

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRACY LOUIS BROWN A/K/A TRACY  
LEWIS BROWN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40067

**FILED**

**MAR 04 2004**

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

ORDER OF REVERSAL AND REMAND

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

On November 20, 2000, Brown was convicted, pursuant to a jury verdict, of one count each of burglary while in possession of a deadly weapon and robbery with the use of a deadly weapon. The district court sentenced Brown to serve a prison term of 30 to 100 months for the burglary count and a concurrent prison term of 24 to 100 months for the robbery count with an equal and consecutive term for the use of a deadly weapon. Brown filed a direct appeal, and this court affirmed the judgment of conviction.<sup>1</sup>

On April 15, 2002, Brown filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to

---

<sup>1</sup>Brown v. State, Docket No. 37195 (Order of Affirmance, June 13, 2001).

appoint counsel or to conduct an evidentiary hearing. On July 25, 2002, the district court denied Brown's petition. This appeal followed.

In the petition, Brown claimed that his trial counsel was ineffective for failing to present exculpatory evidence, namely a Mahoney's Casino surveillance videotape and the testimony of Mahoney's security officer Larry Morrison, that purportedly substantiated Brown's claim that he was playing blackjack at Mahoney's Casino during the time in which the robbery at the Wendy's Restaurant occurred.<sup>2</sup> The district court denied Brown's claims, finding that he failed to present sufficient evidence that the videotape or the alibi witness existed because he failed to attach affidavits to his petition in support of his allegations. Because our preliminary review of this matter revealed that the district court might have erred in failing to hold an evidentiary hearing on Brown's claims, on October 15, 2003, we ordered the State to show cause why this court should not vacate the district court order and remand this matter to the district court.

On October 27, 2003, the State answered this court's order to show cause arguing that the district court did not err in denying Brown's claims without conducting an evidentiary hearing. In its answer, the State argues "there is no authority [in support of the statement in this

---

<sup>2</sup>Brown also claimed that his trial counsel was ineffective for failing to uncover evidence that certain eyewitnesses were coerced by law enforcement into positively identifying Brown as the perpetrator of the robbery. We conclude that the district court did not err in denying Brown's claim because the eyewitness testimony at trial belies Brown's claim that law enforcement coerced the witnesses into identifying Brown. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

court's order to show cause] that 'an appellant is entitled to an evidentiary hearing if he raises factually specific claims not belied by the record, that if true, would entitle him to relief.'" The State also argues that, pursuant to NRS 34.370(4)<sup>3</sup> and Pangallo v. State,<sup>4</sup> Brown was not entitled to an evidentiary hearing because he failed to attach affidavits in support of his allegations. Finally, the State argues that Brown's claims are so unlikely to be true that he should not be given an evidentiary hearing.<sup>5</sup> We disagree with the State, and we conclude that the district court erred in denying Brown an evidentiary hearing.

First, we note that there is ample authority in support of this court's prior statement in the order to show cause that a post-conviction petitioner is entitled to an evidentiary hearing if the petitioner raises factually specific claims that are not belied by the record and that, if true, would entitle him to relief.<sup>6</sup> Second, we reject the State's argument that,

---

<sup>3</sup>NRS 34.370(4) provides, in relevant part, that: "[a]ffidavits, records or other evidence supporting the allegations in the petition must be attached unless the petition recites the cause for failure to attach these materials."

<sup>4</sup>112 Nev. 1533, 930 P.2d 100 (1996), limited on other grounds by Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000).

<sup>5</sup>In particular, the State argues that: "[i]t would be irrational for the defense team to know of exonerating evidence yet not bring it to the prosecution's attention pretrial, or into evidence at trial."

<sup>6</sup>See, e.g., Mann v. State, 118 Nev. 351, 353, 46 P.3d 1228, 1231 (2002) ("A petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief."); Marshall v. State, 110 Nev 1328, 1331, 885 P.2d 603, 605 (1994) ("When a petition for post-  
*continued on next page . . .*

pursuant to NRS 34.370(4), the district court properly dismissed Brown's petition without conducting an evidentiary hearing because Brown failed to attach affidavit supporting his allegations.<sup>7</sup> NRS 34.735 sets forth specific instructions for filing a post-conviction habeas petition and includes a lengthy form identifying the necessary requisites of a valid petition.<sup>8</sup> Notably, NRS 34.735 does not require that affidavits be attached in support of those allegations.<sup>9</sup> Although NRS 34.370 arguably conflicts with NRS 34.735, NRS 34.735 is controlling in this matter

---

*... continued*

conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record."); see also Hathaway v. State, 119 Nev. \_\_\_, 71 P.3d 508 (2003); Pangallo, 112 Nev. 1533, 930 P.2d 100; Hargrove, 100 Nev. 502, 686 P.2d 222.

<sup>7</sup>We also reject the State's argument that Brown was properly denied an evidentiary hearing because the decision not to call eyewitness Larry Morrison was a tactical decision and, as such, was virtually unchallengeable. See Doleman v. State, 112 Nev. 843, 848-50, 921 P.2d 278, 280-82 (1996).

<sup>8</sup>See also NRS 34.730(4) ("No hearing upon the petition may be set until the requirements of NRS 34.740 to 34.770, inclusive, are satisfied.").

<sup>9</sup>An affidavit is only necessary if a petitioner wants an attorney appointed, then an "Affidavit in Support of Request to Proceed in Forma Pauperis" must be attached to the petition. See NRS 34.735.

because the statute is more specific in that it identifies the essential requirements of a valid post-conviction habeas petition.<sup>10</sup>

Likewise, we disagree with the State that our holding in Pangallo supports the district court's ruling. In Pangallo, we recognized that a post-conviction habeas petitioner seeking jail time credits is not required to attach records in support of specific factual allegations.<sup>11</sup> There is no language in Pangallo, however, limiting that rule to instances where the State has custody of the records. Finally, while we agree with the State that it is highly unlikely that defense counsel would know of evidence proving his client's innocence and choose not to present it, a district court may not deny a petitioner's claims merely because it is unlikely to be true. Rather, claims of ineffective assistance of counsel are analyzed under the two-prong test set forth in Strickland v. Washington.<sup>12</sup> In this case, Brown should have been afforded an evidentiary hearing on his claims of ineffective assistance of counsel involving exonerating evidence because those claims are factually specific, not belied by the record and, if true, may entitle him to relief.

---

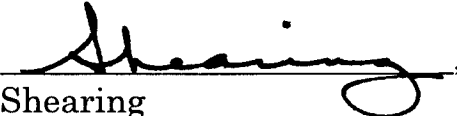
<sup>10</sup>Gaines v. State, 116 Nev. 359, 365, 998 P.2d 166, 170 (2000) (recognizing that "specific statutes take precedence over general statutes").

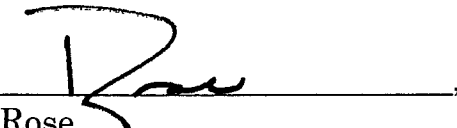
<sup>11</sup>112 Nev. at 1537, 930 P.2d at 103.

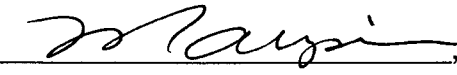
<sup>12</sup>466 U.S. 668 (1984).

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.<sup>13</sup> Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>14</sup>

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

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

cc: Hon. Valorie Vega, District Judge  
Tracy Louis Brown  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

---

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

<sup>14</sup>We have considered all proper person documents filed or received in this matter, and we conclude that no further relief is warranted. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.