that if counsel had filed such a motion the outcome of the trial would have been different. Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that trial counsel was ineffective for not pursuing a defense theory based on "Extreme Emotional Distress Disturbance." On direct appeal, this court determined that there was "clearly sufficient evidence" to establish that appellant acted with deliberation and premeditation, and that the evidence establishing murder by lying in wait was "overwhelming" and provided "a distinct, valid basis for the general verdict of first-degree murder." Further litigation regarding this issue is barred by the doctrine of the law of the

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<sup>12</sup>See Hargrove, 100 Nev. 498, 686 P.2d 222.

case.<sup>13</sup> Therefore, appellant failed to show that counsel was ineffective in this regard and the district court did not err in denying this claim.

Eleventh, appellant claimed that trial counsel was ineffective for failing to object throughout the proceedings in a timely manner. Appellant failed to state what objections counsel should have made.<sup>14</sup> Therefore, appellant failed to show that counsel was ineffective in this regard and the district court did not err in denying this claim.

Twelfth, appellant claimed that trial counsel was ineffective for failing to properly prepare witnesses. Appellant failed to state which witnesses were not prepared and what counsel should have done to better prepare them.<sup>15</sup> Therefore, appellant failed to show that counsel was ineffective in this regard and the district court did not err in denying this claim.

Thirteenth, appellant claimed that trial counsel was ineffective for advising appellant to waive the right to be sentenced by the court rather than the jury. To the extent that this claim is supported by factual allegations, it is belied by record.<sup>16</sup> Prior to the beginning of the trial, the district court had a lengthy and somewhat ardent discussion

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<sup>13</sup>See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

<sup>14</sup>See Hargrove, 100 Nev. 498, 686 P.2d 222.

<sup>15</sup>See id.

<sup>16</sup>See id.



with appellant as to whether, if convicted, he would waive the penalty phase and agree to be sentenced by the district court. Appellant repeatedly informed the court that he would not waive the penalty phase. Therefore, appellant failed to show that counsel was ineffective in this regard and the district court did not err in denying this claim.

Fourteenth, appellant claimed that trial counsel was ineffective for failing to present witnesses and mitigating factors during the penalty phase. To the extent that this claim is supported by factual allegations, it is belied by record.<sup>17</sup> During the penalty phase, the defense presented three witnesses, including appellant's sixteen-year-old son. Appellant also made a statement on his own behalf. Therefore, appellant failed to show that counsels' performance fell below and objective standard of reasonableness, and the district court did not err in denying this claim.

Fifteenth, appellant claimed that trial counsel failed to "determine statutory and non-statutory mitigating circumstances" and "failed to argue lesser included offenses." This claim is not supported by any specific factual allegations that would, if true, entitle appellant to relief.<sup>18</sup> In addition, this court has previously determined that there was more than sufficient evidence to support the conviction. Therefore, appellant failed to show that counsel was ineffective in this regard and the district court did not err in denying this claim.

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<sup>17</sup>See id.

<sup>18</sup>See id.

Appellant also raised three claims of ineffective assistance of appellate counsel. To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that petitioner was prejudiced by the deficient performance.<sup>19</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal in order to be effective.<sup>20</sup> In fact, this court has noted that "appellate counsel is most effective when she does not raise every conceivable issue on appeal."<sup>21</sup> To show prejudice, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.<sup>22</sup>

First, appellant claimed that appellate counsel was ineffective for failing to raise on direct appeal the issue of whether appellant "was denied his Constitutional Right to be appointed an interpreter." As discussed, this claim is without merit. Therefore, appellant did not show that this issue would have had a reasonable probability of success on appeal, and the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel was ineffective for failing to raise on direct appeal the issue of whether the

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<sup>19</sup>Strickland, 466 U.S. at 687.

<sup>20</sup>Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

<sup>21</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (citing Jones, 463 U.S. at 752).

<sup>22</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

district court erred in "admitting highly prejudicial unsubstantiated evidence of other wrongs." Specifically, appellant argued that the district court improperly allowed evidence of the burglary, when in fact, according to appellant, no burglary was committed. Appellant essentially reargues his position taken at trial – that he did not commit burglary because he did not enter the van with the intent of committing a felony. It is within the sole province of the jury "to assess the weight of the evidence and determine the credibility of witnesses."<sup>23</sup> Moreover, as discussed, the jury did not find appellant guilty of the burglary charge. Therefore, appellant failed to demonstrate that counsel's performance fell below an objective standard of reasonableness or that the issue would have had a reasonable possibility of success on appeal. Accordingly, the district court did not err in denying this claim.

Third, appellant claimed that appellate counsel was ineffective for failing to raise on direct appeal the issue of whether the district court abused its discretion in ordering appellant to submit to, and pay for, DNA genetic marker testing because appellant was not convicted of a sex crime. This claim is without merit. The district court did not abuse its discretion because appellant was convicted of a class A felony.<sup>24</sup> Therefore, appellant failed to demonstrate that counsel's performance fell below an objective

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<sup>23</sup>McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

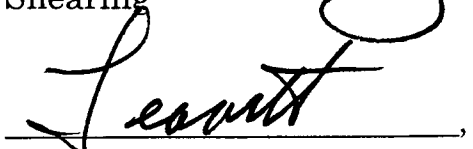
<sup>24</sup>See NRS 176.0913; NRS 176.0915; NRS 200.030(4); see also Gaines v. State, 116 Nev. 359, 998 P.2d 166 (2000).

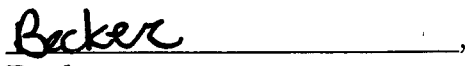
standard of reasonableness or that the issue would have had a reasonable possibility of success on appeal. Accordingly, the district court did not err in denying this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>25</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Shearing

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

  
\_\_\_\_\_, J.  
Becker

cc: Hon. Joseph T. Bonaventure, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Tam Cong Nguyen  
Clark County Clerk

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<sup>25</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).