

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUKE DELANO BANKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40634

FILED

MAR 20 2003

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court denying appellant Luke Delano Banks' post-conviction petition for a writ of habeas corpus.

On December 15, 1999, Banks was convicted, pursuant to a jury verdict, of robbery with the use of a deadly weapon.¹ The district court sentenced Banks to serve two consecutive prison terms of 26-120 months and ordered him to pay restitution in the amount of \$4,740.00 jointly and severally with his codefendant; he was given credit for 405 days time served. Banks did not pursue a direct appeal.

On December 19, 2000, Banks filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On July 24, 2001, Banks filed supplemental points and authorities in support of his petition. The district court subsequently appointed counsel to represent Banks, and counsel submitted a supplement to Banks' petition. On April 10, 2002, the State filed a motion for the partial dismissal of Banks' petition and supplement.

¹In order to correct a clerical error, a corrected judgment of conviction was filed on July 16, 2001.

The district court conducted an evidentiary hearing on the petition, and on November 20, 2002, entered an order denying Banks' petition. This appeal followed.

Banks contends that the district court erred in not finding that he received ineffective assistance of counsel at trial.² Banks argues that both his initial and replacement counsel failed to subpoena and secure the presence of an alibi witness. We disagree.

Initially, we note that Banks' petition was filed more than one year after entry of the judgment of conviction. Because Banks failed to establish good cause for the untimely petition, it is procedurally barred, and we explicitly conclude that the petition should have been denied on that basis.³ We further conclude that the district court correctly determined that Banks' petition lacked merit, and we affirm the district court's ruling on that separate, independent ground.⁴

²In his petition below, Banks raised several additional arguments regarding the ineffective assistance of trial counsel, however, all but the one addressed in this order were abandoned either at the evidentiary hearing in the district court or on appeal.

³See NRS 34.726(1) ("Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur."); see generally Harris v. Reed, 489 U.S. 255, 263 (1989) (holding that procedural default does not bar federal review of claim on the merits unless state court rendering judgment relied "clearly and expressly" on procedural bar) (citation omitted).

⁴Harris, 489 U.S. at 264 n.10 (holding that as long as the state court explicitly invokes a state procedural bar, "a state court need not fear reaching the merits of a federal claim in an alternative holding").

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.⁵ The court need not consider both prongs of the Strickland test if the petitioner fails to make a showing on either prong.⁶ A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.⁷ Further, the tactical decisions of defense counsel are "virtually unchallengeable absent extraordinary circumstances."⁸

Our review of the record reveals that the district court's factual findings are supported by the record and are not clearly wrong. At the evidentiary hearing on the petition, testimony proved that defense counsel were aware of the information the alleged alibi witness could provide and knew how to locate her, and both questioned her credibility. Additionally, the witness was present during the trial and available to testify. The district court found that Banks' trial counsel made a reasonable strategic decision in not presenting the witness due to the

⁵See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁶Strickland, 466 U.S. at 697.

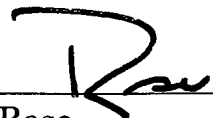
⁷Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).


⁸Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691), modified on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).


questions about her credibility. Therefore, we conclude the district court did not err in determining that Banks failed to show that counsels' performance fell below an objective standard of reasonableness, and that but for their deficient performance, the outcome of the proceedings would have been different.

Having considered Banks' contention and concluded that it is without merit, we

ORDER the judgment of the district court AFFIRMED.⁹


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

⁹Although this court has elected to file the joint appendix submitted, we note that it does not comply with the arrangement and form requirements of the Nevada Rules of Appellate Procedure. See NRAP 3C(e)(2); NRAP 30(c); NRAP 32(a). Specifically, the appendix: (1) does not include an alphabetical index; and (2) includes documents not bearing the district court clerk's file-stamp thus indicating that the documents were filed below. See NRAP 30(c)(1), (2). Counsel are cautioned that failure to comply with the requirements for appendices in the future may result in the appendix being returned, unfiled, to be correctly prepared. See NRAP 32(c). Failure to comply may also result in the imposition of sanctions by this court. NRAP 3C(n).

cc: Hon. James W. Hardesty, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk