

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILFORD DENNING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39504

FILED

JUL 09 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

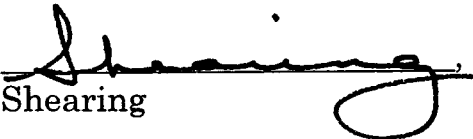
This is an appeal from an order of the district court denying appellant Wilford Denning's post-conviction petition for a writ of habeas corpus.

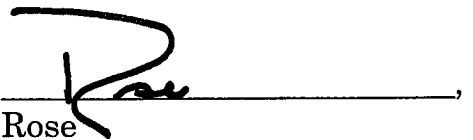
In the petition, Denning presented claims of ineffective assistance of counsel. The district court found that counsel was not ineffective. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.¹ Denning has not demonstrated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

¹See 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. Sally L. Loehrer, District Judge
Goodman Chesnoff & Keach
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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1 **ORDR**
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3 DISTRICT ATTORNEY
4 Nevada Bar #000477
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6 Las Vegas, Nevada 89155
7 (702) 455-4711
8 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,
9 Plaintiff,

10 -vs-

11 WILFORD J. DENNING,
12 #716309

13 Defendant.

Case No.. C171769
Dept. No. XV

15 FINDINGS OF FACT, CONCLUSIONS OF
16 LAW AND ORDER

17 DATE OF HEARING: 3/18/02
18 TIME OF HEARING: 8:30 A.M.

18 THIS CAUSE having come on for hearing before the Honorable SALLY LOEHRER,
19 District Judge, on the 18th day of March, 2002, the Petitioner not being present, represented by
20 RICHARD A. SCHONFELD, ESQ., the Respondent being represented by STEWART L. BELL,
21 District Attorney, by and through MARY KAY HOLTHUS, Chief Deputy District Attorney, and
22 the Court having considered the matter, including briefs, transcripts, arguments of counsel, and
23 documents on file herein, now therefore, the Court makes the following findings of fact and
24 conclusions of law:P:\WPDOCS\ORDR\FORDR\OUTLYING\0N1\0N162402.WPD

25 FINDINGS OF FACT

26 1. Wilford John Denning, hereinafter Defendant, was charged by Amended Criminal
27 Complaint with six counts (Counts I - VI) of Sexual Assault With Minor Under Fourteen
28 Years of Age; seven counts (Counts VII - XIII) of Lewdness With a Child Under the Age of

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1 Fourteen; and three counts (Counts XIV - XVI) of Open or Gross Lewdness. On December
2 4, 2000, the State filed an Information charging the Defendant with Count I - Attempt Sexual
3 Assault With a Minor Under Fourteen Years of Age; and Count II - Attempt Lewdness With
4 a Child Under the Age of Fourteen. On December 12, 2000, the Defendant appeared with
5 counsel and entered an *Alford* guilty plea to both charges contained in the Information. The
6 State also agreed not to proceed on any charges arising out of a 1988 offense involving the
7 Defendant and Dana Johnson.

8 2. As to Count I, the Defendant was sentenced to a maximum term of two hundred forty
9 (240) months in the Nevada Department of Corrections (NDC) with a minimum parole
10 eligibility of sixty (60) months. As to Count II, the Defendant was sentenced to a maximum
11 term of two hundred forty (240) months in the NDC with a minimum parole eligibility of
12 sixty (60) months. Count II to run concurrent to Count I. On February 6, 2001, the district
13 court filed its Judgment of Conviction.

14 3. The Defendant filed a Motion to Withdraw his Guilty Plea. On March 14, 2001, the
15 district court heard argument concerning the Defendant's Motion to Withdraw his Guilty
16 Plea and denied the Defendant's motion.

17 4. On January 28, 2002, the Defendant filed the instant Petition for Writ of Habeas
18 Corpus (Post-Conviction). In his petition, the Defendant alleged that counsel was ineffective
19 for failing to: 1) investigate the statute of limitations with regard to his 1988 charge; 2) object
20 to the State's use of the Defendant's 1988 charge in plea bargaining; 3) timely submit letters
21 to the court at sentencing; and 4) file a timely notice of appeal.

22 5. The Defendant received a very favorable plea negotiation.

23 6. Trial counsel was not ineffective.

