

IN THE SUPREME COURT OF THE STATE OF NEVADA

WANDA SERGI,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 39276

FILED

JUN 26 2002

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

ORDER OF AFFIRMANCE

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

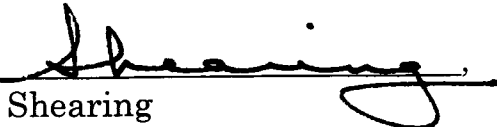
In the petition, Sergi presented claims of ineffective assistance of counsel. The district court found that counsel was not ineffective. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>1</sup> Sergi has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, Sergi has not demonstrated that the district court erred as a matter of law.

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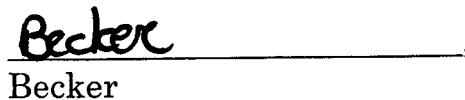
<sup>1</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

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

cc: Hon. Jeffrey D. Sobel, District Judge  
Christopher R. Oram  
Attorney General/Carson City  
Clark County District Attorney  
Clark County Clerk

ORIGINAL

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**

FEB 21 8 58 AM '02

*Shirley S. Hanjira*  
CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,  
8 Plaintiff,

9 -vs-

10 WANDA SERGI,  
11 #1224889

12 Defendant.

Case No.. C134859  
Dept. No. V

14 **FINDINGS OF FACT, CONCLUSIONS OF  
15 LAW AND ORDER**

16 DATE OF HEARING: 1/24/02  
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 24th day of January, 2002, the Petitioner not being present, represented  
20 by CHRISTOPHER R. ORAM, ESQ., the Respondent being represented by STEWART L.  
21 BELL, District Attorney, by and through BILL A. BERRETT, Chief Deputy District Attorney  
22 and the Court having considered the matter, including briefs, transcripts, arguments of counsel  
23 and documents on file herein, now therefore, the Court makes the following findings of fact and  
24 conclusions of law:

24 **FINDINGS OF FACT**

25 1. On April 10, 1996, an Information was filed that charged Wanda Sergi, hereinafter:  
Defendant, with one (1) count each of Conspiracy to Commit Murder, First Degree Kidnaping  
With Use of A Deadly Weapon, Burglary and Possession of Controlled Substance With Inten  
to Sell. After a jury found her guilty of all counts except Burglary, the District Court sentenced

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1 her on February 13, 1997 as follows: on Count I (Conspiracy to Commit Murder) - to  
2 maximum term of one-hundred (108) months with a minimum parole eligibility of forty-three  
3 (43) months in the Nevada Department of Prisons; on Count II (First Degree Kidnaping With  
4 Use of A Deadly Weapon) - to a maximum term of one-hundred eighty (180) months with  
5 minimum parole eligibility of sixty (60) months in the Nevada Department of Prisons plus a  
6 equal and consecutive sentence for use of a deadly weapon, to run consecutively to Count I; and  
7 on Count IV (Possession Substance With Intent to Sell) - to a maximum term of thirty-six (36)  
8 months with a minimum parole eligibility of twelve (12) months in the Nevada Department of  
9 Prisons, to run concurrently with Counts I and II. The District Court ordered Defendant receive  
10 three-hundred forty (340) days credit for time served.

11 2. The Defendant filed a Notice of Appeal and on April 13, 1999, the Nevada Supreme  
12 Court issued its remittitur denying the Defendant's appeal.

13 3. On November 17, 1999, Defendant filed a timely Petition for Writ of Habeas Corpus.  
14 The State filed its Opposition to Defendant's Petition for Writ of Habeas Corpus on January 2  
15 2000. On January 27, 2000, the court granted Defendant's request for counsel to assist her on  
16 her Petition. A Supplemental Brief was thereafter filed on October 20, 2000. The State filed  
17 its Opposition on November 22, 2000.

18 4. On May 1, 2001, the district court conducted an evidentiary hearing with regard to the  
19 Defendant's claim of ineffective assistance of counsel. At the evidentiary hearing, Ms. Gloria  
20 Navarro, Defendant's trial counsel, testified that she considered filing a motion to sever but  
21 concluded that there was no basis under the case law for any kind of inconsistent defenses  
22 (8/1/01 at 6). Ms. Navarro further concluded that working with another attorney would be  
23 beneficial to her in the instant case. Ms. Navarro felt that co-counsel Michael Weisman, an  
24 experienced trial attorney, was quite skilled at cross-examination and would be effective in  
25 examining the State's key witness, Mr. Herbie Little. (8/1/01 at 6, 7). In addition, Ms. Navarro  
26 believed that it was beneficial to have co-defendant Gus Miller in trial. Ms. Navarro stated: "But  
27 also at some point he was willing to say that Wanda didn't know anything about it, or that she  
28 didn't know about the drugs in the glove compartment, or she didn't know that he had a gun, and

1 things like that.” (8/1/01 at 14). At the conclusion of the evidentiary hearing, the court asked  
2 the parties to file a second supplemental brief in support of their arguments.

3 5. On August 21, 2001, the Defendant filed her Second Supplemental Brief in Support of  
4 Defendant’s Petition for Writ of Habeas Corpus. On September 5, 2001, the State filed its  
5 Opposition to the Defendant’s Second Supplemental Brief.

6 6. On January 24, 2002, the district court denied the Defendant’s Petition.

7 7. Trial counsel was not ineffective.

8 CONCLUSIONS OF LAW

9 1. In Nevada, the appropriate vehicle for review of whether counsel was effective is a post-  
10 conviction relief proceeding. McKague v. Warden, 112 Nev. 159, 912 P.2d 255, 257, n.1  
11 (1996). In order to assert a claim for ineffective assistance of counsel the defendant must prove  
12 that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test  
13 of Strickland v. Washington, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 2063-2064 (1984); see  
14 State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the defendant  
15 must show first that his counsel's representation fell below an objective standard of  
16 reasonableness, and second, that but for counsel's errors, there is a reasonable probability that  
17 the result of the proceedings would have been different. See Strickland, 466 U.S. at 687-688 &  
18 694, 104 S.Ct. at 2065 & 2068.

19 2. In considering whether trial counsel has met this standard, the court should first determine  
20 whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case."  
21 Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing, Strickland, 466 U.S. at  
22 690-691, 104 S.Ct. at 2066. Once this decision is made, the court should consider whether  
23 counsel made "a reasonable strategy decision on how to proceed with his client's case."  
24 Doleman, 112 Nev. at 846, 921 P.2d at 280; citing, Strickland, 466 U.S. at 690-691, 104 S.Ct.  
25 at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually  
26 unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at  
27 280; see also, Howard v State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466  
28 U.S. at 691, 104 S.Ct. at 2066; State v. Meeker, 693 P.2d 911, 917 (Ariz. 1984).

1 3. Based on the above law, the court begins with the presumption of effectiveness and the  
2 must determine whether or not defendant has demonstrated, by "strong and convincing proof,  
3 that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996)  
4 *citing* Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981). The role of a court in considering  
5 allegations of ineffective assistance of counsel, is "not to pass upon the merits of the action not  
6 taken but to determine whether, under the particular facts and circumstances of the case, trial  
7 counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675  
8 584 P.2d 708, 711 (1978); *citing*, Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

9 4. This analysis does not mean that the court should "second guess reasoned choices  
10 between trial tactics nor does it mean that defense counsel, to protect himself against allegations  
11 of inadequacy, must make every conceivable motion no matter how remote the possibilities are  
12 of success." Donovan, 94 Nev. at 675, 584 P.2d at 711; *citing*, Cooper, 551 F.2d at 1166 (9th  
13 Cir. 1977). In essence, the court must "judge the reasonableness of counsel's challenged conduct  
14 on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466  
15 U.S. at 690, 104 S.Ct. at 2066.

16 5. NRS 174.165(1) provides: "If it appears that a defendant or the State of Nevada is  
17 prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such  
18 joinder for trial together, the court may order an election or separate trials of counts, grant a  
19 severance of defendants or provide whatever other relief justice requires." To establish that  
20 joinder was prejudicial "requires more than a mere showing that severance might have made  
21 acquittal more likely." United States v. Wilson, 715 F.2d 1164, 1171 (7th Cir.1983). Misjoinder  
22 requires reversal only if the error has a substantial and injurious effect on the jury's verdict.  
23 Mitchell v. State, 105 Nev. 735, 739, 782 P.2d 1340, 1343 (1989).

24 6. Defendants are not entitled to severance merely because they may have a better chance  
25 of acquittal in separate trials. Zafrio v. United States, 506 U.S. 534, 540, 113 S.Ct. 933 (1993).

26 7. In the instant case, trial counsel's decision not to file a motion to sever was clearly a trial  
27 strategy. Doleman, 112 Nev. at 846, 921 P.2d at 280

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1 8. The Defendant's argument is based on hind sight and, therefore, contrary to the Supreme  
2 Court's holding in Strickland, 466 U.S. 668.

3 ORDER

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

7 DATED this 12 day of February, 2002.

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9 \_\_\_\_\_  
10 DISTRICT JUDGE

11 STEWART L. BELL  
12 DISTRICT ATTORNEY  
13 Nevada Bar #000477

14 BY Bill A. Berrett  
15 BILL A. BERRETT  
16 Chief Deputy District Attorney  
17 Nevada Bar #000738

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