

FILED

2021 JUN 10 AM 11:07

TANYA SCHEINE
COURT ADMINISTRATOR
Electronically Filed
Jun 16 2021 10:51 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 20-CV-00635

Dept. No. I

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

TOMMY FROST,

Petitioner,

NOTICE OF APPEAL

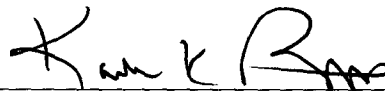
vs.

THE STATE OF NEVADA,

Respondent.

NOTICE IS HEREBY GIVEN that TOMMY FROST, the
Petitioner/Appellant above-named, by and through his counsel,
KARLA K. BUTKO, ESQ., hereby appeals to the Supreme Court of
Nevada, from the Order Denying Petition for Writ of Habeas Corpus
(Post Conviction) dated May 19, 2021, with Notice of Entry of
Order dated June 3, 2021.

DATED this 8th day of June, 2021.



KARLA K. BUTKO
P. O. Box 1249
Verdi, NV 89439
(775) 786-7118
Attorney for Appellant
State Bar No. 3307

1
2 CERTIFICATE OF SERVICE

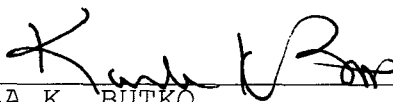
3 I, KARLA K. BUTKO, hereby certify that I am an employee of
4 KARLA K. BUTKO, LTD., and that on this date I served by United
5 States Postal Service, First Class postage paid, the foregoing
6 document, addressed to the following:

7 Tommy Frost, #1220520
8 NNCC
9 P. O. Box 7000
10 Carson City, NV 89702-7000

11 Stephen Rye
12 Lyon County D. A.'s Office
13 31 S. Main Street
14 Yerington, NV 89447

15 Nevada Attorney Generals Office
16 Habeas Division
17 100 N. Carson St.
18 Carson City, NV 89702


19 DATED this 8th day of June, 2021.

20 
21 KARLA K. BUTKO

22 **AFFIRMATION PURSUANT TO NRS 239B.030**

23 The undersigned does hereby affirm that the preceding
24 document DOES NOT CONTAIN the Social Security Number of any
25 person.

26 DATED this 8th day of June, 2021.

27 
KARLA K. BUTKO

FILED

Case No. 20-CV-00635

Dept No. 1

2021 JUN 10 AM 11:08

The undersigned hereby affirms
this document does not contain
a Social Security Number

TANYA SCHEIRING
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

[Signature]

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

TOMMY FROST,

Petitioner/Appellant,

CASE APPEAL STATEMENT

v.

THE STATE OF NEVADA,

Respondent

1. Name of appellant filing this case appeal statement:

TOMMY FROST

2. Identify the judge issuing the decision, judgment, or
order appealed from: The Honorable JOHN P. SCHLEGELMILCH.

3. Identify each Appellant and the name and address of
appellate counsel for Appellant:

Counsel for Appellant: Karla K. Butko, Esq., Court-Appointed
Counsel for purposes of the post-conviction and appeal from
denial of relief; Karla K. Butko, Esq., for Appellant TOMMY
FROST, P. O. Box 1249, Verdi, NV 89439, (775) 786-7118.

KARLA K. BUTKO, ESQ., is an employee of KARLA K. BUTKO, LTD.

1 KARLA K. BUTKO, LTD. is a Nevada professional corporation duly
2 licensed to conduct business in the State of Nevada and is owned
3 entirely by Karla K. Butko. At this point in time, there is no
4 reasonable belief that other counsel will appear on behalf of Mr.
5 Frost in this appellate litigation. Former counsel for Mr. Frost
6 at the trial stage were Matthew Merrill and Mario Walther.

7
8 **4. Identify each Respondent and the name and address of**
9 **appellate counsel for Respondent:**

10 Respondent: The State of Nevada

11 Counsel: Stephen B. Rye, District Attorney for Lyon County:

12 31 S. Main Street, Yerington, NV 89447

13 (775) 463-6511

14
15 Stephen B. Rye, Lyon County District Attorney represents the
16 State of Nevada on the appeal; Brian Haslem and Austin Lucia,
17 Deputy District Attorneys for Lyon County represented the State
18 at the trial stage of the case. There was no direct appeal from
19 the judgment of conviction.

20
21 **5. Identify all parties involved in this appeal (the use of**
22 **et al. to denote parties is prohibited):** Stephen Rye, Lyon
23 County District Attorney represnts the State of Nevada; and Karla
24 K. Butko, Esq., represents Appellant TOMMY FROST.

25 **6. Licensed to practice law:** All attorneys listed herein
26 are duly licensed to practice law in the State of Nevada.

27
28 **7. Indicate whether appellant was represented by appointed**

1 or retained counsel in the district court: Appellant was
2 represented by court appointed counsel in the District Court.

3 8. **Indicate whether appellant is represented by appointed or**
4 **retained counsel on appeal:** Appellant is represented by court
5 appointed counsel on appeal.
6

7 9. **Indicate whether appellant was granted leave to proceed**
8 **in forma pauperis, and the date of entry of the district court**
9 **order granting such leave:** Counsel was appointed as counsel by
10 the District Court. Appellant was granted in forma pauperis
11 status by the District Court after filing his Petition For Writ
12 of Habeas Corpus (postconviction).
13

14 10. **Indicate the date the proceedings commenced in the**
15 **district court (e.g., date complaint, indictment, information, or**
16 **petition was filed):**

17 The Petition for Writ of Habeas Corpus (Post-Conviction) was
18 filed June 16, 2020, the Amended Petition for Writ of Habeas
19 Corpus (postconviction) was filed July 30, 2020.
20

21 11. **Brief Description:**

22 This is an appeal from an Order denying postconviction
23 relief at the district court. This appeal arises from a first
24 and timely petition for writ of habeas corpus (postconviction) on
25 two felony convictions for Lewdness with a Minor under the Age of
26 14, a Category A felony violation of NRS 201.230. The case
27 involves two consecutive life prison sentences with parole
28

1 eligibility after service of 20 years in prison (aggregate).

2 Mr. Frost was convicted after entry of a guilty plea
3 pursuant to plea bargain negotiations with the State of Nevada.
4 There was an evidentiary hearing on the postconviction litigation
5 at District Court. Petitioner argued that counsel was
6 ineffective under the 6th & 14th Amendments, that his guilty plea
7 was coerced by counsel, that counsel failed to file pre plea
8 motions to dismiss the case for willful destruction of evidence
9 by the police and/or state and that he lost his direct appeal due
10 to counsel's ineffective advice not to file a direct appeal. The
11 District Court denied postconviction relief. This appeal follows
12 the denial of post-conviction relief.
13
14

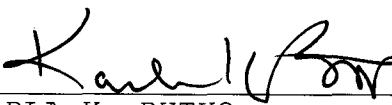
15 11. There was no direct appeal of the judgment of
16 conviction.

17 12. Counsel is not aware of other cases pending on appeal
18 that would be affected by this appellate litigation.

19 13. The appeal does not involve child custody or
20 visitation.

21 14. N/A
22

23 DATED this 8th day of June, 2021.

24
25 
26 KARLA K. BUTKO
27 P. O. Box 1249
28 Verdi, NV 89439
(775) 786-7118
State Bar No. 3307

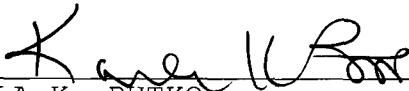
1
2 CERTIFICATE OF SERVICE

3 Pursuant to NRAP 25, I certify that I am an employee of
4 Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and
5 that on this date I caused the foregoing document to be delivered
6 to all parties to this action by

7 X placing a true copy thereof in a sealed, stamped
8 envelope with the United States Postal Service at
9 Reno, Nevada.

10 Stephen Rye
11 Lyon County D. A.'s Office
12 31 S. Main Street
13 Yerington, NV 89447

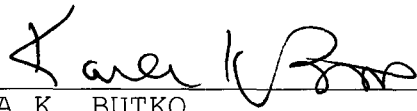
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16 KARLA K. BUTKO

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20 person.

21 DATED this 8th day of June, 2021.

22 
23 KARLA K. BUTKO

Case Summary

TOMMY FROST, THE STATE OF NEVADA ~ WRIT OF HABEAS CORPUS POST CONVICTION

Case Number: 20-CV-00635

Agency: Third Judicial District Court

Type: Writ of Habeas Corpus

Received Date: 6/16/2020

Status: Closed

Status Date: 5/19/2021

Involvements

Primary Involvements

FROST, TOMMY Petitioner

THE STATE OF NEVADA Respondent

Other Involvements

Butko, Karla K. Esq. Attorney - Appointed

Third Judicial District Court (20-CV-00635)

Schlegelmilch, John P. - JPS Dept I - TJDC

Lyon County District Attorney

Rye, Stephen B. D.A. - X004800 District Attorney

Writ of Habeas Corpus

[1. NRS 34.720 ~ WRIT OF HABEAS CORPUS POST CONVICTION](#)

Lead/Active: True

Case Status History

Documents

6/16/2020 Petition for Writ of Habeas Corpus (Post-Conviction).pdf - Filed

6/16/2020 Civil Cover Sheet.pdf - Filed

6/17/2020 Scheduling Order.pdf - Filed

7/30/2020 Amended Petition for Writ of Habeas Corpus Post Conv.pdf - Filed

9/3/2020 Motion to Dismiss Petition and Amended Petition for Writ of Habeas Corpus (Post Conviction).pdf - Filed

9/17/2020 Opposition to Motion to Dismiss.pdf - Filed

Notes: Petition and Amended Petition for Writ of Habeas Corpus (Post-Conviction)

11/2/2020 Setting Memo (2-26-21).pdf - Filed

11/13/2020 Ex Parte Application for Order to Produce Prisoner.pdf - Filed

11/16/2020 Order to Produce Prisoner.pdf - Filed

2/8/2021 Stipulation to Vacate & Continue Evidentiary Hearing.pdf - Filed

2/9/2021 Order to Continue Evidentiary Hearing.pdf - Filed

2/18/2021 Setting Memo (3-23-21).pdf - Filed

2/18/2021 Order to Produce Prisoner (3-23-21).pdf - Filed

3/23/2021 Exhibits - Hearing 3-23-21\Petitioners Exhibit List.pdf - For Court Use Only

3/23/2021 Exhibits - Hearing 3-23-21\Petitioner's Exhibit 1.pdf - Filed

3/23/2021 Exhibits - Hearing 3-23-21\Petitioner's Exhibit 2.pdf - Filed

3/23/2021 Exhibits - Hearing 3-23-21\Petitioner's Exhibit 3.pdf - Filed

3/23/2021 Exhibits - Hearing 3-23-21\Petitioner's Exhibit 4.pdf - Filed

3/23/2021 Exhibits - Hearing 3-23-21\Petitioners Exhibit 5.pdf - Filed

3/23/2021 Exhibits - Hearing 3-23-21\Petitioner's Exhibit 6.pdf - Filed

3/23/2021 Exhibits - Hearing 3-23-21\Witness List.pdf - For Court Use Only

3/30/2021 Transcript Writ of Habeas Corpus Post Conviction 3-23-21.pdf - Filed

5/17/2021 Motion for Payment of Court-Appointed or Attorney Fees and Costs (Thru 4-8-21).pdf - Sealed

SEALED

5/17/2021 Request for Submission (Motion for Fees filed 5-17-21).pdf - Sealed

SEALED

5/18/2021 Order For Payment of Court-Appointed Attorney Fees and Costs (Thru 4-8-21).pdf - Sealed

SEALED

Notes: Submitted to Deborah for payment 5/18/21. -aa

Case Summary

5/19/2021 Order Denying Petition for Writ of Habeas Corpus.pdf - Filed

6/3/2021 Notice of Entry of Order.pdf - Filed

6/10/2021 Notice of Appeal.pdf - Filed

6/10/2021 Case Appeal Statement.pdf - Filed

1 Case No. 20-CV-00635

2 Dept. No. I

3
4
5
6 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF LYON
8

9 TOMMY FROST,

10 Petitioner,

11 vs.

12 William "Bill" Gittere, Warden,
13 Ely State Prison &
THE STATE OF NEVADA,

14 Respondent.
15

**ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)**

16 This matter came before the Court and March 23, 2021, on Petitioner's Petition for Writ
17 of Habeas Corpus and the Amended Petition for Writ of Habeas Corpus (Post-Conviction). The
18 Petitioner appeared with his counsel, Karla Butko, Esq. Stephen B. Rye, Lyon County District
19 Attorney, appeared representing the interests of Respondents and the State of Nevada. The
20 Court has reviewed the pleadings on file, considered the evidence and arguments of the parties
21 presented at the trial and has considered and incorporates the entirety of the record in Case
22 18-CR-001197. The Court issued its findings and Order.

23 **I. LEGAL STANDARDS**

24 A district court reviews claims of ineffective assistance of trial counsel under *Strickland*
25 *v. Washington*, 466 U.S. 668, 686-87 (1984); *see also Kirksey v. State*, 112 Nev. 980, 987, 923
26 P.2d 1102, 1107 (1996). Under *Strickland*, to prevail on a claim of ineffective assistance of trial
27 counsel, a defendant must establish two elements: (1) counsel provided deficient performance,
28 and (2) "the deficient performance prejudiced the defense." *Kirksey*, 112 Nev. 987, 923 P.2d at

1 107. To prove deficient performance, a defendant must show counsel's performance fell below
2 an objective standard of reasonableness. *Id.* To prove prejudice, a defendant must
3 demonstrate "a reasonable probability that, but for counsel's errors, the result of the trial
4 would have been different." *Id.* at 988, 923 P.2d at 1107. "A reasonable probability is a
5 probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.
6 Counsel's performance is measured by an objective standard of reasonableness which takes
7 into consideration prevailing professional norms and the totality of the circumstances.
8 *Strickland*, 466 U.S. at 688; accord, *Homick v. State*, 112 Nev. 304, 913 P.2d 1280 (1996). An
9 insufficient showing on either element of the Strickland standard requires denial of the claim.
10 *Kirksey*, 112 Nev. at 988, 923 P.2d at 1107.

11 The court's view of counsel's performance must be highly deferential, with every effort
12 being taken to eliminate the distorting effects of hindsight. *Strickland*, 466 U.S. at 689, 691.
13 In making a fair assessment of counsel's performance, the trial court must reconstruct the
14 circumstances of counsel's challenged conduct and evaluate that challenged act or omission
15 from counsel's perspective at the time, while remaining perfectly mindful that counsel is
16 "strongly presumed to have rendered adequate assistance and made all significant decisions in
17 the exercise of reasonable professional judgment." *Id.* at 689-90. Accordingly, trial counsel's
18 strategic or tactical decisions will be "virtually unchallengeable absent extraordinary
19 circumstances." *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (quoting
20 *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)). A petitioner must demonstrate
21 the facts underlying a claim of ineffective assistance of counsel by a preponderance of the
22 evidence, and a district court's factual findings regarding a claim of ineffective assistance of
23 counsel are entitled to deference on appeal. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25,
24 33 (2004); *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

25 A guilty plea is knowing and voluntary if the defendant has a full understanding of both
26 the nature of the charges and the direct consequences arising from a plea of guilty. To
27 determine the validity of the guilty plea, the Supreme Court requires the district court to look
28 beyond the plea canvass to the entire record and the totality of the circumstances. The district

1 court may grant a post-conviction motion to withdraw a guilty plea that was not entered
2 knowingly and voluntarily in order to correct a manifest injustice. A guilty plea entered on
3 advice of counsel may be rendered invalid by showing a manifest injustice through ineffective
4 assistance of counsel. U.S. Const. amend. 6. Manifest injustice warranting withdrawal of a
5 guilty plea may be demonstrated by a failure to adequately inform a defendant of the
6 consequences of entering the plea. *Barajas v. State*, 115 Nev. 440,442, 991 P.2d 474,475
7 (1999). *Little v. Warden*, 117 Nev. 4 845, 849, 34 P.3d 540, 543 (2001); *United States v.*
8 *Signori*, 844 F.2d 635, 638 (9th Cir. 1988); see generally *Barajas*, 115 Nev. at 442,991 P.2d at
9 476; *Paine v. State.*, 110 Nev. 609,619, 877 6 P.2d 1025, 1031 (1994), overruled on other
10 grounds by *Leslie v. Warden*, 118 Nev. 773,780-81, 7 59 P.3d 440, 445-46 (2002). See also
11 *Bryant v. State*, supra.

12 To meet the test for reversal because material evidence has been lost, the accused must
13 "show either (1) bad faith or connivance on the part of the government, or (2) prejudice from
14 its loss." *Crockett v. State*, 95 Nev. 859, 865,603 P.2d 1078, 1081 (1979). The Defendant must
15 also show the evidence was exculpatory. Evidence which only suggests an alternative theory
16 for the defense and is not directly exculpatory is insufficient. See *Wood v. State*, 97 Nev. 14
17 363,366-367,632 P.2d 339,341 (1981). The Defendant must show that it could be reasonably
18 anticipated that the evidence sought would be exculpatory and material to appellant's defense.
19 It is not sufficient that the showing disclose merely a hoped-for conclusion from examination
20 of the destroyed evidence, nor is it sufficient for the defendant to show only that examination
21 of the evidence would be helpful in preparing his defense. *Boggs v. State*, 95 Nev. 911,913,604
22 P.2d 107, 108 (1979) (citations omitted).

23 **FINDINGS OF FACT**

24 1. The Petitioner was convicted of two counts of Lewdness with a Child Under the
25 Age of Fourteen (14), and sentenced to life in prison with the possibility of parole after ten (10)
26 years, consecutive to one another, resulting in an aggregate sentence of parole after twenty
27 (20) years. Third Judicial District Court Case Number 18-CR-01197.

28 2. The Judgment of Conviction was filed on July 12, 2019.

1 3. The Petitioner filed a Petition for Writ of Habeas Corpus. The Court appointed
2 Karla Butko, Esq. at attorney to represent Petitioner and counsel filed an Amended Petition
3 for Writ of Habeas Corpus (Post-Conviction).

4 4. The State filed a Motion to Dismiss the Petition.

5 5. The Court held an evidentiary hearing Petition and Amended Petition on March
6 23, 2021.

7 6. Matthew Merrill, Esq. and Mario Walther, Esq. testified at the hearing as the
8 counsel for Mr. Frost during the justice court and district court proceedings in the criminal
9 matter.

10 7. Lyon County Deputy Sheriff Erik Pruitt, Stephen Manning and the Petitioner
11 each testified in the proceeding. Deputy Pruitt testified as to the examination of the cell phone
12 and the process used by the examiner. The Court finds that defense counsel and the Petitioner
13 were not notified about the process for examining the phone in advance, but the law does not
14 require any particular notice.

15 8. The Court also considered the exhibits offered during the course of the hearing,
16 including the Petitioner's Exhibits 1-6.

17 9. The Court considered the testimony at the evidentiary hearing and makes the
18 following findings:

19 a. Mr. Frost's testimony is not credible under the circumstances of this case.
20 The canvass by the district court at the plea hearing was clear. The testimony of counsel
21 was very straightforward in relation to proceeding with the case and the things they can
22 and can't do. Mr. Frost chose to go forward with the plea after consultation with his
23 attorneys.

24 b. Mr. Frost was provided with all of the discovery in this case. The
25 discovery could not be left with him at the jail given the pornographic nature of some of
26 the discovery.

1 c. The search warrant for search of the cell phone was reviewed by an
2 independent magistrate, Judge Lori Matheus. There was probable cause at the time the
3 search warrant was issued to believe that there may be evidence on the phone.

4 d. The uncontroverted evidence is that the phone was not "destroyed." It
5 was just not accessible anymore with the programs that they had at the time.

6 e. Mr. Merrill and Mr. Walther both testified that they were prepared to go
7 forward in the event that Mr. Frost had a change of heart, and the testimony and record
8 in the criminal case establish that Mr. Frost did not have a change of heart and he
9 wanted to go forward with the plea.

10 f. Mr. Frost penned two letters to the Court at the sentencing, one
11 submitted to the Court at the time of sentencing and one submitted to the Court with
12 the Presentence Investigation Report. In the letters Mr. Frost indicated guilt in this
13 case. The Court asked Mr. Frost if he desired to make a statement in mitigation or
14 allocution in relation to the case, and Mr. Frost declined to do so.

15 g. The Court reviewed the letters in relation to the post-conviction claims.

16 h. The cell phone was available to counsel throughout the pendency of the
17 criminal case until sentencing. At no point did counsel or Mr. Frost request additional
18 analysis because Mr. Frost always expressed a desire to plead guilty.

19 i. The Court does not find it credible that Mr. Frost requested anybody to
20 file an appeal on his behalf. There is no written or oral statements showing that he had
21 requested an appeal.

22 j. Mr. Frost's claim of factual innocence is unpersuasive as to his aiding and
23 abetting acts of lewdness. At the time of plea in the district court, the Court was very
24 specific with Mr. Frost as to whether or not he partook in getting these pictures taken of
25 the children and he admitted it, and said he did it. Not only did Mr. Frost admit to the
26 facts, but he verified to the Court that he pled guilty because he in fact did it and was
27 pleading guilty because he in fact did it.
28

k. At every course of the proceedings the defendant had every opportunity to make any objections and Mr. Frost did not make any. The record establishes that the Court allowed Mr. Frost additional time to review the case with his attorney. Mr. Merrill and Mr. Walther both testified that they had several meetings with Mr. Frost.

1. The Court fully canvassed Mr. Frost regarding his plea. He was provided with ample time to review the same with his attorneys, including reviewing the ramifications of his plea.

ORDER

The Court applies the legal principles to the facts in this case. The Court concludes that the Petitioner has failed to meet his burden on each of the grounds raised in the Petition and Amended Petition. First, the Court concludes that the plea in this case was voluntarily, knowingly and intelligently entered, and counsel for Petitioner provided reasonable representation during the plea process. Representation did not violate the standards outlined in *Strickland* and its progeny.

Petitioner did not establish that counsel was ineffective or fell below the *Strickland* standard for failing to preserve the cell phone for examination. As stated above, the Court concludes that the evidence was available and counsel made a reasonable determination based on the facts of this case that no further investigation or review of the cell phone was necessary.

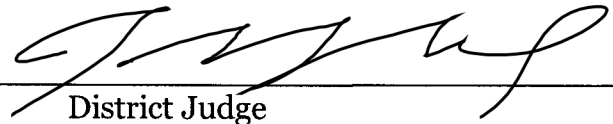
Third, Petitioner failed to establish that he requested an appeal or that counsel was ineffective for not filing an appeal in this case. Petitioner's testimony in this case was not credible and the record and testimony from counsel establish that Petitioner did not request a direct appeal in this matter.

Finally, Petitioner has not established factual innocence in this case. The Court has reviewed the entire record in the criminal case, this case and the Court has also considered the testimony and evidence presented at the evidentiary hearing. Based upon the documents, arguments and record, Petitioner has not established factual innocence, even if the Petitioner properly presents that matter to the Court.

1 In sum, Petitioner received effective assistance of counsel throughout these
2 proceedings. The Court concludes that Petitioner has not met his burden with respect to any
3 grounds in the Petition and Amended Petition.

4 Good cause appearing, and based on the foregoing, the Petition for Habeas Corpus,
5 Post-Conviction, is DENIED.

6 DATED this 19th day of May, 2021.

7
8 
District Judge

FILED

2021 JUN -3 PM 3:24

Case No. 20-CV-00635

Dept. No. 1

TANYA SCEIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Tanya Sceirine

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

TOMMY FROST,

Petitioner,

vs.

NOTICE OF ENTRY OF
ORDER

THE STATE OF NEVADA,

Respondent.

NOTICE OF ENTRY OF ORDER DENYING PETITION FOR WRIT OF HABEAS
CORPUS (POST-CONVICTION)

Please take notice that on the 19th day of May, 2021, the
Court entered its Order Denying Petition for Writ of Habeas
Corpus (Post-Conviction). A true and correct copy of the same is
attached hereto.

DATED this 3rd day of June, 2021.

TANYA SCEIRINE

CLERK OF COURT

BY:

/s/
Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of THIRD JUDICIAL DISTRICT COURT, and that on this date I deposited for mailing, the foregoing document, addressed to the following:

KARLA K. BUTKO
P. O. BOX 1249
Verdi, NV 89439

TOMMY F ROST
Inmate 1220520
NNCC
P. O. Box 7000
Carson City, NV 89702-7000

Stephen Rye
Lyon County District Attorney's Office
31 S. Main Street
Yerington, NV 89447

DATED this 4th day of June, 2021.


Clerk of Court

1 Case No. 20-CV-00635

2 Dept. No. I

3
4
5
6 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
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**ORDER DENYING PETITION
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(POST-CONVICTION)**

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20 Court has reviewed the pleadings on file, considered the evidence and arguments of the parties
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23 **I. LEGAL STANDARDS**

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3 demonstrate "a reasonable probability that, but for counsel's errors, the result of the trial
4 would have been different." *Id.* at 988, 923 P.2d at 1107. "A reasonable probability is a
5 probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.
6 Counsel's performance is measured by an objective standard of reasonableness which takes
7 into consideration prevailing professional norms and the totality of the circumstances.
8 *Strickland*, 466 U.S. at 688; accord, *Homick v. State*, 112 Nev. 304, 913 P.2d 1280 (1996). An
9 insufficient showing on either element of the *Strickland* standard requires denial of the claim.
10 *Kirksey*, 112 Nev. at 988, 923 P.2d at 1107.

11 The court's view of counsel's performance must be highly deferential, with every effort
12 being taken to eliminate the distorting effects of hindsight. *Strickland*, 466 U.S. at 689, 691.
13 In making a fair assessment of counsel's performance, the trial court must reconstruct the
14 circumstances of counsel's challenged conduct and evaluate that challenged act or omission
15 from counsel's perspective at the time, while remaining perfectly mindful that counsel is
16 "strongly presumed to have rendered adequate assistance and made all significant decisions in
17 the exercise of reasonable professional judgment." *Id.* at 689-90. Accordingly, trial counsel's
18 strategic or tactical decisions will be "virtually unchallengeable absent extraordinary
19 circumstances." *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (quoting
20 *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)). A petitioner must demonstrate
21 the facts underlying a claim of ineffective assistance of counsel by a preponderance of the
22 evidence, and a district court's factual findings regarding a claim of ineffective assistance of
23 counsel are entitled to deference on appeal. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25,
24 33 (2004); *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

25 A guilty plea is knowing and voluntary if the defendant has a full understanding of both
26 the nature of the charges and the direct consequences arising from a plea of guilty. To
27 determine the validity of the guilty plea, the Supreme Court requires the district court to look
28 beyond the plea canvass to the entire record and the totality of the circumstances. The district

1 court may grant a post-conviction motion to withdraw a guilty plea that was not entered
2 knowingly and voluntarily in order to correct a manifest injustice. A guilty plea entered on
3 advice of counsel may be rendered invalid by showing a manifest injustice through ineffective
4 assistance of counsel. U.S. Const. amend. 6. Manifest injustice warranting withdrawal of a
5 guilty plea may be demonstrated by a failure to adequately inform a defendant of the
6 consequences of entering the plea. *Barajas v. State*, 115 Nev. 440,442, 991 P.2d 474,475
7 (1999). *Little v. Warden*, 117 Nev. 4 845, 849, 34 P.3d 540, 543 (2001); *United States v.*
8 *Signori*, 844 F.2d 635, 638 (9th Cir. 1988); see generally *Barajas*, 115 Nev. at 442,991 P.2d at
9 476; *Paine v. State.*, 110 Nev. 609,619, 877 6 P.2d 1025, 1031 (1994), overruled on other
10 grounds by *Leslie v. Warden*, 118 Nev. 773,780-81, 7 59 P.3d 440, 445-46 (2002). See also
11 *Bryant v. State*, supra.

12 To meet the test for reversal because material evidence has been lost, the accused must
13 "show either (1) bad faith or connivance on the part of the government, or (2) prejudice from
14 its loss." *Crockett v. State*, 95 Nev. 859, 865,603 P.2d 1078, 1081 (1979). The Defendant must
15 also show the evidence was exculpatory. Evidence which only suggests an alternative theory
16 for the defense and is not directly exculpatory is insufficient. See *Wood v. State*, 97 Nev. 14
17 363,366-367,632 P.2d 339,341 (1981). The Defendant must show that it could be reasonably
18 anticipated that the evidence sought would be exculpatory and material to appellant's defense.
19 It is not sufficient that the showing disclose merely a hoped-for conclusion from examination
20 of the destroyed evidence, nor is it sufficient for the defendant to show only that examination
21 of the evidence would be helpful in preparing his defense. *Boggs v. State*, 95 Nev. 911,913,604
22 P.2d 107, 108 (1979) (citations omitted).

23 FINDINGS OF FACT

24 1. The Petitioner was convicted of two counts of Lewdness with a Child Under the
25 Age of Fourteen (14), and sentenced to life in prison with the possibility of parole after ten (10)
26 years, consecutive to one another, resulting in an aggregate sentence of parole after twenty
27 (20) years. Third Judicial District Court Case Number 18-CR-01197.

28 2. The Judgment of Conviction was filed on July 12, 2019.

1 3. The Petitioner filed a Petition for Writ of Habeas Corpus. The Court appointed
2 Karla Butko, Esq. at attorney to represent Petitioner and counsel filed an Amended Petition
3 for Writ of Habeas Corpus (Post-Conviction).

4 4. The State filed a Motion to Dismiss the Petition.

5 5. The Court held an evidentiary hearing Petition and Amended Petition on March
6 23, 2021.

7 6. Matthew Merrill, Esq. and Mario Walther, Esq. testified at the hearing as the
8 counsel for Mr. Frost during the justice court and district court proceedings in the criminal
9 matter.

10 7. Lyon County Deputy Sheriff Erik Pruitt, Stephen Manning and the Petitioner
11 each testified in the proceeding. Deputy Pruitt testified as to the examination of the cell phone
12 and the process used by the examiner. The Court finds that defense counsel and the Petitioner
13 were not notified about the process for examining the phone in advance, but the law does not
14 require any particular notice.

15 8. The Court also considered the exhibits offered during the course of the hearing,
16 including the Petitioner's Exhibits 1-6.

17 9. The Court considered the testimony at the evidentiary hearing and makes the
18 following findings:

19 a. Mr. Frost's testimony is not credible under the circumstances of this case.
20 The canvass by the district court at the plea hearing was clear. The testimony of counsel
21 was very straightforward in relation to proceeding with the case and the things they can
22 and can't do. Mr. Frost chose to go forward with the plea after consultation with his
23 attorneys.

24 b. Mr. Frost was provided with all of the discovery in this case. The
25 discovery could not be left with him at the jail given the pornographic nature of some of
26 the discovery.

1 c. The search warrant for search of the cell phone was reviewed by an
2 independent magistrate, Judge Lori Matheus. There was probable cause at the time the
3 search warrant was issued to believe that there may be evidence on the phone.

4 d. The uncontroverted evidence is that the phone was not "destroyed." It
5 was just not accessible anymore with the programs that they had at the time.

6 e. Mr. Merrill and Mr. Walther both testified that they were prepared to go
7 forward in the event that Mr. Frost had a change of heart, and the testimony and record
8 in the criminal case establish that Mr. Frost did not have a change of heart and he
9 wanted to go forward with the plea.

10 f. Mr. Frost penned two letters to the Court at the sentencing, one
11 submitted to the Court at the time of sentencing and one submitted to the Court with
12 the Presentence Investigation Report. In the letters Mr. Frost indicated guilt in this
13 case. The Court asked Mr. Frost if he desired to make a statement in mitigation or
14 allocution in relation to the case, and Mr. Frost declined to do so.

15 g. The Court reviewed the letters in relation to the post-conviction claims.

16 h. The cell phone was available to counsel throughout the pendency of the
17 criminal case until sentencing. At no point did counsel or Mr. Frost request additional
18 analysis because Mr. Frost always expressed a desire to plead guilty.

19 i. The Court does not find it credible that Mr. Frost requested anybody to
20 file an appeal on his behalf. There is no written or oral statements showing that he had
21 requested an appeal.

22 j. Mr. Frost's claim of factual innocence is unpersuasive as to his aiding and
23 abetting acts of lewdness. At the time of plea in the district court, the Court was very
24 specific with Mr. Frost as to whether or not he partook in getting these pictures taken of
25 the children and he admitted it, and said he did it. Not only did Mr. Frost admit to the
26 facts, but he verified to the Court that he pled guilty because he in fact did it and was
27 pleading guilty because he in fact did it.
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1 k. At every course of the proceedings the defendant had every opportunity to
2 make any objections and Mr. Frost did not make any. The record establishes that the
3 Court allowed Mr. Frost additional time to review the case with his attorney. Mr.
4 Merrill and Mr. Walther both testified that they had several meetings with Mr. Frost.

5 l. The Court fully canvassed Mr. Frost regarding his plea. He was provided
6 with ample time to review the same with his attorneys, including reviewing the
7 ramifications of his plea.

8 ORDER

9 The Court applies the legal principles to the facts in this case. The Court concludes that
10 the Petitioner has failed to meet his burden on each of the grounds raised in the Petition and
11 Amended Petition. First, the Court concludes that the plea in this case was voluntarily,
12 knowingly and intelligently entered, and counsel for Petitioner provided reasonable
13 representation during the plea process. Representation did not violate the standards outlined
14 in *Strickland* and its progeny.

15 Petitioner did not establish that counsel was ineffective or fell below the *Strickland*
16 standard for failing to preserve the cell phone for examination. As stated above, the Court
17 concludes that the evidence was available and counsel made a reasonable determination based
18 on the facts of this case that no further investigation or review of the cell phone was necessary.

19 Third, Petitioner failed to establish that he requested an appeal or that counsel was
20 ineffective for not filing an appeal in this case. Petitioner's testimony in this case was not
21 credible and the record and testimony from counsel establish that Petitioner did not request a
22 direct appeal in this matter.

23 Finally, Petitioner has not established factual innocence in this case. The Court has
24 reviewed the entire record in the criminal case, this case and the Court has also considered the
25 testimony and evidence presented at the evidentiary hearing. Based upon the documents,
26 arguments and record, Petitioner has not established factual innocence, even if the Petitioner
27 properly presents that matter to the Court.

1 In sum, Petitioner received effective assistance of counsel throughout these
2 proceedings. The Court concludes that Petitioner has not met his burden with respect to any
3 grounds in the Petition and Amended Petition.

4 Good cause appearing, and based on the foregoing, the Petition for Habeas Corpus,
5 Post-Conviction, is DENIED.

6 DATED this 19th day of May, 2021.

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District Judge
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Case Summary

TOMMY FROST, THE STATE OF NEVADA ~ WRIT OF HABEAS CORPUS POST CONVICTION

Case Number: 20-CV-00635

Agency: Third Judicial District Court

Type: Writ of Habeas Corpus

Received Date: 6/16/2020

Status: Closed

Status Date: 5/19/2021

Involvements

Primary Involvements

FROST, TOMMY Petitioner

THE STATE OF NEVADA Respondent

Other Involvements

Butko, Karla K. Esq. Attorney - Appointed

Third Judicial District Court (20-CV-00635)

Schlegelmilch, John P. - JPS Dept I - TJDC

Lyon County District Attorney

Rye, Stephen B. D.A. - X004800 District Attorney

Writ of Habeas Corpus

[1. NRS 34.720 ~ WRIT OF HABEAS CORPUS POST CONVICTION](#)

Events

3/23/2021 9:30:00 AM | Habeas Corpus Hearing | DEPT I 20-CV-00635 | Court Room B

Sceirine, Tanya Clerk - TSCEIRINE

Terhune, Kathy

Staff - STAFF

Court Room B - CourtRmB

Geurts, Patrick Bailiff - X004896

Butko, Karla K. Esq. (Attorney - Appointed)

Rye, Stephen B. D.A. - X004800 (District Attorney)

Schlegelmilch, John P. - JPS (Dept I - TJDC)

FROST, TOMMY (Petitioner)

NSP Custody

Notes: Matter before the Court on a petition for post conviction writ of habeas corpus. Defendant appeared in custody of Nevada State prison with counsel. Ms. Butko advised the Court that defendant acknowledged that testimony from Mr. Merrill and Mr. Walther would involve attorney/client information. Ms. Butko requested that the Court take judicial notice of the criminal case in this matter 18-CR-01197 in its entirety. Court heard sworn testimony of Eric Pruitt, Matthew Merrill, Mario Walther, Steve Manning, Tommy Frost; Petitioners exhibits 1, 2, 3, 4 and 6 were admitted into evidence.

Closing argument Ms. Butko.

Closing argument Mr. Rye. Matter submitted.

Court followed the Strickland standard. Court found the petition and testimony of petitioner not credible in the circumstances of this case. Court found the canvas was clear and that the testimony of counsel was straightforward.

Petitioner was given the choice to pursue the plea agreement. Pornography was not a charge in this case.

Communication occurred in connection with the lewdness over Facebook and Messenger. There was no exchange through text messages. Defendant was given all discovery in the case. Search of the phone was granted by an independent magistrate and notice was not required prior to execution of the search warrant. Testimony indicated the phone was not destroyed but was not accessible with the programs available at the time of the search. Counsel at all times advised petitioner they were ready to go forward with the case and canvas of the petitioner was specific. Defendant was given opportunity to make a statement in mitigation during sentencing and instead provided the Court with a letter. Court found there was no ineffectiveness of counsel on either ground of Strickland. Court found petitioner not credible concerning request for appeal. There was no written or oral statement to request an appeal.

Court found claim of factual innocence not credible and that defendant was never charged or plead to child pornography. Court found defendant admitted to the charges and verified factual basis. Defendant had been granted a continuance to insure he was fully noticed of the implication of his plea. Court denied the petition. Mr. Rye to prepare order within 30 days.

CASE NO: 20-CV-00635

3/23/21

Frost v. State

Petitioner
PLAINTIFF'S EXHIBITS

DESCRIPTION	MARKED	OFFERED	ADMITTED
1. <u>Dist Statement - PST</u>	X	X	X
2. <u>Letter to Court Re: Sentencing</u>	X	X	X
3. <u>Guilty Plea Agreement</u>	X	X	X
4. <u>Search Warrant Applic.</u>	X	X	X
5. <u>Search Warrant</u>	X	X	X
6. <u>Print's Report</u>	X	X	X
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DISTRICT COURT CIVIL COVER SHEET

Case No. 20-15-00635 County, Nevada
 (Assigned by Clerk's Office) Dept. I

FILED

2020 JUN 16 PM 1:31

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):

Tommy Frost

inmate 1220520

Ely State Prison P. O. Box 1989

Ely, NV 89301

Attorney (name/address/phone):

Karla K. Butko

P. O. Box 1249

Verdi, NV 89439

Defendant(s) (name/address/phone):

The State of Nevada

Attorney (name/address/phone):

Stephen Rye

Lyon County District Attorney's Office

31 S. Main Street

Yerington, NV 89447

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property	Negligence	Torts
Landlord/Tenant <input type="checkbox"/> Unlawful Detainer (UD) <input type="checkbox"/> Other Landlord/Tenant (LT) Title to Property <input type="checkbox"/> Judicial Foreclosure (FC) <input type="checkbox"/> Other Title to Property (OT) Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain (CD) <input type="checkbox"/> Other Real Property (RO)	<input type="checkbox"/> Auto (VP) <input type="checkbox"/> Premises Liability (SF) <input type="checkbox"/> Other Negligence (NO) Malpractice <input type="checkbox"/> Medical/Dental (MD) <input type="checkbox"/> Legal (LG) <input type="checkbox"/> Accounting (AG) <input type="checkbox"/> Other Malpractice (MG)	Other Torts <input type="checkbox"/> Product Liability (PL) <input type="checkbox"/> Intentional Misconduct (IM) <input type="checkbox"/> Employment Tort (WT) <input type="checkbox"/> Insurance Tort (IN) <input type="checkbox"/> Other Tort (TO)
Probate	Construction Defect & Contract	Judicial Review/Appeal
Probate (select case type and estate value) <input type="checkbox"/> Summary Administration (SU) <input type="checkbox"/> General Administration (FA) <input type="checkbox"/> Special Administration (SL) <input type="checkbox"/> Set Aside (SE) <input type="checkbox"/> Trust/Conservatorship (TN) <input type="checkbox"/> Other Probate (OP) Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect <input type="checkbox"/> Chapter 40 (CQ) <input type="checkbox"/> Other Construction Defect (CF) Contract Case <input type="checkbox"/> Uniform Commercial Code (UN) <input type="checkbox"/> Building and Construction (BC) <input type="checkbox"/> Insurance Carrier (BF) <input type="checkbox"/> Commercial Instrument (CI) <input type="checkbox"/> Collection of Accounts (CT) <input type="checkbox"/> Employment Contract (EC) <input type="checkbox"/> Other Contract (CO)	Judicial Review <input type="checkbox"/> Foreclosure Mediation Case (FO) <input type="checkbox"/> Petition to Seal Records (PS) <input type="checkbox"/> Mental Competency (MT) Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle (DM) <input type="checkbox"/> Worker's Compensation (SI) <input type="checkbox"/> Other Nevada State Agency (ON) Appeal Other <input type="checkbox"/> Appeal from Lower Court (CA) <input type="checkbox"/> Other Judicial Review/Appeal (AO)
Civil Writ	Other Civil Filing	
Civil Writ <u>Part. writ of Habeas Corpus (post conv.)</u> <input type="checkbox"/> Writ of Habeas Corpus (HB) <input type="checkbox"/> Writ of Mandamus (WM) <input type="checkbox"/> Writ of Quo Warrant (WQ)	<input type="checkbox"/> Writ of Prohibition (WP) <input type="checkbox"/> Other Civil Writ (WO) <input type="checkbox"/> Compromise of Minor's Claim (CM) <input type="checkbox"/> Foreign Judgment (FJ) <input type="checkbox"/> Other Civil Matters (GC)	

Business Court filings should be filed using the Business Court civil coversheet.

Date

Signature of initiating party or representative