

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT WADE MORSE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38713

**FILED**

FEB 12 2002

ORDER OF AFFIRMANCE

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

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

On April 28, 1998, Morse was convicted, pursuant to a jury verdict, of first-degree murder (count I), burglary (count II), and coercion with the use of physical force (count III). The district court sentenced Morse to serve a prison term of 50 years for count I, a concurrent prison term of 16 to 72 months for count II, and a concurrent prison term of 12 to 48 months for count III. Morse filed a direct appeal. After hearing oral argument on the issues presented, this court affirmed the judgment of conviction.<sup>1</sup>

On April 4, 2000, Morse filed a post-conviction petition for a writ of habeas corpus. The district court appointed counsel, and Morse filed a supplemental petition. After conducting an evidentiary hearing, the district court denied the petition. Morse filed the instant appeal.

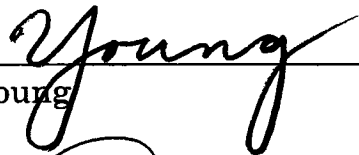
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<sup>1</sup>Morse v. State, Docket No. 32296 (Order Dismissing Appeal, July 16, 1999).


In the petition, Morse presented claims of ineffective assistance of counsel. The district court found that counsel was not ineffective. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>2</sup> Appellant has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, appellant has not demonstrated that the district court erred as a matter of law.

Accordingly, for the reasons stated in the attached order of the district court, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Jack B. Ames, District Judge  
Attorney General/Carson City  
Elko County District Attorney  
Lockie & Macfarlan, Ltd.  
Elko County Clerk

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

*MacFarlan*

Case No. CV-HC-00-6882  
CV-HC-00-7034  
2 Dept. No. II

**FILED**

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6 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
7 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

ELKO CO. DISTRICT COURT  
CLERK \_\_\_\_\_ DEPUTY *BL*

8  
9 ROBERT WADE MORSE,  
10 Petitioner,

ORDER DISMISSING WRIT  
OF HABEAS CORPUS

11 vs.  
12 THE STATE OF NEVADA,  
13 Defendant.  
14 \_\_\_\_\_/

15 On August 16, 2001, this court held a hearing on the Writ of Habeas Corpus filed on  
16 behalf of the Petitioner. At this time the court has heard the testimony presented at the hearing and  
17 reviewed the trial transcript.

18 The Petitioner raises six issues in his supplemental points and authorities; 1) that trial  
19 counsel was ineffective for failure to seek suppression of the statements made by him to Detective  
20 Kolsch the day after surgery; 2) trial counsel was ineffective for failing to object to the burden shifting  
21 statements made by the District Attorney during closing argument; 3) that trial counsel was ineffective  
22 for failing to raise the burden shifting issue on appeal; 4) that trial counsel was ineffective for failing to  
23 present impeachment evidence as to Mrs. Morse and Ms. Eiden; 5) that trial counsel was ineffective for  
24 failing to present evidence as to how the baseball bat came to be in Mr. Morse's truck; and 6) that trial  
25 counsel was ineffective for failing to call the Petitioner to explain his motive and intent for entering the  
26 residence.

27 The test for determining whether counsel was effective is a two prong test. First the  
28 defendant must show that counsel's performance was deficient and second, defendant must show that he

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1 was prejudiced by this deficiency. "'Deficient' assistance requires a showing that trial counsel's  
2 representation of the defendant fell below an objective standard of reasonableness. If the defendant  
3 establishes that counsel's performance was deficient, the defendant must next show that, but for  
4 counsel's errors, the result of the trial probably would have been different." Strickland v. Washington,  
5 466 US 668, 80 L. Ed. 2d 674 (1984).

6 For the purpose of determining whether ineffective assistance of counsel has occurred,  
7 the Nevada Supreme Court in Kirksey v. State, 112 Nev. 980 (1997), defined reasonable probability as  
8 that degree of probability sufficient to undermine confidence in the outcome of the trial.

