

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Mar 25 2014 11:15 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

JOSEPH HENDERSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 62629

Appeal from an Order Denying
Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable Abbi Silver, District Judge
District Court No. C-05-212968-1

APPELLANT'S REPLY BRIEF

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ARGUMENT ON THE ISSUES

I. The District Court's Decision to Deny Mr. Henderson Funds for a DNA Expert Violated Due Process and was an Abuse of Discretion.

The State attempts to misstate the argument presented within this issue. Where the minutes clearly indicate the district court's intent, this Court has previously accepted court minutes as sufficient record from which to issue a decision. *See Knox v. Dick*, 99 Nev. 514, 517, 665 P.2d 267, 269 (1983). Here, the district court clearly indicated that its basis was "there was already an independent expert, Nora Rudin therefore another one is not necessary as this is not another trial;" instead, the district court noted that "the issue is Ineffective Assistance of Counsel and that would be a question of whether or not the Deft's attorneys fell below the standard of care pursuant to the Strickland factors." [sic] 2 AA 67.

Ultimately, the justification for the district court's denial of Mr. Henderson's request for an independent expert is immaterial, and the State's argument on this ground misses the mark. The issue presented is the nature of Mr. Henderson's petition below and the due process rights that attached when the district court appointed counsel. *See Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985). What the State – and the district court – do not recognize is this: to demonstrate ineffective assistance of counsel, habeas counsel must be given the opportunity to show what trial counsel could

have accomplished if trial counsel were effective. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Rubio v. State*, 124 Nev. 1032, 1039-40, 194 P.3d 1224, 1229 (2008). Once the district court appointed counsel to make the argument, its decision to underfund and hamstring habeas counsel's investigation and development of that argument constituted a violation of due process. *See Evitts*, 469 U.S. at 400-01.

The State would have this Court believe that, because the State's own expert and trial counsel's expert Nora Rudin both examined the DNA in this case, due process is satisfied. The State refuses to acknowledge that due process can extend beyond the trial stage, and in fact persists even into post-conviction because Nevada has made that remedy available. *Id.* The district court's decision below depriving Mr. Henderson the means with which to demonstrate ineffectiveness constitutes an abuse of discretion and requires reversal.

III. The District Court Erred in Denying Mr. Henderson's Claims of Ineffective Assistance of Counsel Because Trial Counsels' Performance Fell Beneath an Objective Standard of Reasonableness.

The State, in dismissing Mr. Henderson's claims of ineffective assistance of counsel as "largely incoherent," disregards the appropriate standard of review and conflates factual findings and legal conclusions. The standard for ineffectiveness is a legal conclusion given that the underlying

factual basis for these grounds is trial counsel's failure to act –facts that were not contested in the proceedings below. As a result, this Court is tasked with a de novo review of the district court's legal conclusions. *State v. Huebler*, 128 Nev. ___, ___, 275 P.3d 91, 95 (2012) (relying on *Lott v. Mueller*, 304 F.3d 918, 922 (9th Cir. 2002); *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005)).

1. Trial Counsel's Pretrial Investigation into the DNA Evidence Fell Beneath an Objective Standard of Reasonableness.

As noted previously, “effectiveness” encompasses making “sufficient inquiry into the information that is pertinent” to the case to make “a reasonable strategy decision on how to proceed with his client's case.” *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (citing *Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2065-67). Here, the district court was presented with information that, after conferring with one expert, trial counsel abandoned a germane issue for a reasonable doubt – the inconsistent Nevada and CODIS hits. *See* 2 AA 75. Rather than vetting Nora Rudin's conclusions, trial counsel instead abandoned that line of investigation and waived any argument to be made about inconsistent DNA. That failure was what Mr. Henderson referred to, and the State's and the district

court's refusal to see trial counsel's ineffectiveness stems from their misunderstanding of the standard for "sufficient inquiry."

In a case like this one, where DNA evidence constitutes the crux of the case against a defendant, "sufficient inquiry" does not end when an expert gives an unfavorable report. At a minimum, trial counsel should vet the expert's opinion by consulting with a secondary expert; trial counsel has a duty to fully investigate the information being provided such that trial counsel can effectively make a "reasonable strategy decision." *Cf. Doleman*, 112 Nev. at 848, 921 P.2d at 280.

CONCLUSION

Mr. Henderson respectfully submits that the district court erred in denying Mr. Henderson access to additional funds for expert assistance, in violating the exclusionary provisions of NRS 50.155, and when it categorically denied Mr. Henderson's petition without regard for the legitimate issues raised. Mr. Henderson therefore requests that this Court reverse the decision of the district court and remand this case with instructions to issue a writ of habeas corpus. In the alternative, Mr. Henderson would ask this

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Court to remand this case for the appointment of a DNA expert and further evidentiary proceedings.

DATED this 24 of March, 2014.

/s/ Julian Gregory

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1) I certify that I have read this brief and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief is typed in 14-point Georgia font using Microsoft Word 2010, is 5 pages and 1171 words long, and complies with the typeface and -style requirements of NRAP 32(a)(4)-(6), as well as the page length requirements of NRAP 32(a)(7)(A).

2) I further certify that, to the best of my knowledge, this brief complies with all applicable Nevada Rules of Appellate Procedure and/or subsequent orders of this Court and with NRAP 28(e), which requires every assertion in the brief regarding matters in the record be supported by a reference to a page of the transcript or appendix where the matter relied on is to be found.

3) I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 24 of March, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2014, I served the foregoing document on the following parties and/or counsel:

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AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

/s/ Julian Gregory

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03-24-14

Date