24 **CONCLUSIONS OF LAW**

25 1. In Nevada, the appropriate vehicle for review of whether counsel was effective is a
26 post-conviction relief proceeding. McKague v. Warden, 112 Nev. 159, 912 P.2d 255, 257,
27 n.4 (1996). In order to assert a claim for ineffective assistance of counsel the defendant must
28 prove that he was denied "reasonably effective assistance" of counsel by satisfying the

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1 two-prong test of Strickland v. Washington, 466 U.S. 668, 686-687, 104 S.Ct. 2052,
2 2063-2064 (1984); see, State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).
3 Under this test, the defendant must show first that his counsel's representation fell below an
4 objective standard of reasonableness, and second, that but for counsel's errors, there is a
5 reasonable probability that the result of the proceedings would have been different. See
6 Strickland, 466 U.S. at 687-688 & 694, 104 S.Ct. at 2065 & 2068.

7 2. In considering whether trial counsel has met this standard, the court should first
8 determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his
9 client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing,
10 Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once this decision is made, the court
11 should consider whether counsel made "a reasonable strategy decision on how to proceed
12 with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280; citing, Strickland, 466
13 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision
14 and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112
15 Nev. at 846, 921 P.2d at 280; see also, Howard v State, 106 Nev. 713, 722, 800 P.2d 175,
16 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; State v. Meeker, 693 P.2d 911,
17 917 (Ariz. 1984).

18 3. Based on the above law, the court begins with the presumption of effectiveness and
19 then must determine whether or not defendant has demonstrated, by "strong and convincing
20 proof," that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280,
21 1285 (1996); citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981). The role of a court
22 in considering allegations of ineffective assistance of counsel, is "not to pass upon the merits
23 of the action not taken but to determine whether, under the particular facts and circumstances
24 of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State,
25 94 Nev. 671, 675, 584 P.2d 708, 711 (1978); citing, Cooper v. Fitzharris, 551 F.2d 1162,
26 1166 (9th Cir. 1977).

27 4. This analysis does not mean that the court should "second guess reasoned choices
28 between trial tactics nor does it mean that defense counsel, to protect himself against

1 allegations of inadequacy, must make every conceivable motion no matter how remote the
2 possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711; citing, Cooper, 551
3 F.2d at 1166 (9th Cir. 1977). In essence, the court must "judge the reasonableness of
4 counsel's challenged conduct on the facts of the particular case, viewed as of the time of
5 counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

6 5. With regard to the Defendant's allegations concerning the 1988 charge, the Defendant
7 cannot show that defense counsel acted unreasonably in securing the deal for him. Defense
8 counsel's investigation was limited by the fact that the Defendant pleaded guilty. Once the
9 Defendant decided to plead guilty, defense counsel did not have a duty to determine whether
10 the statute of limitations was tolled with regard to the 1988 offense. Furthermore, in
11 Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994), the Supreme Court of Nevada held
12 that a defendant waives any defense of the statute of limitations when he/she enters an *Alford*
13 plea of guilty.

14 6. The Defendant failed to show that he was prejudiced by counsel's failure to timely
15 submit letters at sentencing. Therefore, the Defendant failed to satisfy the two prong test set
16 forth in Strickland.

17 7. Defendant's claim that trial counsel was ineffective for failing to file a timely appeal
18 is meritless. Defense counsel was not obligated to file a direct appeal on behalf of the
19 Defendant. Furthermore, defense counsel was not even required to inform Defendant of his
20 right to appeal. In Thomas v. State, 115 Nev. 148, 979 P.2d 222 (2000), the Nevada
21 Supreme Court specifically rejected the defendant's contention that counsel is required to
22 inform a defendant of his right to appeal. In Thomas, the court stated: "We hold that there is
23 no constitutional requirement that counsel must always inform a defendant who pleads guilty
24 of the right to pursue a direct appeal. 115 Nev. at 148, 979 P.2d at 223.

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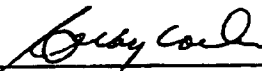
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ORDER

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 8th day of April, 2002.



DISTRICT JUDGE *ST*

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477



BY _____
MARY KAY HOLTHUS
Chief Deputy District Attorney
Nevada Bar #003814

NELSON/gmr