

IN THE SUPREME COURT OF THE STATE OF NEVADA

TREVEILLIAN HEARTFELT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39066

FILED

MAR 12 2002

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus.

Appellant Treveillian Heartfelt was originally convicted, pursuant to a jury verdict, of two counts of grand larceny and one count of obtaining money by false pretenses. The district court sentenced Heartfelt to serve two consecutive prison terms of 38 to 96 months for the grand larceny counts and a concurrent prison term of 12 to 48 months for the false pretenses count. Treveillian filed a direct appeal, contending that his trial counsel was ineffective due to a conflict of interest. This court rejected Treveillian's contention and affirmed his conviction.¹

On April 18, 2000, Heartfelt filed a proper person post-conviction petition for a writ of habeas corpus, alleging numerous instances of ineffective assistance of counsel. The State opposed the petition. The district court appointed counsel, and Heartfelt filed a supplemental petition. After conducting an evidentiary hearing, the

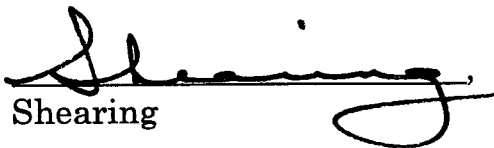
¹Heartfelt v. State, Docket No. 32943 (Order Dismissing Appeal, July 16, 1999).

district court denied the petition, finding Heartfelt's counsel was not ineffective.

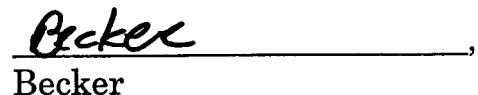
The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.² Heartfelt has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, Heartfelt has not demonstrated that the district court erred as a matter of law.³

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

ORDER the judgment of the district court AFFIRMED.

 J.
Shearing

 J.
Rose

 J.
Becker

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

³Prior to the evidentiary hearing, the district court dismissed Heartfelt's claim that his counsel was ineffective because of actual conflict of interest. We conclude that the district court did not err in dismissing that claim because it was barred by the doctrine of the law of the case. Heartfelt raised the identical issue on direct appeal, and this court's resolution of that issue on direct appeal constitutes the law of the case; the issue cannot be relitigated. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

cc: Hon. Peter I. Breen, District Judge
Mary Lou Wilson
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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RONALD A. LONGTIN, JR.

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE

* * *

TRAVELLIAN HEARTFELT,

Petitioner,

v.

Case No. CR98P0143

THE STATE OF NEVADA,

Dept. No. 7

Respondent.

AMENDED
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT

On November 18, 2001, the parties, by and through their respective counsel, Joseph R. Plater, for the State of Nevada, and Mary Lou Wilson, for the petitioner, appeared before the court on petitioner's petition for writ of habeas corpus (post-conviction). After having heard and considered the evidence and testimony, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACTS

1. Petitioner was charged with two counts of grand larceny and one count of obtaining money under false pretenses. Paul Giese

11.4

1 was appointed to represent petitioner.

2 2. A jury convicted petitioner of all charges. Steve Sexton
3 represented petitioner on appeal. The Nevada Supreme Court
4 affirmed petitioner's convictions and dismissed his appeal.

5 3. Petitioner then filed a petition for writ of habeas corpus
6 (post-conviction), alleging numerous claims of ineffective
7 assistance of trial and appellate counsel. Specifically,
8 petitioner alleges his trial counsel failed to: (1) contact
9 exculpatory witnesses (claims two and eleven); (2) spend adequate
10 time with petitioner (claim eight); (3) acquire various
11 exculpatory documents (claim ten); (4) prepare adequately for
12 trial (claim twelve); (5) inform petitioner of his rights,
13 specifically the right to use the subpoena power of the court
14 (claim thirteen); (6) acquire discovery (claim fifteen); and (7)
15 raise meritorious issues on appeal, such as the trial court's
16 erroneous admission of prior bad acts (claim sixteen).¹

17 4. The court denies petitioner's claims. To state a claim of
18 ineffective assistance of counsel sufficient to invalidate a
19 judgment of conviction, a defendant must demonstrate that
20 counsel's performance fell below an objective standard of
21 reasonableness, and that counsel's errors prejudiced the defense.
22 Strickland v. Washington, 466 U.S. 668 (1984); accord Warden v.
23 Lyons, 100 Nev. 430, 683 P.2d 504 (1984). To establish prejudice
24

25 ¹ The court dismissed petitioner's other claims (claims one
26 three, four, five, six, seven, fourteen, seventeen, eighteen,
nineteen) prior to the evidentiary hearing.

1 based on the deficient assistance of trial counsel, a defendant
2 must show that but for counsel mistakes, there is a reasonable
3 probability that the outcome of the trial would have been
4 different. Strickland, 466 U.S. at 694. To establish prejudice
5 based on the deficient assistance of appellate counsel, a
6 defendant must show that the omitted issue would have a
7 reasonable probability of success on appeal. Kirksey v. State,
8 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). The court need
9 not consider both prongs of the Strickland test if the defendant
10 makes an insufficient showing on either prong. Strickland, 466
11 U.S. at 697.

