

The Supreme Court of Nevada
Supreme Court No. 81648

Jeffrey Kent Brown,
Appellant
Vs.
The State of Nevada,
Respondent

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Elizabeth A. Brown
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APPELLANT'S OPENING BRIEF
(Appeal from Denial of Post-conviction Habeas Petition)

NRAP 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 the judges of this court may evaluate possible disqualification or recusal.

DATED THIS 3rd day of December, 2020.

Jeannie Hua, Esq., Attorney of record for Appellant, Jeffrey Kent Brown
Clark County District Attorney's Office for the State of Nevada

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JURISDICTIONAL STATEMENT

This is an appeal from a final order, the July 30, 2020 Findings of Fact, Conclusions of Law and Order of the Eighth Judicial District Court denying a post-conviction petition for writ of habeas corpus and request for evidentiary hearing in the above-captioned matter. (Findings of Fact, Conclusions of Law and Order, Appellant's Appendix ("AA")). Appellant's Notice of Appeal was filed in the District Court on August 13, 2020. (AA). A Notice of Appeal was filed in this Court on August 19, 2020. (Id.). This Court has appellate jurisdiction pursuant to Nev. R. App. P. 4(b)(1)(A), Nev. R. App. P. 4(b)(2), and Nev. R. App. P. 22.

ROUTING STATEMENT

This matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17(b)(2)(A).

STATEMENT OF THE ISSUES PRESENTED

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENSE COUNSEL FAILED TO INVESTIGATE. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO OFFER EXCULPATORY EVIDENCE AT GRAND JURY. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO PREPARE A SENTENCING MEMORANDUM FOR SENTENCING. TRIAL COURT ERRED BY DENYING PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING.

STATEMENT OF THE CASE

This is an appeal from a denial of a post-conviction habeas petition and a denial of a request for evidentiary hearing on the petition. Appellant was charged by way of Indictment with Aggravated Stalking, Attempt Murder with Use of a Deadly Weapon, Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm Constituting Domestic Violence, Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm, Assault with a Deadly Weapon, Child Abuse, Neglect, or Endangerment with Use of a Deadly Weapon, and Discharge of Firearm from or within a Structure or Vehicle. (Appellant's Appendix (AA)) Proctor was arraigned on October 27, 2016 and pled not guilty. (AA)

On January 17, 2018, pursuant to negotiations with the state, Appellant pleaded guilty to: Attempt Murder with Use of a Deadly Weapon and Assault with a Deadly Weapon. (AA). The guilty plea agreement reflecting the negotiations and above charges, and an amended indictment, were filed in open court on the same day. (AA). On June 21, 2018, Trial Court sentenced Appellant to a minimum of eight years and a maximum of twenty years in the Nevada Department of Corrections for Attempt Murder, plus a consecutive term of a minimum of eight years and a maximum of twenty years for use of deadly weapon enhancement, and minimum of sixteen months and a maximum of seventy two months for Assault with Use of a Deadly Weapon. (AA). After Appellant was sentenced on June 28, 2017, a Judgment of Conviction was filed on July 2, 2018. (AA). An Entry of Order was never filed. No direct appeal was filed.

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Appellant filed a Motion for Withdrawal of Attorney of Record and Transfer of Records on October 9, 2018. (AA p. 32-56). On November 13, 2018, Trial Court granted both motions. (AA p. 60). Appellant filed Motion to Compel Public Defender Department to Produce Records on November 19, 2018. The motion was granted on November 28, 2018. Appellant filed Pro Per Motion to Compel Public Defender Department to Produce Records on January 15, 2019. Appellant filed Petition for Writ of Mandamus on February 26, 2019. Appellant filed Motion for Order or in the Alternative Motion for Contempt on March 12, 2019. Appellant filed Notice of Motion and Motion for Transcripts at State's Expense on March 12, 2019 as well. State filed Response to Petition for Writ of Mandamus on March 13, 2019. Appellant filed Motion for Order or in the Alternative Motion for Contempt on March 21, 2019. Appellant filed Defendant's Pro Per motion for Transcripts at State's Expense on April 11, 2019. Trial Court granted in part Defendant's Pro Per Motion for Transcripts at the State's expense on April 19, 2019.

On April 11, 2019 Appellant filed Motion for Appointment of Attorney and Application to Proceed in Forma Pauperis. Trial Court granted Appellant's motions on April 26, 2019. Appellant filed Motion to Revisit Petitioner's Motion for Transcripts at State's Expense by Consideration of the Supplemental on May 1, 2019. Appellant filed Amended Petition for Writ of Habeas Corpus on May 10, 2019. State filed its Response on June 4, 2019. Appellant filed Request for Submission of Petitioner's Motion for Appointment of Counsel on June 11, 2019. Appellant filed Petition for Writ of Habeas Corpus on June 13, 2019. Counsel was confirmed on August 8, 2019. Supplement was filed on October 7, 2019. (AA p. 79-138). State's Response was filed on January 16, 2020. (AA p. 139-162). Reply was filed on February 10, 2020. Argument

hearing was on February 13, 2020. Findings of Fact, Conclusions of Law and Order was filed on July 30, 2020. (AA p. 158-173). Notice of Appeal and Case Appeal Statement were filed on April 6, 2020. (AA p. 153-157). The Notice of Entry of Findings of Fact, Conclusions of Law was filed on August 3, 2020. (AA p. 158-173). Notice of Appeal was filed in Trial Court on August 13, 2020.

STATEMENT OF FACTS

The State alleged that on September 19, 2016, Appellant shot at his estranged wife, him boyfriend and his son. (AA p. 161). Appellant had advised his trial counsel that he acted in self defense. (AA p. 114). Trial counsel failed to inform Appellant regarding his right to testify at grand jury. Had Appellant known he could have testified at grand jury, he would have been able to offer exculpatory evidence of self defense. Without conducting any investigation, trial counsel advised Appellant to plead guilty. While the Respondent filed a sentencing memorandum in preparation for sentencing, Appellant's trial counsel failed to do so.

ARGUMENT

SUMMARY OF THE ARGUMENT

Trial Counsel rendered ineffective assistance of counsel when he failed to investigate Appellant's claim of self-defense prior to advising him to plead guilty.

Trial Counsel rendered ineffective assistance of counsel when he failed to present exculpatory evidence at grand jury in the form of Appellant's testimony regarding self defense.

Trial Counsel rendered ineffective assistance of counsel when he failed to prepare a sentencing memorandum in preparation of sentencing.

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I. Appellant received ineffective assistance of counsel with regard to his plea because trial counsel failed to adequately investigate his case, violating his 6th amendment and 14th amendment rights under United States Constitution and Article I, Section 8 of the Nevada State Constitution

Because the habeas petition was denied without an evidentiary hearing, the denial is reviewed de novo. *See State v. Haberstroh*, 119 Nev. 173, 184, 69 P.3d 676 (2003), *see also Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (a claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review).

As a general rule, on review, this Court defers to a district court's findings of fact relating to claims of ineffective assistance of counsel. *McNelson v. State*, 115 Nev. 396, 990 P.2d 1263 (1999). However, because ineffective assistance of counsel claims present mixed questions of law and fact, they are still subject to the Courts independent review. *Id.* A criminal defendant has a right to effective representation in connection with a plea. *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366 (1985). The Nevada Supreme Court has recognized that "a criminal defendant has a sixth Amendment right to effective assistance of counsel when deciding whether to accept or reject a plea bargain." *Larson v. State*, 104, Nev. 691, 693, 766 P.2d 261 (1988). When alleging ineffective assistance of counsel with respect to a guilty plea, in order to satisfy the "prejudice" requirement, a defendant need only show a reasonable probability that, but for the errors of his attorney, he would not have pled guilty but would have insisted on going to trial. *Hill*, 474 U.S. at 58-59, 106 S.Ct at 370.

While judicial review of a lawyer's representation is deferential, a defendant may overcome the presumption that the challenged action should be considered sound strategy by identifying the acts or omissions of counsel that the defendant alleges were not the result of reasonable professional judgment. *Larson v. State*, 104 Nev. 691, 766 P.2d 261 (1988);

Strickland, 466 U.S. at 689-90, 104 S.Ct. at 2065. The reviewing court must evaluate the complained of conduct under the circumstances and from counsel's perspective at the time. Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996); *see also* Larson, 104 Nev. at 694, 766 P.2d at 263.

Significantly, a petitioner need not show that counsel's deficient conduct more likely than not altered the outcome in the case. Strickland, 466 U.S. at 693, 104 S.Ct. at 2068. The outcome of a proceeding can be rendered unreliable, and the proceeding itself unfair, "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Id. at 694, 104 S.Ct. at 2068. All that needs be shown is a reasonable probability that the outcome would be different. Id. Further, a claim for ineffective assistance of counsel asserts the absence of one of the crucial assurances that the result of the proceeding was reliable. Id.

A particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id.

In Nevada, attorneys in felony cases should

[C]onduct, or secure the resources to conduct, a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The duty to investigate exists regardless of the client's admissions or statements to defense counsel of facts constituting guilt or the client's stated desire to plead guilty . . .

ADKT 411 Standard 4-7(a): Case Preparation and Investigation.

Investigation is necessary to make an informed decision whether to counsel a client to take a plea. Strickland, 466 U.S. 690-91, 104 S.Ct. at 2066 (counsel has a duty to make

reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary).

Overwhelming authority requires counsel to investigate a defendant's case. See Strickland v. Washington, 466 U.S. 668, 691 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); see also Rompilla v. Beard, 545 U.S. 374, 387 (2005) (noting that counsel must "obtain information that the State has and will use against the defendant."); Wiggins v. Smith, 539 U.S. 510, 524-25 (2003) (noting that counsel was ineffective for failing to investigate mitigation evidence); Colwell v. State, 118 Nev. 807, 813, 59 P.2d 463, 467-68 (2002).

This duty to investigate is also enshrined in professional performance standards. See In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT 411 [hereinafter ADKT 411], Standard 9(a) ("Counsel at every stage has an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case"); 31 Hofstra L. Rev. 913, 1079-80 (ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) [hereinafter 2003 ABA Guidelines], 10.7(A) (noting that obligation to investigate applies to guilt and penalty phase); *id.*, Commentary (referring to the penalty phase: "Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed desires of the client. Nor may counsel 'sit idly by, thinking that investigation would be futile.'"); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) [hereinafter 1989 ABA Guidelines], 11.4.1(C)

("investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."). Thus, failing to conduct a sufficient investigation is ineffective assistance of counsel. See Hart v. Gomez, 174 F.3d 1067, 1071 (9th Cir. 1999) ("A lawyer who fails to adequately investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.").

Appellant's Trial Counsel failed to uphold this duty. His investigation was nonexistent. Numerous indications in the record indicated investigative leads. Appellant had informed Trial Counsel that he was forced to defend himself because the victim was behaving aggressively. Trial Counsel failed to follow up on Appellant's need for self defense by failing to hire ballistic expert to study the trajectory of the bullets and positions of all parties at the time of the shooting. Trial counsel also failed to hire an investigator to see if there were any witnesses present during the shooting not listed in the police report to corroborate Appellant's account of what had happened. A self defense claim would have cancelled out the specific intent element for the charge of Attempt Murder with Use of a Deadly Weapon. Despite this, Trial Counsel did not look into Appellant's potential defense claim of self defense.

Wiggins is instructive. There, trial counsel relied solely on a presentence investigation and a detailed social services report to conclude that they needed no further mitigation investigation. Wiggins, 539 U.S. at 518. The Court noted that the failure to expand the mitigation investigation fell below the standard of practice because funds were available to hire a forensic social worker, but counsel did not seek one. Id. at 524. Further, the Court noted that

counsel's failure to investigate was exacerbated because counsel ignored investigative leads: that Wiggins's mother was an alcoholic, that Wiggins was shuttled from foster home to foster home, that Wiggins demonstrated emotional difficulties, that Wiggins had frequent and lengthy absences from school, and that his mother would leave him and his siblings alone for days without food. *Id.* at 525. Failing to follow up on these leads was ineffective. *Id.* ("any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses.")

Appellant's case is similar. There is no evidence that Trial Counsel conducted any investigation or any follow up on Appellant's self defense information. Further, since Appellant served in the military, Trial Counsel failed to investigate into potential conditions of post traumatic stress disorder (PTSD), a condition common to those who have served in the military, that Appellant may have suffered from and would have contributed to his self defense claim.

Trial counsel's failure to investigate these leads constitutes ineffective assistance of counsel. See Wiggins, 539 U.S. at 526 ("In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."). The information available to Trial Counsel would lead a reasonable attorney to investigate further because self defense and PTSD are reasonable defenses for attempt murder. See Stankewitz v. Young, 698 F.3d 1163, 1171-72 (9th Cir. 2012)("Counsel's possession and awareness of the evidence, but failure to investigate or present it, is evidence of-not an excuse for-his deficiency.").

Here, this Court should reverse the Trial Court's ruling because Trial Counsel's performance fell below standards of adequate representation when he failed to adequately investigate the case. See Larson, 104 Nev. At 693. Appellant had told trial counsel that the victim had done something to him baby. Trial Counsel failed to follow up because he did not believe him.

Further, this Court has held that testimony corroborating one party and discredits the other is material and essential where the jury's determination of guilt or innocence depends upon their assessment of the credibility of the defendant. Banks v. State 101 Nev. 771, 710 P.2d 723 (1988). In United States v. Tucker, 716 F.2d 576 (1983), the Court found that a failure to identify and interview witnesses to corroborate the defendant's testimony was below the objective standard of reasonableness. The Court noted that "Counsel has been found to be ineffective where he neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so." Hendricks v. Vasquez, 974 F.2d 1099, 1109 (1992). In Hendricks, the Court vacated a judgment of the trial court where it was not possible to determine if counsel's decision was a strategic one, and, if so, whether the decision was a sufficiently informed one. Pursuant to Hendricks, Appellant was clearly prejudiced by the obvious lack of investigation into Appellant's case prior to begin advised to enter into negotiations.

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II. Appellant received ineffective assistance of counsel with regard to his plea because trial counsel failed to offer exculpatory evidence at grand jury proceeding, violating his 6th amendment and 14th amendment rights under United States Constitution and Article I, Section 8 of the Nevada State Constitution

In Hays v. Farwell, 482 F.Supp.2d 1180, the Court held that trial counsel was ineffective. State in Hays charged defendant with four counts of Sexual Assault on a Minor and four counts of Lewdness with Minor. A jury convicted defendant of all charges. After the trial, defendant's trial counsel discovered the victim recanted. He failed to file a Motion for New Trial based upon this new exculpatory evidence of the recantation. The Hayes Court ruled that defendant's trial counsel was ineffective for not essentially presenting exculpatory evidence at a hearing for a new trial.

Here, while this case doesn't involve a new trial procedurally, the policy is the same. Trial counsel failed to offer exculpatory evidence at grand jury proceeding in the form of Appellant's testimony that he was defending himself. Pursuant to NRS 172.241(1), "A person whose indictment the district attorney intends to seek or the grand jury on its own motion intends to return, but who has not been subpoenaed to appear before the grand jury, may testify before the grand jury if the person requests to do so and executes a valid waiver in writing of the person's constitutional privilege against self incrimination."

Trial counsel failed to tell Appellant how the grand jury proceeding works and his opportunity to testify. Had Appellant known of his opportunity to present exculpatory evidence by testifying how he was forced to defend himself, Appellant would have taken the opportunity to testify. By failing to inform Appellant his right to testify and present evidence and failing to offer exculpatory evidence at grand jury proceeding, pursuant to Hayes, this Court should find

trial counsel had rendered ineffective assistance of counsel, vacate Appellant's convictions and remand his case to trial court.

III. Petitioner received ineffective assistance of counsel with regard to his Presentencing Investigation report because trial counsel failed to prepare a sentencing memorandum to counter State's damaging sentencing memorandum at sentencing, violating his 6th amendment and 14th amendment rights under United States' Constitution and Article I, Section 8 of the Nevada State Constitution

Attorneys are "bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views." See Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973). This duty continues through sentencing, where attorneys are obligated to provide effective assistance of counsel. See Weaver v. Warden, 107 Nev. 856, 858-59, 822 P.2d 112, 114 (1991) ("[W]hen a district court finds that a petitioner for a writ of habeas corpus had ineffective assistance of counsel at sentencing, the district court should grant the petition and vacate the sentence.").

Counsel's duty to investigate extends to matters that bear on sentencing. Attorneys have been found ineffective for failing to prepare and investigate sentencing issues, *see, e.g., Lopez v. State*, 462 S.W.3d 180, 185-88 (Tex. Ct. App. 2015); McCarty v. State, 802 N.E.2d 959, 963-66 (Ind. App. 2004); for failing to present mitigating circumstances such as a mental illness, *see, e.g., Radmer v. State*, 362 S.W.3d 52, 56-57 (Mo. App. 2012); for encouraging the court to consider factors weighing against a client, *see, e.g., State v. Mills*, 137 So.3d 8, 9-10 (La. 2014); Johnson v. State, 120 So.3d 629, 630-31 (Fla. App. 2013); for failing to investigate a client's prior convictions, *see, e.g., In re Brown*, 218 Cal.App.4th 1216, 1223-29 (2013); Ex parte Harrington, 310 S.W.3d 452, 458-60 (Tex. Crim. App. 2010); or for providing nothing more than perfunctory assistance. *See, e.g., In re Williams*, 101 A.3d 151, 158 (Vt. 2014).

In Gonzalez v. United States, 722 F.3d 118, 134-37 (2nd Cir. 2013), the court held counsel was ineffective with regard to sentencing because, among other things, he "did not accompany Gonzalez when Gonzalez was interviewed by the Probation Department," did not provide Gonzalez with a copy of presentence investigation report (PSR), "spent no more than 15 minutes with Gonzalez discussing the PSR," and "failed to submit to the court a sentencing memorandum." 722 F.3d at 134-35.

In Drake v. State 108 Nev. 523, 836 P.2d 52 (1992), the Court remanded the case for an evidentiary hearing over the State's objection where counsel had not adequately opposed a Motion in Limine filed by State. The purpose of such a hearing was to determine in counsel had sufficient cause for the noted failure. Drake, 108 Nev. At 527-28. Similar to Drake, trial counsel failed to file sentencing memorandum to address and counter prejudicial information in the State's sentencing memorandum. Trial Court imposed the maximum sentence upon Appellant, based on the fact that Respondent's sentencing memorandum was the "last word" in what had happened and why the trial court should sentence harshly.

CONCLUSION

Since Trial Court had erred by denying Appellant's Pro Per Petition for Habeas Corpus and Supplemental, Appellant respectfully requests this Court to remand Appellant's case back to Trial Court for an evidentiary hearing.

DATED this 3rd day of December, 2020.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, using Microsoft Word in 14 point Times New Roman font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(A) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it does not exceed 30 pages.

Finally, I hereby certify that I have read this appellate 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 Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number 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 3rd day of December, 2020.

/s/ Jeannie N. Hua

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CERTIFICATE OF SERVICE

I hereby certify that Appellant's Opening Brief was filed electronically with the Nevada Supreme Court on the 3rd day of December, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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 /s/ Jeannie N. Hua