

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTON EDWARD SIREX,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42725

FILED

SEP 29 2004

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On May 7, 1999, the district court convicted appellant Weston Sirex, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon. The district court sentenced Sirex to serve consecutive prison terms of life without the possibility of parole for the murder and consecutive terms of 72 to 180 months for the robbery. The sentence for robbery was imposed to run concurrently with the sentence for murder. This court affirmed Sirex's conviction.<sup>1</sup> The remittitur issued on August 7, 2001.

On February 11, 2002, Sirex filed a proper person petition for a writ of habeas corpus in the district court. The district court appointed

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<sup>1</sup>Sirex v. State, Docket No. 34196 (Order of Affirmance, July 10, 2001).

counsel to represent Sirex. Appointed counsel filed a supplement to Sirex's habeas petition, in which additional claims were presented. The State filed a motion for partial dismissal of both the habeas petition and the supplement. The district court granted the motion, dismissing all but two of Sirex's claims. After conducting an evidentiary hearing on the remaining two claims, the district court denied Sirex's habeas petition. This appeal follows.

Sirex has raised claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate "(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense."<sup>2</sup> "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one."<sup>3</sup> To demonstrate prejudice, "the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different."<sup>4</sup> Whether a defendant received ineffective assistance of counsel is a mixed question of

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<sup>2</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>3</sup>Id. (citing Strickland, 466 U.S. at 697).

<sup>4</sup>Id. at 988, 923 P.2d 1107 (citing Strickland, 466 U.S. at 694); see also Riley v. State, 110 Nev. 638, 648, 878 P.2d 272, 279 (1994) ("Prejudice in an ineffective assistance of counsel claim is shown when the reliability of the jury's verdict is in doubt.").

law and fact and is therefore subject to independent review.<sup>5</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>6</sup>

First, Sirex claims that trial counsel were ineffective for not presenting the district court with an offer of proof to expound his theory of the case and thereby justify a severance of the trial. He contends that a letter written by his codefendant contained exculpatory statements which supported his theory of the case. The letter was admitted into evidence, but the statements were redacted and were not entered into evidence. Sirex assumes the statements would have been admitted at a separate trial. He further asserts that he was entitled to an evidentiary hearing on this claim and that the district court erred by denying him the hearing.

Sirex raised a similar claim on direct appeal. He claimed that the district court's denial of his motion to sever the trial resulted in unfair prejudice. However, we determined that severance was proper and the redacted statements were not so essential that their absence at trial or during the penalty phase resulted in unfair prejudice. Given our disposition of this claim on direct appeal, we conclude that Sirex has failed to demonstrate that he was prejudiced by counsel's failure to make an offer of proof. Therefore, counsel were not ineffective, Sirex is not entitled

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<sup>5</sup>Riley, 110 Nev. at 647, 878 P.2d at 278.

<sup>6</sup>Id.

to relief on this issue, and the district court did not err in dismissing this claim without first conducting an evidentiary hearing.<sup>7</sup>

Second, Sirex claims that trial counsel were ineffective for not seeking the admission of the letter in its entirety during both the guilt and penalty phases of the trial. Sirex contends that the letter contains exculpatory evidence indicating that he had abandoned his intent to rob and shoot the victim. He further asserts that he was entitled to an evidentiary hearing on this claim and that the district court erred by denying him the hearing. However, on direct appeal this court determined that the redacted statements were not exculpatory and did not tend to relieve Sirex of liability for first-degree murder. Given our holding on direct appeal, Sirex failed to demonstrate that he was prejudiced by counsel's failure to seek admission of the redacted statements. Therefore, counsel were not ineffective, Sirex is not entitled to relief on this issue, and the district court did not err in dismissing this claim without first conducting an evidentiary hearing.<sup>8</sup>

Third, Sirex claims that trial counsel were ineffective because they did not provide him with a meaningful analysis of whether he should testify during the guilt and penalty phases of the trial. Sirex's post-

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<sup>7</sup>Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (providing that a petitioner is entitled to an evidentiary hearing if he makes specific factual allegations that would, if true, entitle him to relief).

<sup>8</sup>Id.

conviction counsel has failed to provide this court with a transcript of the evidentiary hearing. "It is the appellant's responsibility to provide the materials necessary for this court's review."<sup>9</sup> However, the district court's order denying the petition includes findings of fact and conclusions of law, and it is evident from the court minutes that Sirex's former counsel testified at the hearing. In its order, the district court found "that counsel offered sound advice on the subject." Given that the district court's findings are entitled to deference and Sirex failed to provide any evidence which would cause this court to doubt the lower court's finding, Sirex failed to overcome the presumption that the district court did not err in denying his claim.<sup>10</sup>

Fourth, Sirex claims that trial counsel were ineffective because they failed to have psychiatrist Dr. Jerry Howle evaluate his mental states at the time of Churchill County shooting incident and the Washoe County robbery/murder. Sirex further contends that counsel were ineffective for not calling Dr. Howle as a witness during the guilt phase of the trial. In its order, the district court stated that it was "not persuaded

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<sup>9</sup>Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975); see also NRAP 30(b)(3).

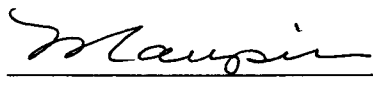
<sup>10</sup>See Lee v. Sheriff, 85 Nev. 379, 380-81, 455 P.2d 623, 624 (1969) (stating that the appellant has the burden to provide this court with an adequate record from which to review a lower court's finding and observing that there is a presumption that the lower court did not commit an error in its ruling).

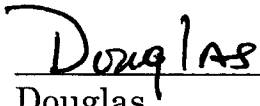
that counsel were ineffective in some way relating to Dr. Howle" and that it did not find any prejudice stemming from this claim. Given that the district court's findings are entitled to deference and Sirex failed to provide any evidence which would cause this court to doubt the lower court's finding, we conclude that Sirex failed to overcome the presumption that the district court did not err in denying his claim.<sup>11</sup>

For the reasons set forth above, we conclude that Sirex failed to demonstrate that the district court erred in denying his petition for a writ of habeas corpus. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

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

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<sup>11</sup>Id.