12 5. The court finds that trial counsel adequately represented
13 petitioner. Mr. Giese contacted the people who petitioner said
14 would offer exculpatory evidence for petitioner. However, the
15 people told Mr. Giese that they did not have favorable evidence
16 to offer for petitioner. To the contrary, they told Mr. Giese
17 that their testimony would hurt petitioner. Accordingly, the
18 court finds that Mr. Giese was not deficient in contacting
19 potentially exculpatory witnesses.

20 6. In addition, petitioner failed to prove he suffered any
21 prejudice from the absence of his proposed witnesses. None of
22 the witnesses offered any testimony at the evidentiary hearing.

23 7. The court finds that Mr. Giese spent the necessary time to be
24 fully prepared for trial, and that he was, in fact, prepared for
25 trial. Petitioner's testimony to the contrary is rejected.

26 8. The court also finds that Mr. Giese reviewed all discovery

1 and relevant documents connected to the State's case and
2 petitioner's defense. The court rejects petitioner's testimony
3 that there were other documents Mr. Giese should have procured
4 that tended to prove petitioner's innocence for the simple reason
5 that petitioner did not present any documents at the evidentiary
6 hearing.

7 9. The court finds that Mr. Giese did not tell his investigator
8 not to investigate the case or to locate witnesses who would have
9 provided exculpatory testimony.

10 10. The court finds that Mr. Giese informed petitioner of his
11 rights, including his rights to subpoena witnesses to trial, to
12 remain silent and to cross-examine witnesses.

13 11. Petitioner contends that Mr. Giese should have cross-
14 examined Ms. Hanson about a drug deal she was involved in with
15 petitioner. According to petitioner, Ms. Hanson was upset with
16 petitioner because he would not transport 600 pounds of marijuana
17 to sell across state borders. Ms. Hanson was thus upset about
18 losing her share of the profit from the sale of the drugs.

19 12. The court finds that Mr. Giese made a reasonable tactical
20 decision not to cross-examine Ms. Hanson about the alleged drug
21 deal with petitioner. Mr. Giese decided not to present the "drug
22 deal" defense because there was no corroborating evidence to
23 support the defense. In addition, petitioner told Mr. Giese
24 contradictory versions of the drug deal. For example, petitioner
25 told Mr. Giese that the deal was to cross state lines with the
26 marijuana while at other times petitioner said the deal did not

1 involve crossing state lines.

2 13. Further, petitioner told Mr. Giese that petitioner would
3 testify to anything in order to beat the charges against him.
4 Witnesses also contradicted what petitioner told Mr. Giese the
5 witnesses would offer by way of testimony. Accordingly,
6 Mr. Giese reasonably concluded that petitioner was not truthful
7 or trustworthy in helping Mr. Giese fashion a defense to the
8 charges.

9 14. Mr. Giese also concluded that petitioner would commit
10 perjury if petitioner testified at trial. Mr. Giese also
11 concluded that the drug deal defense, by its very nature, would
12 have no reasonable chance of success in front of a jury. Thus,
13 the court finds that Mr. Giese made a reasonable tactical
14 decision not to cross-examine or present witnesses relative to
15 the drug deal because the idea was highly prejudicial to
16 petitioner and fraught with lies and perjury.

17 15. The court also rejects the drug deal defense because
18 petitioner never proved that he could have elicited such evidence
19 at trial. Ms. Hanson's trial testimony repels the idea that she
20 would have admitted that she fabricated the charge against
21 petitioner in order to get revenge for her lost profit in a drug
22 deal. In any event, Ms. Hanson did not testify at the
23 evidentiary hearing; and petitioner did not present any testimony
24 or evidence to support his theory of Ms. Hanson's motive.
25 Although petitioner testified about the alleged drug deal at the
26 evidentiary hearing, he did not testify at trial; and he

1 testified at the evidentiary hearing that he voluntarily and
2 intelligently chose not to testify at trial, pursuant to the
3 advice of his California lawyer. Accordingly, the court finds
4 that petitioner could have never proved the existence of a drug
5 deal at trial.

6 16. Mr. Sexton made a reasonable, tactical reason not to argue
7 on appeal this court's decision to admit the bad act evidence.
8 The court conducted a hearing pursuant to Petrocelli v. State,
9 101 Nev. 46, 692 P.2d 503 (1985), and concluded that evidence
10 that petitioner wrote bad checks was part of the series of crimes
11 petitioner committed against Ms. Blake and was therefore
12 admissible. (Trial Transcript, June 1, 1998, 85-109). See NRS
13 48.035(3). The court also finds that the evidence was relevant
14 to show petitioner's intent and to provide corroboration to the
15 victim's testimony. See NRS 175.261. The evidence was proved by
16 clear and convincing testimony and its probative value was not
17 substantially outweighed by its prejudice.

18 17. Evidence that petitioner took Ms. Harper's checks was
19 relevant to prove identity and the intent to defraud (Trial
20 Transcript, June 2, 1998, 280-84). It was also proved by clear
21 and convincing evidence and its probative value was not
22 substantially outweighed by its prejudicial value. Accordingly,
23 the court finds that the Nevada Supreme court would not have
24 found the bad act evidence inadmissible.

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CONCLUSIONS OF LAW

1. Petitioner was afforded the effective assistance of counsel outlined in Strickland v. Washington, 466 U.S. 668 (1984).

JUDGMENT

It is therefore the order and judgment of this court that petitioner's Petition of Writ of Habeas Corpus (Post-Conviction) is hereby denied.

DATED this 4 day of January, 2002.



DISTRICT JUDGE