

IN THE SUPREME COURT OF THE STATE OF NEVADA

OTIS TANNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38739

FILED

MAR 29 2002

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 Otis Tanner's post-conviction petition for a writ of habeas corpus.

In the petition, Tanner presented claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.¹ The district court found that Tanner's 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.² Tanner has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, Tanner has not demonstrated that the district court erred as a matter of law.

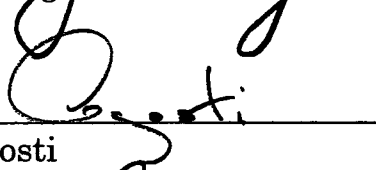
¹See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

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

We have reviewed the record on appeal, and for the reasons set forth in the attached order of the district court, conclude that the district court properly denied Tanner's petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Lee A. Gates, District Judge
David M. Schieck
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

0419-10

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1 **ORDR**
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8 Attorney for Plaintiff

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Shirley S. Pangione
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,
8 Plaintiff,

9 -vs-

10 OTIS LEE TANNER,
11 #1208866
12 Defendant.

Case No.. C147805
Dept. No. VIII

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

DATE OF HEARING: 5/21/01
TIME OF HEARING: 9:00 A.M.

17 THIS CAUSE having come on for hearing before the Honorable LEE A. GATES, District
18 Judge, on the 21st day of May, 2001, the Petitioner not being present, represented by DAVID
19 M. SCHIECK, ESQ., the Respondent being represented by STEWART L. BELL, District
20 Attorney, by and through BILL A. BERRETT, Chief Deputy District Attorney, and the Court
21 having considered the matter, including briefs, transcripts, arguments of counsel, and documents
22 on file herein, now therefore, the Court makes the following findings of fact and conclusions of
23 law:

FINDINGS OF FACT

24 1. On October 22, 1997, a husband and wife were in their car waiting for the light
25 to change in the southbound lane of Eastern at Flamingo in Las Vegas. Otis Lee Tanner,
26 hereinafter Defendant, pulled up behind the victims, and then intentionally collided with their
27 car. Defendant and the male victim began shouting at each other, and Defendant shot at the
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1 couple. The victims fled, and Defendant pursued them in his vehicle. Defendant chased the
2 victims, shooting several times at and into the victims' vehicle. Defendant shot the female
3 victim in the head. The male victim and another witness later identified Defendant as the driver
4 and shooter.

5 2. The Defendant was charged with two counts of attempt murder with use of a deadly
6 weapon, one count of discharging firearm at or into a vehicle, and one count of battery with use
7 of a deadly weapon.

8 3. After a jury trial, Defendant was convicted of battery with use of a deadly weapon,
9 attempt murder with use of a deadly weapon, and discharging a firearm at or into a vehicle.
10 Defendant was sentenced to a minimum of 48 months and a maximum of 120 months in the
11 Nevada State Prison for battery with use of a deadly weapon, a minimum of 43 months and a
12 maximum of 120 months in the Nevada State Prison for attempt murder with use of a deadly
13 weapon, with a separate but equal term for the weapon enhancement, and a minimum of 28
14 months and a maximum of 72 months for discharging a firearm at or into a vehicle, all sentences
15 to run concurrently. Defendant received 101 days credit for time served. The Judgment of
16 Conviction (Jury Trial) was filed on June 2, 1998.

17 4. Defendant filed a Fast Track Appeal which was denied by the Nevada Supreme Court on
18 May 18, 1999.

19 5. On April 19, 2000, Defendant filed a Petition for Writ of Habeas Corpus (Post-
20 Conviction) alleging eight grounds for relief: (1) ineffective assistance of trial counsel; (2)
21 ineffective assistance of appellate counsel; (3) Defendant was denied a fair trial due to
22 cumulative effect of errors during trial; (4) prosecutorial misconduct; (5) insufficient evidence
23 to support the conviction; (6) a Batson challenge; (7) insufficient evidence to support the weapon
24 enhancement; and (8) Defendant's sentence constitutes cruel and unusual punishment.

25 6. Counsel was later appointed to assist with Defendant's petition and counsel filed a
26 supplemental brief on December 5, 2000. In his supplemental pleading, Defendant alleges that
27 counsel was ineffective for two reasons: (1) failure to investigate Defendant's alibi defense or
28 call witnesses to substantiate the defense; and (2) failure to call witnesses identified by

1 Defendant who could have testified to prior damage to the headlight on Defendant's car.

2 7. The State filed a supplemental brief in response to Defendant's supplemental brief and
3 the affidavit Defendant filed on December 14, 2000 regarding additional claims of
4 ineffectiveness of trial counsel.

5 8. Defendant admits in his affidavit that he inhibited trial counsel's investigation by failing
6 to inform counsel of the identity of the alleged driver of his car when this incident happened.
7 This claim that someone else was driving Defendant's car is in direct contrast to Defendant's
8 sworn testimony at trial that nobody else drove his car on October 22, 1997.

9 9. Defendant failed to show facts that undermine confidence in the outcome of this case.
10 Defendant has not shown any prejudice whatsoever resulting from counsel's decision not to call
11 additional alibi witnesses.

12 10. Defendant provides no evidence to overcome the presumption that counsel fully
13 discharged his duties. Rather, Defendant provides only bare allegations that counsel's
14 performance was deficient. Defendant claims that counsel failed to investigate alibi witnesses.
15 However, in his affidavit, Defendant admits that counsel interviewed a possible alibi witness,
16 one Ms. Debbie Teal, but that she could not definitively provide the alibi Defendant said she
17 could.

18 11. Defendant also claims that counsel was aware of a receipt indicating that the headlight
19 on his car was broken when he acquired the car, and that Defendant's father would have testified
20 thereto. This argument is moot, however. Defendant himself testified to the exact information
21 to which Defendant's father would have supposedly testified. In addition, Defendant's mother
22 testified that the car had a broken headlight when he bought it.

23 12. Trial counsel was not ineffective.

24 CONCLUSIONS OF LAW

25 1. To demonstrate ineffective assistance of counsel, a convicted defendant must show both
26 that his counsel's performance was deficient and that the deficient performance prejudiced his
27 defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). The
28 proper standard in evaluating whether an attorney's performance was deficient is that of

1 "reasonably effective assistance," i.e., that counsel's performance fell below an objective
2 standard of reasonableness. Id., 104 S. Ct. at 2055. Furthermore, the Nevada Supreme Court
3 has held that it is presumed that counsel fully discharged his duties, and that presumption can
4 only be overcome by strong and convincing proof to the contrary. Donovan v. State, 94 Nev.
5 671, 675, 584 P.2d 708, 711 (1978).

6 2. "[S]trategic choices made by counsel after thoroughly investigating the plausible options
7 are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

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9 3. Defendant cannot repudiate statements he has made on the record. Lundy v. Warden, 89
10 Nev. 419, 514 P.2d 212 (1973).

11 4. In addition to proving that defense counsel's actions were deficient, a Defendant must
12 demonstrate that the deficient performance prejudiced his defense. Strickland, 466 U.S. at 687,
13 104 S. Ct. At 2064. In meeting the prejudice requirement of an ineffective assistance of counsel
14 claim, this Court has held that a defendant must show reasonable probability that, but for
15 counsel's errors, the result of the trial would have been different. McNelson v. State, ___ Nev.
16 ___, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687). "A reasonable probability
17 is a probability sufficient to undermine confidence in the outcome." Id., (citing Strickland, 466
18 U.S. at 687-89, 694).

19 5. Defendant's unsubstantiated allegations are not sufficient to entitle Defendant to post-
20 conviction relief. Hargrove, 100 Nev. at 502. "Without such limitations on the availability of
21 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse
22 post-conviction remedies." Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132, 1134 (1998)
23 (quoting Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994)).

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ORDER

Based upon the Findings of Fact and Conclusions of Law contained herein, it is hereby:
ORDERED, ADJUDGED, and DECREED that Defendant's Petition for Writ of Habeas
Corpus (Post-Conviction) is denied.

DATED this 3 day of October, 2001.

Lee A. Gates
DISTRICT JUDGE *sc*

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY Bill A. Berrett
BILL A. BERRETT
Chief Deputy District Attorney
Nevada Bar #000738