

IN THE SUPREME COURT OF THE STATE OF NEVADA

LATISHA MARIE BABB,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42886

FILED

NOV 04 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. B. Babb*
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On May 7, 1999, the district court convicted appellant Latisha Babb, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon. The district court sentenced Babb to serve two consecutive prison terms of life without the possibility of parole for the murder and two consecutive prison terms of 72 to 180 months for the robbery. The sentence for robbery was imposed to run concurrently with the sentence for murder. This court affirmed Babb's conviction.¹ The remittitur issued on August 7, 2001.

On December 4, 2001, Babb filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Babb. Counsel filed a

¹Babb v. State, Docket No. 34195 (Order of Affirmance, July 10, 2001).

supplement to Babb's habeas petition, in which additional claims were presented. The State filed a motion for partial dismissal of both the habeas petition and the supplement. The district court granted the motion, dismissing all but one of Babb's claims. After conducting an evidentiary hearing on the remaining claim, the district court denied Babb's petition. This appeal follows.

Babb raises a claim of ineffective assistance of counsel. She contends that counsel were ineffective for failing to present available and compelling mitigating evidence to the jury during the sentencing phase of the trial. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate "(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense."² "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one."³ To demonstrate prejudice based on deficient performance at sentencing, an appellant must show that but for counsel's mistakes there is a reasonable probability that the

²Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

³Id. (citing Strickland, 466 U.S. at 697).

sentence imposed would have been different.⁴ "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."⁵

Babb specifically contends that her counsel were ineffective for failing to present mitigating evidence regarding her loving relationship with her infant daughter and her abusive relationship with co-defendant Shawn Harte. We note that Babb was facing a potential sentence of death and was sentenced instead to life without the possibility of parole while Harte received a death sentence. We conclude that Babb failed to demonstrate that trial counsel's performance was deficient or that she was prejudiced by trial counsel's performance.

First, Babb claims that trial counsel were ineffective for failing to call certain witnesses to testify at the sentencing hearing. During the evidentiary hearing the district court heard testimony that trial counsel employed an experienced private investigator to assist in finding and interviewing potential witnesses, including those identified by Babb and her mother. The private investigator was able to contact and interview three or four potential witnesses. He prepared investigative memoranda regarding some of these witnesses. Trial counsel reviewed the memoranda and then considered whether to present the witnesses at trial. Trial counsel testified that they wanted to present witnesses that would

⁴See Strickland, 466 U.S. at 694; Riley v. State, 110 Nev. 638, 650 n.7, 878 P.2d 272, 280 n.7 (1994).

⁵Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated in part on other grounds as recognized by Harte v. State, 116 Nev. 1054, 1072, n.6, 13 P.3d 420, 432 n.6 (2000).

portray Babb in a sympathetic manner without the risk of damage. Trial counsel noted that one potential witness felt that Babb "should take her lumps," and another stated that Harte would occasionally make her leave her children at home—a statement which might also have applied to Babb and her child. We conclude that the district court did not err in determining that trial counsel made reasonable tactical decisions and were not ineffective.


Next, Babb claims that trial counsel were ineffective for failing to present evidence that she was a good and loving mother. During the evidentiary hearing, trial counsel testified that they considered presenting evidence that Babb was a good mother, but they concluded that the risks exceeded the benefits as this evidence could be turned around to do more harm than good. Trial counsel believed that good-mother evidence would be undercut by evidence of Babb's relationship with Harte, the crimes that she committed, and questions of who was caring for the baby while she was out committing the crimes. For these reasons, trial counsel also felt that photographs of Babb and her daughter could do more damage than good. We conclude that the district did not err in denying this claim. Trial counsel made a reasonable tactical decision not to present this evidence. Moreover, Babb failed to show that had this evidence been presented a reasonable probability existed that her sentence would be different. Therefore, Babb was not prejudiced by counsel's actions.


Finally, Babb claims that trial counsel were ineffective for failing to present evidence of Babb's abusive relationship with Harte. Trial counsel testified that evidence that Harte was smart and controlling and could influence Babb into doing anything for him could be mitigating.

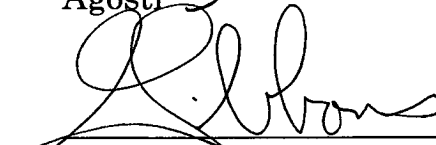
However, they also noted that this evidence could backfire because it was Babb's idea to commit the robbery in order to obtain money for her rent. Moreover, as the district court found, the evidence showed that at the time of the trial Babb still loved Harte and would not have supported presenting such mitigating evidence. We conclude that the district court did not err in determining that trial counsel were not deficient, and that Babb again failed to demonstrate a reasonable probability that her sentence would have been different had the evidence been presented.

For the reasons set forth above, we conclude that Babb failed to demonstrate that the district court erred in denying her petition for a writ of habeas corpus. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Nathalie Huynh
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk