

IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDRICK XAVIER MOORE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40964

FILED

MAY 28 2004

ORDER OF AFFIRMANCE

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

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

On September 21, 2001, the district court convicted Moore, pursuant to a jury verdict, of one count of burglary and one count of robbery with the use of a deadly weapon. The district court sentenced Moore to serve one term of 12 to 60 months in the Nevada State Prison for burglary and one term of 26 to 120 months for robbery with an equal and consecutive term for the use of a deadly weapon. The term for robbery was imposed to run concurrently with the term for burglary. Moore did not file a direct appeal.

On August 21, 2002, Moore filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent Moore. The district court conducted an evidentiary hearing. On January 27, 2003, the district court denied Moore's petition. This appeal followed.

In his petition, Moore first made several claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient, and that the petitioner was prejudiced by counsel's performance.<sup>1</sup> Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact and is therefore subject to independent review.<sup>2</sup> However, the "purely factual findings of an inferior tribunal regarding a claim of ineffective assistance are entitled to deference on subsequent review of that tribunal's decision."<sup>3</sup>

Moore specifically contended that his counsel was ineffective for failing to (1) challenge the burglary charge on grounds that the only crime committed was petit larceny; (2) challenge the robbery charge on grounds that there was no evidence of a taking by force; (3) challenge the deadly weapon enhancement on grounds that there was no deadly weapon; and (4) for failing to file a notice of appeal, not informing Moore that he could file a direct appeal, and coercing or misleading Moore into signing a waiver of appeal.

The district court found that trial counsel was not ineffective and that Moore "freely and voluntarily" asked counsel not to take an

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<sup>1</sup>Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

<sup>2</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

<sup>3</sup>Id.

appeal in his case.<sup>4</sup> The record on appeal includes an affidavit filed by Moore's trial counsel, Lauren Diefenbach.<sup>5</sup> In her affidavit, Diefenbach stated that she did not file motions asking for dismissal of the burglary and robbery counts because she did not believe there was a legal basis to do so. She stated that, based on her understanding of the facts, the Nevada Revised Statutes, and applicable case law, she could not in good faith file a motion to strike the deadly weapon portion of the information. Diefenbach explained to Moore that there was very little chance that a direct appeal would succeed, that she did not believe there were any appealable issues, and that Moore "possessed the power to decide not to file an appeal." Diefenbach further stated that Moore was not coerced or misled into waiving his right to appeal; he simply decided not to file an appeal when presented with the choice. Diefenbach attached Moore's waiver of appeal to her affidavit. This affidavit, coupled with Moore's waiver of appeal, demonstrates that the district court's factual findings

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<sup>4</sup>See generally Cruzado v. State, 110 Nev. 745, 747, 879 P.2d 1195, 1195-96 (1994) limited on other grounds by Lee v. State, 115 Nev. 207, 985 P.2d 164 (1999).

<sup>5</sup>We have previously held that a petitioner's statutory rights are violated when the district court improperly expands the record, by accepting affidavits refuting claims presented in a petition, without first deciding to conduct an evidentiary hearing. Mann v. State, 118 Nev. 351, 355, 46 P.3d 1228, 1231 (2002). Here, the district court expanded the record by accepting Diefenbach's affidavit prior to conducting an evidentiary hearing. However, in light of the fact that the district court held an evidentiary hearing, we conclude that the error was harmless and that the district court could properly consider the evidence presented in Diefenbach's affidavit.

are supported by substantial evidence and, therefore, are not clearly wrong.<sup>6</sup> Accordingly, we conclude that counsel was not deficient and Moore was not deprived of an appeal.

Next, Moore claimed that the district court lacked jurisdiction. This claim is belied by the record.<sup>7</sup> The justice's court ordered Moore to be bound over to answer charges of burglary and robbery with the use of a deadly weapon.<sup>8</sup> The State then filed an information in the district court.<sup>9</sup> We note that the crimes set forth in the State's information were based on the same facts that were presented during the preliminary hearing.<sup>10</sup> Because the State properly filed its information and the district court has original jurisdiction over felony cases,<sup>11</sup> we conclude that Moore's claim is without merit.

Lastly, Moore raised claims of insufficient evidence and prosecutorial misconduct. However, these claims are outside the scope of a post-conviction petition for a writ of habeas corpus because they could

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<sup>6</sup>See Riley, 110 Nev. at 647, 878 P.2d at 278.

<sup>7</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that a petitioner is not entitled to post-conviction relief if his factual allegations are belied by the record).

<sup>8</sup>See NRS 193.165; NRS 200.380; NRS 205.060.

<sup>9</sup>See NRS 173.035(1).


<sup>10</sup>See NRS 173.035(3).

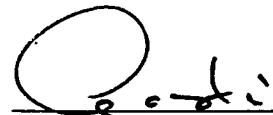
<sup>11</sup>See Battiato v. Sheriff, 95 Nev. 361, 594 P.2d 1152 (1979).


have been raised on direct appeal had Moore chosen to pursue one.<sup>12</sup> Therefore, the district court did not err in denying these claims.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that 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.<sup>14</sup>

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

  
\_\_\_\_\_, J.  
Agosti

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

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

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

<sup>14</sup>We have reviewed all documents that Moore has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Moore has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Sally L. Loehrer, District Judge  
Fredrick Xavier Moore  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk