

1
2 IN THE SUPREME COURT OF THE STATE OF NEVADA

3 Electronically Filed
4 Sep 29 2021 12:39 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

5 KODY CREE PATTEN,

6 Appellant,

7 vs.

CASE NO.82715

8 THE STATE OF NEVADA,

9 Respondent.

10 Appeal From The Fourth Judicial District Court
11 Of The State of Nevada
In And For The County Of Elko

12 **RESPONDENT'S ANSWERING BRIEF**

13 THE HONORABLE AARON D. FORD
14 ATTORNEY GENERAL OF NEVADA
100 N. CARSON STREET
CARSON CITY, NV 89701

15 TYLER J. INGRAM
16 Elko County District
Attorney's Office
17 TYLER J. INGRAM
State Bar Number 11819
18 540 Court Street, 2nd Floor
Elko, NV 89801
19 (775) 738-3101
ATTORNEYS FOR RESPONDENT

RICHARD WAYNE SEARS
State Bar Number:
457 Fifth Street
ELY, NV 89301
(775) 289-1559
ATTORNEY FOR APPELLANT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

JURISDICTIONAL STATEMENTIII

ROUTING STATEMENTIII

STATEMENT OF ISSUESIII

 WHETHER THE DISTRICT COURT ERRED IN DENYING RELIEF FOR
 COUNSEL’S FAILURE TO INVESTIGATE A FALSE CONFESSION WITHOUT AN
 EVIDENTIARY HEARING.III

STATEMENT OF THE CASE..... 1

STATEMENT OF THE FACTS.....2

STANDARD OF REVIEW5

SUMMARY OF ARGUMENT6

ARGUMENT7

 I. THE DISTRICT COURT PROPERLY DENIED RELIEF ON THE
 ALLEGATION THAT COUNSEL DID NOT HAVE A PSYCHOLOGICAL
 EXAMINATION PERFORMED.7

CONCLUSION13

CERTIFICATE OF COMPLIANCE.....13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

TABLE OF AUTHORITIES

PAGE NO.

Cases

Bongiovi v. Sullivan, 122 Nev. 556 (2006) (footnote 5)..... 8
Hargrove v. State, 100 Nev. 498 (1988)..... 12
Hill v. Lockhart, 474 U.S. 54 (1985) 9
Kirksey v. State, 112 Nev. 980 (1996) 6
Molina v. State, 120 Nev. 185 (2004)..... 11
Nika v. State, 124 Nev. 1272 (2008)..... 12
Riley v. State, 110 Nev. 638 (1994) 11
State v. Gomes, 112 Nev. 1473 (1996) 6, 8
Strickland v. Washington, 466 U.S. 668, (1984) 6, 9

Statutes

NRS 34.810 8
NRS 34.950 8
NRS 34.960 8

Rules

NRAP 28(c)..... 8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

JURISDICTIONAL STATEMENT

The Supreme Court of Nevada has jurisdiction because this is an appeal from the District Court’s denial of a post-conviction writ of habeas corpus following the entry of a guilty plea to first degree murder with the use of a deadly weapon. This case is not presumptively assigned to the Court of Appeals. The Notice of Appeal was filed in the Fourth Judicial District Court on April 2, 2021. Appellant’s Opening Brief was timely filed on August 16, 2021.

ROUTING STATEMENT

Because this case is a post-conviction appeal that involves a challenge to a judgment of conviction or sentence for a category A felony, it is not presumptively assigned to the Court of Appeals. NRAP 17(b)(3).

STATEMENT OF ISSUES

Whether the District Court erred in denying relief for counsel’s failure to investigate a false confession without an evidentiary hearing.

///
///
///
///

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0

920

/ / /

1

2

4

1 her vehicle was dusty. *Id.* There was a shovel and zip ties in Wendi's
2 vehicle. *RA*, Vol. III, 445.

3 Dr. Ellen Clark, the medical examiner for this case, testified that
4 Micaela's body was clothed in blue jeans, pink and gray tennis shoes, and
5 underwear. *RA*, Vol. III, 449. Her body was substantially soiled concentrated
6 over areas of bleeding in upper chest, neck, face and head. *Id.* Micaela died
7 due to exsanguination (bleeding or hemorrhage) due to stab and slash
8 wounds, with contributing conditions including blunt force and asphyxia
9 trauma. *RA*, Vol. III, 450. The sleeves of a sweatshirt were tightly knotted
10 and tied and laid over the body. *Id.* Her face, chin and neck had multiple
11 sharp force and blunt force injuries. *Id.* There were angulated wounds to the
12 left brow and eyelid which were cut wounds. *Id.* There were at least seven
13 (7) additional stab wounds that penetrated deeper into her body and slash
14 wounds to her chin. *Id.* Additionally, there were plastic straps attached to
15 her forearm (referred to as zip ties). *RA*, Vol. III, 450-451. Micaela's upper
16 body was covered in numerous injuries described by Dr. Clark. *RA*, Vol. III,
17 450-452. Several of the wounds were associated with a sharp edge causing
18 the injuries. A wound on the right side of her neck penetrated and cut the
19 jugular vein. *RA*, Vol. III, 452. Track patterning on her neck was associated
20 with a ligature and there was evidence of impairment of the airway both in

1 the form of potential direct application of pressure to the throat or neck,
2 bleeding into the airway and tissue surrounding the upper neck. *Id.* The
3 scalloped edge of a shovel was associated with the configuration of the
4 wounds on Micaela's body. *RA*, Vol. III, 425.

5 Michael Moore, a West Wendover resident, located the grave Micaela
6 was buried in near a gravel pit on the west side of West Wendover near the
7 railroad tracks. *RA*, Vol. III, 464. He noticed tire tracks, freshly dug dirt, and
8 blood. *RA*, Vol. III, 464. Moore then showed police what he found. *RA*,
9 Vol. III, 465. A forensic team from Washoe County processed that scene
10 and Micaela was discovered in the grave with zip ties wrapped around her
11 right forearm. *RA*, Vol. III, 476.

12 After the discovery of Micaela's body, Patten submitted to an
13 interview, the contents of which are included in *AA*, Vol. I, 27-82. After
14 being Mirandized, and with his father present, Patten admitted to killing
15 Micaela and hitting her and slashing her with a shovel. *Id.*

16 Det. Donald Burnum of the West Wendover Police Department had
17 occasion to search a burn site at a gravel pit near West Wendover where he
18 discovered a number of items associated with Micaela, including a key ring
19 with a charm that read "Bud." *RA*, Vol. III, 488. Patten admitted during his
20 interview that he took Micaela's belongings to a gravel pit and burned them.

1 AA, Vol. 1, 74. Det. Burnum located a shovel under Toni Fratto's house,
2 behind some vinyl siding where Patten was living. RA, Vol. III, 488¹.
3 Fratto's mother testified at preliminary hearing that she recognized the shovel
4 and had previously seen it Patten's room. RA, Vol. III, 489. She next noticed
5 it missing from Patten's room on March 6, 2011, when law enforcement
6 searched that room. *Id.*

7 Kip Patten, Defendant Patten's father, testified that Patten told him
8 (outside of the presence of law enforcement), that Patten had involvement in
9 Micaela's death and that he (Patten) hit Micaela with a shovel across the
10 neck. RA, Vol. III, 490. Patten also admitted to his father that he dug a hole
11 and buried her. *Id.* Patten further admitted to his father that he burned items
12 belonging to Micaela. RA, Vol. III, 492.

13 Steven Gresko, a criminalist at the Washoe County Crime Lab in the
14 DNA section, testified that DNA matching Patten was located on the
15 sweatshirt mentioned above. RA, Vol. III, 501.

16 STANDARD OF REVIEW

17 To prevail on a claim of ineffective assistance of counsel, a petitioner
18 must show (1) counsel's performance was deficient because it fell below an

19 _____
20 ¹ The State will seek permission from this Court to transmit Exhibit #42 from
the preliminary hearing which the State believes is a photo of the item
described.

1 objective standard of reasonableness and (2) the deficiency prejudiced the
2 defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) ; *Kirksey v.*
3 *State*, 112 Nev. 980, 997 (1996) (adopting the Strickland test).

4 “To state a claim of ineffective assistance of counsel sufficient to
5 invalidate a judgment of conviction based on a guilty plea, a defendant must
6 demonstrate a reasonable probability that, but for counsel's errors, he would
7 not have pled guilty an [sic] would have insisted on going to trial.” *State v.*
8 *Gomes*, 112 Nev. 1473, 1479 (1996).

9 SUMMARY OF ARGUMENT

10 Numerous grounds were addressed by Kody Patten (Patten), the State,
11 and the District Court in the post-conviction writ litigation. There were
12 approximately twenty-four (24) grounds raised in District Court; however,
13 Patten only addresses one of those grounds on appeal. Therefore, all other
14 remaining grounds should be deemed waived. Also, as it relates to the one
15 ground raised in this appeal, the District Court correctly concluded that
16 Patten failed to establish that his counsel’s performance was deficient, or that
17 he suffered actual prejudice, and that an evidentiary hearing was not
18 necessary. The District Court’s denial of relief should be affirmed.

19 ///

20 ///

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20

2
3

4
5
6
7
8
9
10
11
12
13
14
15

16
17
18
19
20

1 opening brief are deemed waived. *Bongiovi v. Sullivan*, 122 Nev. 556, 569
2 (2006) (footnote 5); see also NRAP 28(c).

3 It is not clear to the State whether Patten is arguing actual (factual)
4 innocence or not. See, Appellant's Opening Brief, P.10. Patten seems to
5 argue that he could not be convicted if his confession was false despite the
6 mountain of other evidence, but he never argues – at least as far as the State
7 can tell – that he wouldn't have entered his plea if his counsel wasn't
8 deficient in obtaining a psychological evaluation regarding a false confession.

9 If Patten is claiming actual innocence, then that claim is separate from
10 a habeas claim and is not properly before this Court. NRS 34.950.
11 Likewise, the habeas petition in this case cannot be construed as a petition
12 claiming factual innocence because it does not comply with NRS 34.960.
13 Moreover, Patten doesn't even allege that his plea was entered involuntarily
14 or unknowingly in regards to the psychological examination issue. See NRS
15 34.810.

16 With that said, "To state a claim of ineffective assistance of counsel
17 sufficient to invalidate a judgment of conviction based on a guilty plea, a
18 defendant must demonstrate a reasonable probability that, but for counsel's
19 errors, he would not have pled guilty an [sic] would have insisted on going to
20 trial." *State v. Gomes*, 112 Nev. 1473, 1479 (1996). Importantly, Patten

1 never articulated in his petition that but for counsel not having a
2 psychological examination performed that he would have not pled guilty and
3 instead would have went to trial. *AA*, Vol. II, 390-422.

4 In *Hill v. Lockhart*, 474 U.S. 54 (1985), the United States Supreme
5 Court held that the petitioner's claim that his counsel failed to properly
6 inform him about his eligibility for parole was insufficient to satisfy the
7 prejudice prong of *Strickland v. Washington* because "Petitioner did not
8 allege in his habeas petition that, had counsel correctly informed him about
9 his parole eligibility date, he would have pleaded not guilty and insisted on
10 going to trial." *Id.* at 60. "He alleged no special circumstances that might
11 support the conclusion that he placed particular emphasis on his parole
12 eligibility in deciding whether or not to plead guilty." *Id.* Of particular note,
13 is that the United States Supreme Court in *Hill* concluded that the District
14 Court did not err in declining to have an evidentiary hearing on his
15 ineffective assistance of counsel claim because he failed to allege any kind of
16 prejudice. *Id.*

17 This case is the same in that regard. Patten did not argue that he would
18 have insisted on going to trial instead of pleading guilty. Instead, Patten
19 argued that "A thorough workup of Kody's personality and intelligence *may*
20 have revealed why he continued to take the blame, even in the face of life

1 imprisonment or the death penalty.” *AA*, Vol. II, 407 (emphasis added). Any
2 analysis into why he continued to take the blame – even if we correlate that
3 to what Patten now refers to as a false confession – is irrelevant to the issue
4 here. Patten, under oath, admitted to unlawfully killing the victim with a
5 deadly weapon at his change of plea hearing.

6 The State is not supporting its argument with Patten’s change of plea
7 factual basis to first degree murder with the use of a deadly weapon using
8 circular reasoning vis-à-vis his confession to law enforcement as Patten
9 suggests the District Court did in denying his Petition. Instead, the State is
10 citing his factual basis to support the fact that Patten’s admissions and/or
11 confessions remained substantially similar in that he maintained his
12 murderous participation in the death of the victim and that it is of zero
13 consequence why he continued to protect his ex-lover, Fratto. *AA*, Vol. I,
14 72-81.

15 Also, Patten places a lot of emphasis on continued deception on the
16 part of himself and Fratto. The State submits that it is very common for
17 suspects and Defendant’s alike to engage in deception with law enforcement
18 and the judicial system. Requiring a defense attorney to engage in extra steps
19 such as a psychological evaluation to figure out why a defendant is deceitful
20 seems like a tall order given the frequency in which defendants are deceitful.

1 “Where counsel and the client in a criminal case clearly understand the
2 evidence and the permutations of proof and outcome, counsel is not required
3 to unnecessarily exhaust all available public or private resources.” *Molina v.*
4 *State*, 120 Nev. 185, 192 (2004). In this case, Patten was evaluated at Lake’s
5 Crossing by Drs. Henson and Farmer. *AA*, Vol. I, 109-124. Importantly,
6 there is nothing in the reports that raise any red flags about Patten’s
7 psychological well-being. In *Riley v. State*, 110 Nev. 638 (1994), the
8 Supreme Court of Nevada aptly held that where there isn’t any indication that
9 a defendant suffered from mental disorders, counsel is not ineffective for
10 not obtaining a psychological evaluation. As such, Counsel in this case was
11 not required to do so.

12 Even if Patten wasn’t evaluated by Lake’s Crossing, he still has the
13 burden to prove that but for his Counsel’s failure to obtain an evaluation he
14 would not have entered a guilty plea and would have insisted on a trial. He
15 argues that such an evaluation might explain why he essentially protected his
16 co-defendant by not implicating her in the murder. Is it enough for Patten to
17 say that a psychological examination may have uncovered the reason why he
18 took all of the blame? Even if it did, how does his co-defendant’s
19 participation in the murder change his culpability? It doesn’t. Regardless of
20 his co-defendant’s participation and regardless of why he didn’t implicate his

1 co-defendant to the extent that he now feels he should have, he still
2 bludgeoned the victim with a sharp shovel. Counsel and Patten understood
3 the mountain of evidence against him; however, Patten's statement of facts is
4 only supported by the transcript of the interview with law enforcement
5 (confession) and the proffer. He did not include anything from the
6 preliminary hearing transcript which contains sworn testimony about the
7 evidence against him. This case did not rest solely on his own statements. It
8 wasn't a close call. The point is that it is easy, in hindsight, to argue that
9 defense counsel should have taken additional steps; however, when the
10 evidence corroborates Patten's confessions not only to law enforcement, but
11 also to his father, then Patten's argument that his confession was false is
12 obliterated and he cannot satisfy the prejudice prong of the analysis.

13 Finally, an evidentiary hearing is not necessary. In *Nika v. State*, 124
14 Nev. 1272, 1300-1301 (2008)(citing *Hargrove v. State*, 100 Nev. 498
15 (1988)), the Supreme Court of Nevada held, "[C]laims must consist of more
16 than "bare" allegations and that an evidentiary hearing is mandated only
17 when a post-conviction petitioner asserts specific factual allegations that are
18 not belied or repelled by the record and that, if true, would entitle him to
19 relief." Here, the underlying issued being appealed – the "false confession" –
20 is a bare allegation. His allegation is not true because Patten's confession

1 was corroborated by the evidence, and even if it was true, Patten is not
2 entitled to relief because he did not articulate how a psychological
3 examination would have changed his mind about going to trial and not
4 entering a plea.

5 CONCLUSION

6 This Court should affirm the District Court's decision to deny the
7 claim(s) without an evidentiary hearing.

8
9 RESPECTFULLY SUBMITTED this 29 day of September, 2021.

10 TYLER J. INGRAM
11 Elko County District Attorney

12 By: 
13 TYLER J. INGRAM
14 Elko County District Attorney
15 State Bar Number: 11819

16 CERTIFICATE OF COMPLIANCE

17 I hereby certify that this Respondent's Answering Brief complies with
18 the formatting requirements of NRAP 32(a)(4), the typeface requirements of
19 NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This
20 Respondent's Answering Brief has been prepared in a proportionally spaced

1 typeface using Microsoft Office Word 2007, in size 14 point Times New
2 Roman font.

3 I further certify that this brief complies with the page or type-volume
4 limitations of NRAP 32(a)(7) because, excluding the parts of the
5 Respondent's Answering Brief exempted by NRAP32(a)(7)(C), because it
6 contains 2,898 words.

7 I hereby certify that I have read the Respondent's Answering Brief,
8 and to the best of my knowledge, information, and belief, it is not frivolous
9 or interposed for any improper purpose. I further certify that this brief
10 complies with all applicable Nevada Rules of Appellate Procedure, in
11 particular NRAP 28(e), which requires every assertion in the brief regarding
12 matters in the record to be supported by appropriate references to the record
13 on appeal. I understand that I may be subject to sanctions in the event that
14

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

1 the accompanying brief is not in conformity with the requirements of the
2 Nevada Rules of Appellate Procedure.

3 DATED this 29 day of September, 2021.

4 TYLER J. INGRAM
5 Elko County District Attorney
6 540 Court Street, 2nd Floor
7 Elko, NV 89801

8 By: 

9 TYLER J. INGRAM
10 Elko County District Attorney
11 State Bar Number: 11819
12
13
14
15
16
17
18
19
20

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20

Honorable Aaron D. Ford
Nevada Attorney General

and

RICHARD WAYNE SEARS
Attorney for Appellant


KURRI SULLIVAN
ASSISTANT OFFICE MANAGER

DA#: AP-21-00780