

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH MICHAEL ANDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41228

FILED

JAN 09 2004

ORDER OF AFFIRMANCE

[Signature]
DEPUTY CLERK

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

On July 7, 1999, the district court convicted appellant, pursuant to a jury verdict, of sexual assault and first degree kidnapping. The district court sentenced appellant to life in the Nevada State Prison with the possibility of parole after serving ten years for sexual assault and a consecutive term of life with the possibility of parole after serving five years for kidnapping. This court affirmed appellant's conviction on October 3, 2000.¹ The remittitur issued on October 31, 2000.

On August 2, 1999, while appellant's direct appeal was pending with this court, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court dismissed the petition on November 2, 1999. Appellant appealed the

¹See Anderson v. State, Docket No. 34620 (Order of Affirmance, October 3, 2000).

dismissal, and this court subsequently affirmed the district court's order in part, reversed in part and remanded for an evidentiary hearing on the sole issue whether trial counsel rendered ineffective assistance of counsel for failing to present witnesses to testify to the fact that the victim was intoxicated during the time of the alleged sexual assault and kidnapping.²

The district court subsequently conducted an evidentiary hearing on this issue. At the conclusion of the hearing, the district court determined that appellant's trial counsel was not ineffective. This appeal followed.

Appellant claims that his trial counsel was ineffective for failing to investigate the intoxication level of the victim, which prevented competent cross-examination of the victim and violated appellant's right to confrontation. Appellant claims that trial counsel should have impeached the victim at trial, where she stated that she had approximately one or two drinks but was not drunk, with the transcripts of earlier inconsistent statements. One transcript showed that in an interview with Officer Jenkins of the Reno Police Department she stated that she was "nice and toasted" on the night of the incident, and the transcript of the preliminary hearing showed that she stated that she had two or three drinks and was intoxicated.

²See Anderson v. State, Docket No. 35251 (Order Affirming in Part, Reversing in Part and Remanding).

A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.³ To establish ineffective assistance of trial counsel, a claimant must demonstrate that his trial counsel's performance fell below an objective standard of reasonableness, and a reasonable probability that, but for counsel's errors, the result of the trial would have been different.⁴

At the preliminary hearing, the victim stated that she consumed two or three drinks and was intoxicated on the evening of the crime. At trial, she testified that she had approximately one or two drinks, but that she was not drunk. She also testified that she was interviewed by Officer Jenkins shortly after the crime occurred and stated to him that she got "nice and toasted." She then went on to testify that she was not a drinker and that to her "toasted" means feeling the alcohol or "feeling a buzz," which is different from "falling-down drunk."

After the victim testified at trial that she had one or two drinks but was not drunk, trial counsel asked the victim about her change in testimony from the interview with Officer Jenkins, to the preliminary hearing, to her present testimony at trial. Counsel asked her specifics about her statement to Officer Jenkins such as if she remembered telling him that she was drunk or if she remembered stating that she got "nice and toasted." Counsel, however, did not use the transcript of the interview with Officer Jenkins or the transcript of the preliminary

³See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

⁴See Strickland v. Washington, 466 U.S. 668, 687, 694 (1984).

hearing, nor did he call Officer Jenkins to the stand to impeach her on this issue. Trial counsel then questioned her regarding her inconsistent statements about her use of Tylenol with codeine after the crime occurred. With respect to this issue, counsel did use the transcript of the interview to impeach her trial testimony.

At the evidentiary hearing, trial counsel was asked why he did not impeach the victim regarding her inconsistent statements about her alcohol consumption with the transcript of her interview with Officer Jenkins. Counsel testified that he did not know why he did not use the transcript to impeach the victim regarding her intoxication level, but that he did address the inconsistencies in her statements by his questioning on cross-examination.

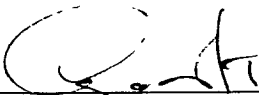
We conclude that trial counsel was not ineffective. Although trial counsel probably should have impeached the victim regarding her inconsistent statements on her level of intoxication with the transcripts or by calling Officer Jenkins to the stand, we conclude that counsel's actions did not prejudice appellant. Counsel did address the inconsistencies in the victim's testimony regarding her intoxication from the use of alcohol and also specifically addressed, with the transcript of the interview with Officer Jenkins, her intoxication from the use of Tylenol with codeine. Moreover, there was overwhelming evidence presented at trial demonstrating appellant's guilt. Therefore, appellant was not prejudiced, and the district court did not err in denying this claim.

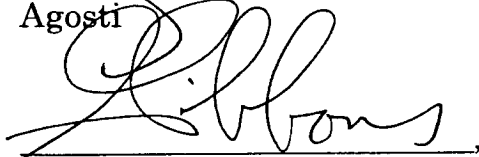
Appellant also raises various other claims: appellate counsel was ineffective for failing to raise critical issues on direct appeal; counsel was ineffective for failing to adequately investigate; his due process rights

were violated when his appointed counsel failed to supplement the petition for writ of habeas corpus to correct any deficiencies in the pleading of the claims; and trial counsel was ineffective for failing to bring the breakdown in the attorney-client relationship before the district court for a hearing and for failing to withdraw as counsel. These claims should not have been included in this appeal because this court remanded this case on only one issue. Therefore, we need not consider them. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Peter I. Breen, District Judge
Karla K. Butko
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk