

IN THE SUPREME COURT OF THE STATE OF NEVADA

TADZIU EWING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42053

FILED

FEB 11 2004

ORDER OF AFFIRMANCE

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

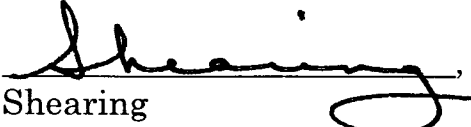
This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.


In the petition, appellant 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 Appellant has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, appellant has not demonstrated that the district court erred as a matter of law.

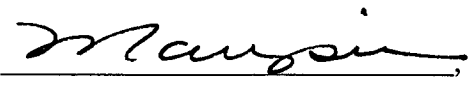
¹See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Accordingly, for the reasons stated in the attached order of the district court, we

ORDER the judgment of the district court AFFIRMED.

 C.J.
Shearing

 J.
Rose

 J.
Maupin

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

ORIGINAL

FILED

SEP 03 2003

RONALD A. LONGTIN, JR., CLERK

By *R. Stole*
DEPUTY

1 Code 3025

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

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IN AND FOR THE COUNTY OF WASHOE

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TADZIU EWING,

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Petitioner,

Case No. CR00P-2265

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vs.

Dept. No. 4

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THE STATE OF NEVADA,

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Respondent.

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ORDER

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On March 14, 2003, Petitioner Tadziu Ewing filed a Supplement to Petition for

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Writ of Habeas Corpus. On April 28, 2003, Respondent State of Nevada filed a

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Motion to Dismiss Petition for Writ of Habeas Corpus. On May 30, 2003, Petitioner

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filed his Opposition to Motion to Dismiss Supplement to Petition for Writ of Habeas

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Corpus. On June 3, 2003, Respondent filed its Reply to Opposition to Motion to

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Dismiss Petition for Writ of Habeas Corpus. This matter is now before the court for

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decision.

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1 Petitioner submits his Petition for Writ of Habeas Corpus on four (4) grounds;
2 That he received ineffective assistance of trial and appellate counsel in violation of his
3 4th, 5th, 6th, and 14th Amendment rights, and that he is entitled to an evidentiary
4 hearing on the matter because:

- 5 1. Petitioner contends that his trial counsel should have asked for a “defense
6 theory of the case” jury instruction due to his contention that there was a
7 fatal flaw in the chain of custody pertaining to Petitioner’s blood samples.
8 Petitioner claims that his trial counsel should have asked for an instruction
9 informing the jury that they could acquit on failure of chain of custody.
10
- 11 2. Petitioner further contends that the prosecutor committed Griffin error by
12 inferring, in his closing argument, that the defense should have produced
13 evidence to refute the states case, thus shifting the burden of proof from the
14 State to the defense. Additionally, Petitioner contends that his trial counsel
15 committed error by not permitting a specific “curing” instruction for the
16 Griffin error that was offered by the District Court.
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- 18 3. Petitioner next contends that his appellate counsel should have alleged
19 “insufficient evidence” on appeal because she knew about the existence of
20 the chain of custody issues raised by Petitioner at trial.
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- 22 4. Petitioner’s final contention is that his appellate counsel committed error by
23 failing to allege Griffin error on appeal.

24 The United States Supreme Court, in Strickland v. Washington, 466 U.S. 668
25 (1984), set the standard as to what a defendant must show in regards to having a
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1 conviction overturned due to ineffective assistance of counsel. The requirements of
2 the two-prong test are:

3 First, the defendant must show that counsel's performance was
4 deficient.

5 This requires showing that counsel made errors so serious that counsel
6 was not functioning as the "counsel" guaranteed the defendant by the
7 Sixth Amendment. Second, the defendant must show that the deficient
8 performance prejudiced the defense. This requires showing that
9 counsel's errors were so serious as to deprive the defendant of a fair
10 trial, a trial whose result is reliable.

11 Id. at 687. Both prongs of this test need not be satisfied, and the court need not
12 address them in this same order. Id. at 697. If it is easier to dispose of a claim of
13 ineffectiveness on the ground of lack of sufficient prejudice, then that is the route that
14 should be chosen. Id.

15 Furthermore, a criminal defendant is not entitled to an evidentiary hearing if the
16 factual allegations are belied or repelled by the record. Pangallo v. State, 112 Nev.
17 1533, 1536 (1996).

18 On Ground One (1), Petitioner contends that he received ineffective assistance
19 from his trial counsel because she should have asked for a "defense theory of the
20 case" jury instruction. Specifically, Petitioner believes that he was entitled to, and his
21 counsel should have requested, a jury instruction pertaining to the alleged failure in
22 the chain of custody in the State's handling of Petitioner's blood samples. (See
23 Supplement to Petition for Writ, pg. 15, lines 23-24).

24 A criminal defendant is entitled to have the jury instructed on his theory of the
25 case, no matter how weak or incredible the evidence supporting the theory may be.

