

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY TOBY FRANCIOSI,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42505

FILED

JUL 01 2004

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant Anthony Franciosi's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On February 28, 2002, the district court convicted Franciosi, pursuant to a jury verdict, of battery with substantial bodily harm, victim 65 years of age or older (count I), and preventing or dissuading a witness from testifying or producing evidence (count III).<sup>1</sup> Franciosi was additionally adjudicated a habitual criminal. The district court sentenced Franciosi to serve a term of 60 to 240 months in the Nevada State Prison for count I, and a concurrent term of one year in the Clark County Detention Center for count III. This court affirmed Franciosi's judgment of conviction and sentence on appeal.<sup>2</sup> The remittitur issued on September 17, 2002.

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<sup>1</sup>An amended judgment of conviction was entered on April 10, 2002.

<sup>2</sup>Franciosi v. State, Docket No. 39403 (Order of Affirmance, August 21, 2002).

On July 18, 2003, Franciosi filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Franciosi filed a memorandum in support of his petition on October 2, 2003. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Franciosi or to conduct an evidentiary hearing. On January 8, 2004, the district court denied Franciosi's petition.<sup>3</sup> This appeal followed.

In his petition, Franciosi first raised several claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.<sup>4</sup> A petitioner must further establish that there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.<sup>5</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>6</sup>

First, Franciosi contended that his trial counsel was ineffective for failing to procure testimony from eight witnesses. Franciosi claimed that these witnesses would have testified that Franciosi's

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<sup>3</sup>The district court entered specific findings of fact and conclusions of law on January 30, 2004.

<sup>4</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>5</sup>Id.

<sup>6</sup>Strickland, 466 U.S. at 697.

mother—the victim of the instant offenses—overreacts and becomes physically abusive when she gets angry. Franciosi further claimed that one of the witnesses would have testified that Franciosi's mother attempted to shoot him when he was seventeen years old. Franciosi alleged that another witness would have testified that Franciosi's mother was reaching for a garden hoe prior to the incident at issue.

We conclude that Franciosi's claim is without merit. Testimony at trial indicated that 36-year-old Franciosi attacked his 71-year-old mother after she attempted to evict Franciosi's girlfriend. Franciosi pushed his mother to the ground, sat on top of her, and covered her nose and mouth with his hands while threatening to kill her. Franciosi then hit his mother on the side of the head, but his girlfriend urged him to stop. Franciosi eventually released his mother, but proceeded to kick her twice—breaking a rib—before she was able to escape. Franciosi failed to demonstrate that the outcome of his trial would have been different if witnesses had testified that his mother had a violent temper. Consequently, Franciosi did not establish that his trial counsel was ineffective on this issue, and the district court did not err in denying the claim.

Next, Franciosi claimed that his trial counsel was ineffective for failing to independently investigate his mother's claim that one of her ribs was broken during the attack. Franciosi contended that his mother had previously suffered a broken rib, and medical records would have demonstrated that Franciosi did not break her rib during the attack.

We initially note that Franciosi's trial counsel did question Franciosi's mother concerning a rib she had previously broken, and she

indicated that it was in a different place than the broken rib she suffered in the instant offense. Further, during his closing argument, trial counsel stated that medical records demonstrated that Franciosi's mother did not suffer a new broken rib in the attack. Most importantly however, Franciosi failed to articulate what additional investigation his trial counsel should have conducted concerning the victim's broken rib, such that the outcome of his trial would have been different.<sup>7</sup> Therefore, we affirm the order of the district court with respect to this claim.

Third, Franciosi alleged that his trial counsel was ineffective for failing to develop a theory of defense. Franciosi did not support this claim with specific facts, however, or articulate how his counsel's performance was defective in this area.<sup>8</sup> As such, the district court did not err in denying the claim.

Franciosi next raised a claim of ineffective assistance of appellate counsel. To establish ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.<sup>9</sup> "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."<sup>10</sup>

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<sup>7</sup>See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

<sup>8</sup>Id.

<sup>9</sup>See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

<sup>10</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>11</sup>

Franciosi contended that his appellate counsel was ineffective for failing to appeal his habitual criminal adjudication. Specifically, Franciosi contended that his habitual criminal adjudication violated the United States Supreme Court's holding in Apprendi v. New Jersey.<sup>12</sup> Franciosi did not establish that this claim had a reasonable probability of success on appeal, however. Apprendi specifically excluded from its holding a sentencing enhancement involving an increased penalty based upon a prior conviction.<sup>13</sup> Consequently, Franciosi failed to demonstrate that his appellate counsel was ineffective on this issue, and we affirm the order of the district court with respect to this claim.

Finally, Franciosi claimed that: (1) the State violated his Fifth Amendment right against self-incrimination by eliciting testimony from other witnesses concerning Franciosi's prior bad acts, (2) the prosecutor committed misconduct, and (3) his trial contained structural errors. These claims are outside the scope of a post-conviction petition for a writ of habeas corpus and should have been raised on direct appeal.<sup>14</sup> Further, Franciosi failed to include specific facts in support of each of

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<sup>11</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>12</sup>530 U.S. 466 (2000).


<sup>13</sup>Id. at 490.

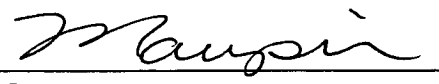
<sup>14</sup>See NRS 34.810(1)(b)(2).


these claims.<sup>15</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 Franciosi is not entitled to relief and that briefing and oral argument are unwarranted.<sup>16</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>17</sup>

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

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

  
\_\_\_\_\_, J.  
Douglas

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<sup>15</sup>See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

<sup>16</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>17</sup>We have reviewed all documents that Franciosi 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 Franciosi has attempted to present claims or facts in those submissions that were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Jackie Glass, District Judge  
Anthony Toby Franciosi  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk