

IN THE SUPREME COURT OF THE STATE OF NEVADA

D'VAUGHN KEITHAN KING,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 74703

District Court Case No.
CR12-1160

Electronically Filed
May 02 2018 03:54 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Appeal from an Order Dismissing Post-Conviction Petition

Honorable David Hardy, Second Judicial District Court

APPELLANT'S OPENING BRIEF

Troy C. Jordan
Law Offices of Troy Jordan
300 S. Arlington Ave, Suite B
Reno, Nevada 89501
(775) 432-1581

Attorney for Appellant

Joseph Plater
Deputy District Attorney
Washoe County District Attorney
1 South Sierra Street
Reno, Nevada 89501
(775)328-3200

Adam Laxalt
Attorney General of the State of
Nevada
101 N. Carson St.
Carson City, NV 89701

Attorneys for Respondent

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that judges of this court may evaluate possible disqualification or recusal:

Troy Jordan, Esq.,

Law Offices of Troy Jordan, Ltd.

Washoe County District Attorney's Office

Joseph Plater, Esq.

Jennifer Noble, Esq.

Mary Lou Wilson, Esq.

Bruce Hahn, Esq.

Richard Molezzo, Esq.

John Ohlson, Esq.

Karla Butko, Esq.

TABLE OF CONTENTS

<u>Title</u>	<u>Page</u>
RULE 26.1 DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
JURISDICTIONAL STATEMENT	1
ROUTING STATEMENT	1
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	3
LAW AND ARGUMENT	3
I. Applicable Law Regarding Ineffective Assistance of Counsel	3
II. The District Court erred in concluding that Ground I of the Petition and Supplemental petition did not meet or exceed the standard in <i>Hargrove</i>.	4
CONCLUSION	6
CERTIFICATE OF COMPLIANCE	7

CERTIFICATE OF SERVICE9

TABLE OF AUTHORITIES

Cases

<i>Evans v. State</i> , 117 Nev. 609, 621, 28 P.3d 498, 507 (2001)	5
<i>Hargrove v. State</i> , 100 Nev. 498 (1984).....	4
<i>State v. Love</i> , 109 Nev. 1136, 1139 (1993)	4
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)	3
<i>Warden v. Lyons</i> , 100 Nev. 430, 432, 683 P.2d 504, 505 (1984), <i>cert. denied</i> , 471 U.S. 1004, 85 L. Ed. 2d 159, 105 S. Ct. 1865 (1985).....	3

JURISDICTIONAL STATEMENT

A. STATUTE ALLOWING JURISDICTION

NRS 34.575

B. TIMELINESS OF THIS APPEAL

The District Court filed the written order on November, 21 2017. Notice of Entry of Order was filed November 22, 2017. The notice of appeal was filed on December 12, 2018.

C. TYPE OF APPEAL

Direct Appeal from order of the District Court dismissing a Petition for Writ of Habeas Corpus Post Conviction without a hearing.

ROUTING STATEMENT

This matter involves the post-conviction appeal of a Category A Felony. Therefore, pursuant to NRAP 17 (b) (1) this matter should remain with the Supreme Court.

ISSUES PRESENTED FOR REVIEW

- I. The District Court Erred in Denying Ground I of the Petition and Supplemental Petition without first holding a hearing on the issue.**

STATEMENT OF THE CASE

On April 18, 2005 the State of Nevada filed and information against the Appellant charging him with one count of Murder with use of a firearm. Appellant's Appendix (hereinafter AA) at AA001-AA004. Pursuant to plea negotiations the State reduced the charge to Second Degree Murder with a Deadly Weapon. AA005-AA014. On November 25, 2013, the Appellant entered a plea of guilty to the reduced charge. AA015-AA031. Sentencing occurred on January 22, 2014. AA032. A judgement of conviction was entered the next day. AA075. The Appellant appealed his conviction, but this court affirmed his conviction on November 12, 2014. AA077-AA081. On July 16, 2015 Appellant filed a timely proper person post-conviction petition. AA082. Counsel was appointed and supplemented the petition. AA121. The State answered and did not move to dismiss the petition under *Hargrove*. AA130. Without granting a hearing the District Court denied the Petition alleging (despite the fact the State did not so allege) that the claims were belied by the record. AA130-AA138. This appeal followed.

STATEMENT OF FACTS

There were no facts developed below as no trial occurred. The Defendant pled guilty to Second Degree Murder alleging that he killed a human being with use of a firearm.

SUMMARY OF ARGUMENT

The District Court erred in denying ground I without a hearing. The claim met the or exceeded the standard in *Hargrove* and should have been granted a hearing.

LAW AND ARGUMENT

I. Applicable Law Regarding Ineffective Assistance of Counsel

A defendant possesses a constitutional right to reasonably effective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984), *cert. denied*, 471 U.S. 1004, 85 L. Ed. 2d 159, 105 S. Ct. 1865 (1985).

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a convicted defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that he was prejudiced as a result of counsel's performance. *Strickland*, 466 U.S. at 687-88, 692. Prejudice is demonstrated where counsel's errors were so severe that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 466 U.S. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of trial. *Id.* The defendant carries the

affirmative burden of establishing prejudice. *Id.* at 466 U.S. at 693. Prejudice in an ineffective assistance of counsel claim is shown when the reliability of the jury's verdict is in doubt. *Id.* at 466 U.S. at 687. Reliability is in doubt where the defendant can show that, but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. See *State v. Love*, 109 Nev. 1136, 1139 (1993).

II. The District Court erred in concluding that Ground I of the Petition and Supplemental petition did not meet or exceed the standard in *Hargrove*.

Mr. King was denied due process of law pursuant to the Fifth and Fourteenth Amendments to the United States Constitution when the District Court abused its discretion and dismissed Ground I of the Petition and Supplemental Petition finding it was belied by the record and failing to grant an evidentiary hearing.

Ground I of the Supplemental Petition was worthy of an evidentiary hearing. This Court has already articulated the standard for to receive an evidentiary hearing on claims in a post-conviction petition for writ of habeas corpus in *Hargrove v. State*, 100 Nev. 498 (1984). In *Hargrove*, the Court found that a petitioner cannot make bare or naked allegations. *Hargrove* at 100 Nev. 502. The petitioner must support his allegations with factual allegations that if true would entitle him to relief to receive an evidentiary hearing. *Id.*

This Court later held that a petitioner for post-conviction relief cannot rely on conclusory claims for relief but must make specific factual allegations that if true would entitle him to relief. *Evans v. State*, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001). The petitioner is not entitled to an evidentiary hearing if the record belies or repels the allegations. *Id.* It is proper to raise claims of ineffective assistance of trial or appellate counsel initially in a timely, first post-conviction petition for a writ of habeas corpus. *Id.* at 117 Nev. 622.

In this case, the allegations in Ground I of the Supplemental Petition filed by counsel met or exceeded the standards in *Hargrove* and *Evans*. An evidentiary hearing should have been granted by the District Court.

Ground I of the supplemental petition indicated that that Petitioner's trial counsel failed to call Dr. Martha Mahaffey in mitigation at sentencing and had she been called at sentencing the outcome would have been different. AA124-AA125. Despite, Dr. Mahaffey never testifying previously, the Court found the claim to be belied by the record. AA135. Given that Mahaffey never testified, the claim cannot as a matter of law be belied by the record because the evidence was not before the court in the first instance. There was no argument by the State nor a finding made by the court that the claim was inadequately pled. Therefore, pursuant to *Hargrove*, the claim was entitled to an evidentiary hearing. The Court's finding was an abuse of discretion and not supported by the record.

CONCLUSION

The District Court erred in dismissing Appellant's Petition for Writ of Habeas Corpus. The District Court's findings of fact and conclusions of law should be reversed and Appellant should be granted an evidentiary hearing on these matters.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this opening brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This Opening Brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this opening complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is:

[X] Proportionately spaced, has a typeface of 14 points or more and does not exceed 30 pages

3. Finally, I hereby certify that I have read this opening brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rule of Appellate Procedure including NRAP 28(e)(1), which every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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 2nd Day of May, 2018

/S/ TROY JORDAN
TROY JORDAN
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that I, Troy Jordan, on the 2nd Day of May, 2018, served the foregoing Opening Brief by electronically filing the document with notice to:

Washoe County District Attorney

Nevada Attorney General

/S/ TROY JORDAN

TROY JORDAN

Attorney at Law