

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES LAMONT MOORE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 39387

FILED

NOV 20 2002

ORDER OF AFFIRMANCE

CLERK OF SUPREME COURT  
BY *J. Richards*  
DEPUTY CLERK

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

On April 30, 1996, appellant James Lamont Moore was convicted, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon, three counts of attempted robbery with the use of a deadly weapon, and three counts of robbery with the use of a deadly weapon. The district court sentenced Moore to serve multiple prison terms, including two consecutive prison terms of life with the possibility of parole for the murder count. Moore appealed, and this court affirmed his conviction.<sup>1</sup>

On September 11, 2000, Moore filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district court appointed counsel, who supplemented the

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<sup>1</sup>Moore v. State, 116 Nev. 302, 997 P.2d 793 (2000).

petition. Without conducting an evidentiary hearing, the district court denied Moore's petition. This appeal followed.

In his petition, Moore raised several claims of ineffective assistance of trial counsel. To establish ineffective assistance of trial counsel, a petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.<sup>2</sup> To show prejudice, a petitioner must show a reasonable probability that but for counsel's errors the result of the trial would have been different.<sup>3</sup> "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."<sup>4</sup> This court may consider the two test elements in any order and need not consider both prongs if an insufficient showing is made on either one.<sup>5</sup>

First, Moore claimed that his trial counsel was ineffective in: (1) failing to present a voluntary intoxication defense; (2) failing to request a jury instruction with regard to voluntary intoxication; and (3) conceding

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<sup>2</sup>Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984).

<sup>3</sup>Strickland, 466 U.S. at 694.

<sup>4</sup>Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691), abrogation on other grounds recognized by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

<sup>5</sup>Strickland, 466 U.S. at 697; Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

that Moore was guilty of felony-murder,<sup>6</sup> rather than presenting the legal excuse of voluntary intoxication. We conclude that trial counsel's failure to present an involuntary intoxication defense was not objectively unreasonable.

The decision not to present a voluntary intoxication defense was a tactical decision, to which Moore expressly consented. In fact, at a hearing outside the presence of the jury,<sup>7</sup> trial counsel David Wall informed the district court that he and Moore had agreed "not to take the position against felony murder, as a tactical decision to try to maintain credibility for the penalty phase." Trial counsel explained that, in light of Moore's confession to the crime and the number of eyewitnesses identifying Moore as the shooter, he and Moore had decided to orient their whole defense toward trying to get the lightest sentence possible. Trial counsel further explained:

[I]f we argued that he was not responsible or that this doesn't constitute felony murder, we believe that would put us in a position of facing the jury in the penalty phase who believe that we absolutely lied to them during the guilt phase and that would

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<sup>6</sup>We note that, despite Moore's contention, trial counsel was not ineffective for failing to ensure that a guilty plea canvass was conducted. A guilty plea canvass was not required in this case because Moore did not plead guilty, but rather was convicted pursuant to a jury trial.

<sup>7</sup>Trial counsel requested the hearing for purposes of establishing a record that Moore had expressly consented to the defense strategy of not contesting guilt.

have an effect on the penalty phase and the sentence that they would render at that time.

Notably, trial counsel informed the court that he and Moore had discussed the strategy for several months, and Moore acknowledged on the record that he agreed with the trial strategy and did not want to present another defense. Accordingly, the district court did not err in rejecting Moore's claim that his trial counsel was ineffective because Moore failed to show that trial counsel's performance fell below an objective standard of reasonableness.

Next, Moore claimed ineffective assistance of appellate counsel. To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that petitioner was prejudiced by the deficient performance.<sup>8</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal in order to be effective.<sup>9</sup> This court has noted that "appellate counsel is most effective when she does not raise every conceivable issue on appeal."<sup>10</sup> To show prejudice, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.<sup>11</sup>

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<sup>8</sup>Strickland, 466 U.S. at 687.

<sup>9</sup>Jones v. Barnes, 463 U.S. 745, 751-52 (1983).

<sup>10</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (citing Jones, 463 U.S. at 752).

<sup>11</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

Moore contended that his appellate counsel was ineffective in failing to raise Moore's claims "under a constitutional guideline" in order to properly preserve them for federal appellate review. In particular, Moore contends that appellate counsel should have claimed that Moore's right to a fair trial was denied under the Fifth and Fourteenth Amendment to the United States Constitution because: (1) the district court erroneously denied his motion in limine to compel the State to elect a single theory of prosecution; (2) the felony-murder count set forth in the criminal information was fatally defective for lack of specificity; and (3) the prosecutor engaged in misconduct by expressing his personal beliefs at trial.

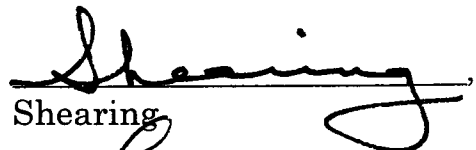
Even assuming appellate counsel was unreasonable for failing to allege these claims under the rubric of constitutional violations, Moore has failed to demonstrate a reasonable probability of success on appeal. In fact, on direct appeal, this court previously considered the merits of Moore's claims and concluded that they lacked merit under Nevada law. Moore has not demonstrated that these claims would have been successful had appellate counsel couched them as federal claims. Accordingly, the district court did not err in rejecting Moore's claim that his appellate counsel was ineffective.

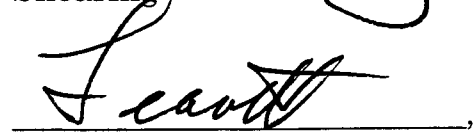
In the supplement to his petition, Moore also raised a claim that could have been raised on direct appeal. Namely, Moore claimed that the district court committed reversible error in failing to sua sponte give a

jury instruction on voluntary intoxication. Moore waived this claim by failing to raise it on direct appeal.<sup>12</sup> Therefore, we need not consider it.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant Moore is not entitled to relief and that briefing and oral argument are unwarranted.<sup>13</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Shearing

 J.  
Leavitt

 J.  
Becker

cc: Hon. Lee A. Gates, District Judge  
James Lamont Moore  
Attorney General/Carson City  
Clark County District Attorney  
Clark County Clerk

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<sup>12</sup>See NRS 34.810(1)(b)(2).

<sup>13</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).