9 After the altercation which resulted in the death of Mr. Lymbery, Mr. Morse underwent  
10 surgery to repair a fracture and dislocation of his right ankle. The surgery occurred at 12:15 p.m. on  
11 March 23, 1997. On March 24, 1997, at 9:00 a.m., Det. Kolsch went to the hospital for the purpose of  
12 interviewing Mr. Morse. At that time, Mr. Morse had received the following medications: two Vicadin  
13 (pain killer) at 7:45 a.m. on March 23, 1997; 10 milligrams of morphine at 3:00 p.m. on the 23<sup>rd</sup>; 30  
14 milligrams of Restoril (sleeping medication) at 11:20 p.m. on March 23, 1997; two Vicadin at 2:30 a.m.  
15 on the 24<sup>th</sup>; and 10 milligrams of morphine and 25 milligrams of Vistaril (antihistamine used to enhance  
16 the effect of the morphine) at 4:30 a.m. on March 24, 1997.

17 Concerning the voluntariness of these statements, the court finds that even if the failure to  
18 file the Motion to Suppress was below the standard of effectiveness, the court would have denied the  
19 motion. The testimony at the hearing was that on March 23, 1997, Mr. Morse wanted to speak to law  
20 enforcement immediately after the incident. Despite this, the officers declined to interview him until  
21 approximately 36 hours after the incident and the day after the surgery. Mr. Morse was interviewed by  
22 Detective Kolsch. During the hearing, Detective Kolsch, testified that he is experienced with the use and  
23 intoxicating effects of controlled substances, and that in his opinion Mr. Morse was coherent at the time  
24 of the interview. It also appears to the court from a review of the tape recording of the interview, that  
25 Mr. Morse was coherent during the interview.

26 Dr. Jerry Howle was called as an expert witness regarding the possible effects of the  
27 prescription medications and testified as to their typical effects. Dr. Howle testified that each person  
28 reacts differently to drugs and that he did not interview any of Mr. Morse's treating physicians or nurses

and is not aware of how the medications actually affected Mr. Morse. The testimony indicated that Mr. Morse last received medication five (5) hours prior to the interview.

The testimony at the hearing indicated that Detective Kolsch had read Mr. Morse his Miranda warnings and that Mr. Morse had signed a Miranda waiver form stating that he understood his rights. The court finds that the statements made by Mr. Morse during his interview were voluntarily and intelligently made and his fifth amendment rights were not violated. The court further finds that trial counsel did not fall below that objective standard of reasonableness.

The Petitioner also argues that the officers failed to give Miranda as argued for in Moran v. Burbine, 475 US 412 (1986). "Moran requires that a voluntary waiver of rights be 'made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" Williams v. State, 113 Nev. 1008 (1997). Petitioner urges the court to find that this language from Moran requires the officers to "inform the suspect that they will use his statement in an attempt to secure a conviction." In Williams, the officers read the Defendant his rights after his arrest and again prior to his confession. The Defendant there also signed a waiver of rights card. The Defendant was described by interviewing officers as "calm and well-spoken". Here, the officers advised Mr. Morse of his Miranda warnings twice, once after he was arrested and then again before he made his statement to the detectives. In addition, he executed a valid waiver of rights form. The court had opportunity to observe Mr. Morse's demeanor during his testimony at the evidentiary hearing and finds that he is well-spoken and intelligent.

Based upon these factors the court finds that the Miranda warnings given to Mr. Morse were sufficient pursuant to the language of Moran and Williams.

Petitioner argues that during closing argument the District Attorney made inappropriate "burden shifting" comments to the jury. The four specific instances as pointed out by the Petitioner are: 1) pointing out the absence of any evidence that the Petitioner had sutures in his head; 2) failure to present evidence that the victim actually died from the ingestion of alcohol or controlled substance; 3) failure to rebut the State's theory regarding the cause of death; and 4) that the District Attorney inferred that the defense counsel had an obligation to present evidence.

The court has reviewed the trial transcript. At the end of the State's closing argument the

1 District Attorney did comment on the role of the victim, the Petitioner and the Petitioner's estranged  
2 wife. In his original Petition for Writ of Habeas Corpus, Petitioner argued that the District Attorney was  
3 vouching for the truthfulness of his witnesses. The court finds that the comments are of no substance  
4 and that the State had the burden of proof. The court further finds that the District Attorney was  
5 commenting on the state of the evidence and not directly on the Petitioner's failure to call witnesses.  
6 The court also finds that the jury was properly instructed regarding closing arguments in that the  
7 "positions that are set forth by the attorneys are the positions of their client, not their own personal  
8 opinions." Trial transcript, closing arguments page 2.