1 Barron v. State, 105 Nev. 767, 773 (1989). However, if a proffered instruction
2 misstates the law or is adequately covered by other instructions, it need not be given.

3 Id.

4 The thrust of the instruction proffered by Petitioner seems to be that the State
5 failed to produce evidence to meet their burden of proof beyond a reasonable doubt.
6 However, there were numerous other instructions given to the jury that addressed the
7 Prosecutions burden to prove guilt beyond a reasonable doubt, and the Prosecutions
8 duty to meet this burden through the production of certain types of evidence. (See
9 Petitioners Appendix 245, 254, 255, 256). Therefore, a “defense theory of the case”
10 jury instruction need not have been given because it was adequately covered by other
11 instructions.
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13 Petitioner’s counsel was not deficient by not asking for this instruction.
14 Additionally, even if counsel was deficient, Ewing was not prejudiced by the failure to
15 request a theory of the case instruction because the proffered instruction was already
16 covered by other instructions to the jury.
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18 On Ground Two (2), Petitioner, Ewing, contends that he received ineffective
19 assistance from his trial counsel. Specifically, Petitioner claims that the prosecutor
20 committed Griffin error in his closing argument, and that his counsel erred in declining
21 an attempt by the district court to cure any potential Griffin error by giving an
22 additional instruction advising the jury that Petitioner did not need to testify, and his
23 silence could not be used against him. Petitioner claims that he had a hung jury in his
24 first trial on this issue, and then was convicted in the second trial, and the only
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1 difference between the trials was the alleged Griffin error. Therefore, Petitioner
2 claims he was prejudiced by the conduct of the prosecutor.

3 The United States Supreme Court has held that the "...Fifth Amendment, in its
4 direct application to the Federal Government, and in its bearing on the States by
5 reason of the Fourteenth Amendment, forbids either comment by the prosecution on
6 the accused's silence or instructions by the court that such silence is evidence of guilt.
7 Griffin v. California, 380 U.S. 609, 615 (1965).
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9 Petitioner does not claim that the prosecutor, in his closing argument,
10 commented on Petitioner's failure to testify, but rather, that the prosecutor inferred
11 that the defense should have produced evidence to refute the State's case, thus
12 shifting the burden of proof from the State to the defense. However, in the language
13 cited by Petitioner to be in violation, the prosecutor only refers to the evidence that
14 was presented, and the proceedings that occurred in the courtroom. (See Supplement
15 to Petition for Writ pg. 18, lines 11-24). "It is permissible for the prosecutor to argue
16 the evidence before the jury...and to suggest reasonable inferences that might be
17 drawn from that evidence." Klein v. State, 105 Nev. 880, 884 (1989).
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19 In the present case, the prosecutor never commented, in his closing argument,
20 on Petitioner's failure to testify. He merely argued the evidence that was presented to
21 the jury, and suggested inferences that could be made from that evidence, or lack
22 thereof. Therefore the prosecutor did not commit Griffin error as alleged by Petitioner.
23 Further, Petitioner was not prejudiced by the prosecutor's conduct because he did not
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1 commit Griffin error, and because no Griffin error was committed, Petitioner's counsel
2 was not deficient in rejecting a "curing" instruction offered by the district court.

3 On Ground Three (3), Petitioner claims that his appellate counsel was deficient
4 in not alleging "insufficient evidence" on appeal due to the alleged evidence adduced
5 at trial of a break in the chain of custody pertaining to Petitioner's blood samples.
6 However, it was never definitively established, in either of the previous trials, that a
7 break in the chain of custody actually occurred. Furthermore, "It is not necessary to
8 negate all possibilities of substitution or tampering with an exhibit, nor to trace its
9 custody by placing each custodian upon the stand; it is sufficient to establish only that
10 it is reasonably certain that no tampering or substitution took place, and the doubt, if
11 any, goes to the weight of the evidence." Sorce v. State, 88 Nev. 350, 352-53 (1972).
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14 In this case, the record shows that the State presented sufficient evidence to
15 establish, to a reasonable certainty, that Petitioner's blood samples were not
16 tampered with or substituted. (See Appendix to Petition of Writ, 301-304). Therefore,
17 Petitioner's appellate counsel was not deficient by choosing not to allege "insufficient
18 evidence."
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20 On Ground Four (4), Petitioner claims that he received ineffective assistance
21 from his appellate counsel due to a failure to allege Griffin error on appeal. As
22 previously explained in Ground Two (2), there was no Griffin error committed by
23 Petitioner's trial counsel, so therefore, Petitioner's appellate counsel was not deficient
24 by not alleging Griffin error on appeal.

25 Based on the foregoing and with good cause appearing,
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IT IS HEREBY ORDERED that Respondent State of Nevada's Motion to
Dismiss Petition for Writ of Habeas Corpus is GRANTED.

DATED this 3 day of September, 2003.

Connie J. Steinheimer
DISTRICT JUDGE