

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANNY DAVID MCCOY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 33744

FILED

JUN 05 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

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

On August 2, 1990, the district court convicted appellant, pursuant to a jury trial, of attempted murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of eight years in the Nevada State Prison. This court dismissed appellant's appeal from his judgment of conviction.¹ The remittitur issued on July 16, 1991.

On July 16, 1992 appellant filed a proper person petition for post-conviction relief in the district court. The State opposed the petition. The district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On July 8, 1993, the district court summarily denied appellant's petition but failed to serve notice of entry of order. On January 15, 1999, the district entered findings of facts and conclusions of law and denied appellant's petition. This appeal followed.

¹McCoy v. State, Docket No. 21577 (Order Dismissing Appeal, June 27, 1991).

In his petition, appellant claimed that his trial and appellate counsel were ineffective for failing to challenge the attempted murder jury instructions given during appellant's jury trial. Specifically, appellant claimed that the jury instructions regarding attempted murder were improper because they failed to state that attempted murder required specific intent to kill and because the instructions suggested that the jury could convict appellant of attempted murder based upon implied malice. In denying his petition, the district court concluded that neither trial counsel nor appellate counsel rendered ineffective assistance for failing to challenge the attempted murder jury instructions because trial counsel did not request a specific intent jury instruction for attempted murder, and because the jury instructions taken in their entirety informed the jury that the intent to kill was an essential element of attempted murder. We disagree.

Our review of the record reveals that appellant's trial counsel and appellate counsel were ineffective for failing to challenge the jury instructions regarding attempted murder given during appellant's jury trial because the jury instructions did not adequately inform the jury of the elements of attempted murder.²

First, the jury was improperly instructed on the definition of attempted murder because the instruction stated that implied malice was an element of attempted murder.³ Specifically, the instruction defined

²See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996); see also Keys v. State, 104 Nev. 736, 766 P.2d 270 (1988).

³See Keys, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988).

attempted murder to be “the unlawful attempt to kill a human being, with malice aforethought, either expressed or implied.” Attempted murder can only be committed when the accused’s acts are accompanied by express malice.⁴ One cannot attempt to kill with implied malice because one can not attempt to achieve an unintended result.⁵ Thus, the attempted murder jury instruction given during appellant’s jury trial was inadequate because it improperly stated that implied malice was an element of attempted murder. Appellant’s counsel, therefore, were ineffective for failing to challenge this instruction.

Second, the jury was improperly instructed on the definition of implied malice in a separate jury instruction as well as in an instruction defining malice aforethought. This court has held that an instruction on implied malice in relation to the crime of attempted murder is misleading to a jury.⁶ This court cannot conclude that instructions on implied malice for attempted murder did not mislead the jury. Thus, it was improper for the jury to be separately instructed on implied malice. Appellant’s counsel, therefore, were ineffective for failing to challenge this instruction.

We acknowledge appellant was convicted in 1990, however, it does not alter the fact that the jury was improperly instructed on the elements of attempted murder. Therefore, we conclude that the district court erred in denying appellant’s petition. We reverse the order of the district court denying appellant’s petition and direct the district court to vacate the judgment of conviction.

⁴See id.


⁵See id.

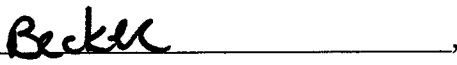
⁶See id. at 739, 766 P.2d at 272.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.⁷ Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁸


_____, J.
Shearing


_____, J.
Rose


_____, J.
Becker

cc: Hon. Ronald D. Parraguirre, District Judge
Attorney General/Carson City
Clark County District Attorney
Danny David McCoy
Clark County Clerk

⁷See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁸This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.