9           The next argument contained in the Supplemental Points and Authorities is that defense  
10 counsel failed to present evidence to impeach witnesses. Specifically, Petitioner argues that defense  
11 counsel should have sought evidence to impeach the testimony of Beverly Morse and Ms. Sherry  
12 Eiden. Defense counsel hired a private investigator to interview witnesses. Defense counsel later  
13 discussed the interviews with Mr. Morse and pointed out the problems with testimony. One of the  
14 witnesses that Mr. Morse wished to call was Bob Newton. The Petitioner and Mr. Newton played golf  
15 on the afternoon of the murder. The information that Mr. Newton gave to the private investigator, Mr.  
16 Nevin, was that Mr. Morse wanted to reconcile with his wife. "A strategy decision, such as who should  
17 be called as a witness, is a tactical decision that is 'virtually unchallengeable absent extraordinary  
18 circumstances.'" Doleman v. State, 112 Nev. 843 (1996), citing Strickland v. Washington, 466 U.S.  
19 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The court finds that defense counsel's decision not to  
20 call Mr. Bob Newton was a tactical decision and was based upon sound trial strategy. The court further  
21 finds that defense counsel had the opportunity to cross examine Ms. Eiden.

22           Petitioner next argues that defense counsel was ineffective for failing to call Terry  
23 Schneider as a witness to show the Petitioner's reputation for peacefulness. During the writ hearing, Mr.  
24 Schneider was called as a witness and the court finds his credibility to be questionable. The court  
25 therefore finds that defense counsel's decision not to call Terry Schneider as a witness was a tactical  
26 decision and was based upon sound trial strategy.

27           When the Petitioner was arrested at the victim's residence a baseball bat was found in his  
28 pickup truck. Petitioner contends in his writ that his son, Jeff Morse borrowed his truck on the day of

1 the murder and he left the bat in the pickup. Mr. Jeff Morse did testify at the hearing, however he did  
2 not remember borrowing his father's truck on the day in question. The court finds that the evidence  
3 presented at the evidentiary hearing does not support Petitioner's contention.

4 The last contention of the Petitioner in his Supplemental Points and Authorities is that  
5 defense counsel was ineffective for failing to call the Petitioner to testify on his own behalf. Defense  
6 counsel testified at the evidentiary hearing that he advised the Petitioner of his right to testify. The  
7 testimony of the Petitioner at the hearing conflicted with the testimony of defense counsel. However,  
8 the court finds that it inquired of the Petitioner at trial and out of the presence of the jury whether  
9 Petitioner wished to testify and the Petitioner indicated that he did not. The court finds this argument  
10 without merit.

11 In addition to these arguments, Petitioner's original brief contains two arguments which  
12 were not argued in the Supplemental Points and Authorities and the court will address those arguments  
13 now.

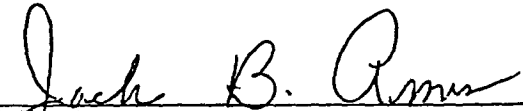
14 1. Petitioner argues that his rights to a fair trial and due process of law were denied when  
15 the court denied an instruction on implied malice. The court finds that Instruction Number 8,  
16 specifically instructs the jury on implied malice. In addition, after a review of the rejected instructions it  
17 does not appear that they provide any additional information regarding implied malice. Furthermore,  
18 this issue was not raised on direct appeal. The court finds this argument without merit.

19 2. Petitioner argues that defense counsel was ineffective due to his failure to raise an  
20 argument concerning the lack of sufficient evidence to support a conviction for burglary on direct  
21 appeal. The court finds that this argument is likewise without merit. The jury believed that there was  
22 sufficient evidence to support the burglary charge. On a review of the record it appears that this was a  
23 reasonable finding. The Petitioner stalked his wife for the entire day; he initially followed her to the  
24 home of the victim and then went for a few beers; he later returned to the victim's residence saw his  
25 wife's vehicle in the driveway and approached the residence; when he was unable to see in the  
26 downstairs windows, he entered the residence through a sliding glass door on the second floor balcony;  
27 the testimony of Ms. Morse, the only eyewitness, was that the Petitioner was the aggressor in the fight  
28 between the Petitioner and the victim. In-addition, there was a baseball bat in his pickup truck.

Based upon the foregoing;

IT IS HEREBY ORDERED that the Writ of Habeas Corpus filed by the Petitioner is dismissed.

DATED this 17<sup>th</sup> day of October 2001.

  
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Jack B. Ames  
District Judge/Department II

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