

IN THE SUPREME COURT OF THE STATE OF NEVADA

MALCOLM GRAY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 39346

FILED

SEP 03 2003

ORDER OF AFFIRMANCE

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

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

During the course of an argument between appellant's friend, Anthony James, and James's girlfriend, Amy Tuttle, appellant fatally shot Tuttle in the head with a .38 caliber revolver. Appellant testified at trial, and while he admitted shooting Tuttle, he also stated that he believed the gun would fire five times before discharging a live round.

The district court convicted appellant, pursuant to a jury verdict, of second-degree murder and sentenced him to serve two consecutive life terms in the Nevada State Prison with the possibility of parole. This court dismissed appellant's appeal from his judgment of conviction.<sup>1</sup> Appellant subsequently filed a timely, first post-conviction petition for a writ of habeas corpus. The district court appointed counsel

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<sup>1</sup>Gray v. State, Docket No. 28156 (Order Dismissing Appeal, December 30, 1997).

but did not conduct an evidentiary hearing. On December 16, 1998, the district court denied appellant's petition. This appeal followed.<sup>2</sup>

Appellant raises one claim of ineffective assistance in this appeal. To state a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's errors, there is a reasonable probability that the outcome of the proceeding would have been different.<sup>3</sup> The court need not consider both prongs of the test if the defendant makes an insufficient showing on either prong.<sup>4</sup> Moreover, an evidentiary hearing is not necessary where claims in a post-conviction petition are belied or repelled by the record or are not supported by

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<sup>2</sup>Although the district court denied appellant's post-conviction petition on December 16, 1998 and appellant did not file his notice of appeal until March 11, 2002, the notice is nonetheless timely; the time period for appealing the order had not run because the district attorney, not the district court, served appellant with written notice of entry of the order. See NRS 34.575(1) (providing that an appeal from an order denying a post-conviction petition must be made within 30 days after service by the court of written notice of entry of the order). Also, on October 28, 2002, appellant filed a notice of appeal from the district court's denial of his motion for appointment of counsel. Such an order is not independently appealable, however. See Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990) (holding that the right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists).

<sup>3</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>4</sup>Strickland, 466 U.S. at 697.

specific factual allegations that, if true, would entitle the petitioner to relief.<sup>5</sup>

Appellant argues that his decision to testify was based on "inadequate advice" from his trial counsel and resulted in appellant's "mistaken and prejudicial decision to testify." In support, appellant contends that his testimony regarding aiming the gun at Tuttle and pulling the trigger was very damaging and "essentially conceded [his] guilt of at least a lesser offense." He also alleges that he had a "poor relationship" with his counsel, but he does not raise this as an independent issue.

The district court did not err in denying this claim without first conducting an evidentiary hearing. First, appellant has failed to provide any description of his attorney's advice respecting his right to testify. It is therefore not possible to conclude that the advice was inadequate and trial counsel's performance deficient.<sup>6</sup> Second, appellant does not explain how the outcome of his trial would have been different had he not testified. And there is every indication that appellant benefited from his testimony. At trial, independent evidence established the following: (1) Tuttle died from a gunshot wound to the left side of her forehead fired from a .38 caliber revolver; (2) the configuration of the fatal gunshot wound indicated that the gun was in contact with Tuttle when the shot was fired; (3) appellant was a reserve Marine and had received firearm training; (4) James, who was present at the shooting, testified that upon hearing the shot that killed Tuttle, he turned and saw appellant


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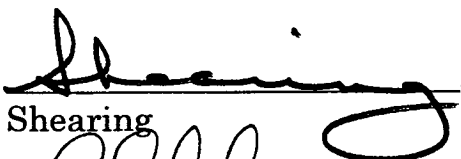
<sup>5</sup>Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).


<sup>6</sup>Id.

holding a .38 caliber revolver; (4) appellant subsequently threw the gun in a dumpster; (5) appellant concocted a series of stories in an effort to avoid criminal liability; and (6) James received letters from appellant in which he admitted killing Tuttle. Thus, independent evidence conclusively established that appellant fired the shot that killed Tuttle and that he did so from extremely close range. Moreover, appellant's subsequent conduct strongly suggested his consciousness of guilt. Without appellant's testimony regarding his alleged belief that the gun would not fire a live round, the jury might well have concluded that appellant intended to kill Tuttle and convicted him of first-degree murder. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. John S. McGroarty, District Judge  
Amesbury & Schutt  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk