IN THE SUPREME COURT OF THE STATE OF NEVADA

BRUCE MAYO ENNIS,
Appellant,
vs.
WARDEN, HIGH DESERT STATE PRISON, GEORGE GRIGAS,
Respondent.

No. 43017

FILED

NOV 03 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant Bruce Ennis' post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On January 30, 1996, the district court convicted Ennis, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. Additionally, Ennis entered a plea of guilty to possession of a firearm by an ex-felon. The district court sentenced Ennis to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole for first-degree murder with the use of a deadly weapon, and a concurrent term of six years for possession of a firearm by an ex-felon. This court dismissed Ennis' appeal from his judgment of conviction and sentence.[1] The remittitur issued on January 21, 1998.

On December 29, 1998, Ennis filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Ennis subsequently retained post-conviction

[1]Ennis v. State, Docket No. 28322 (Order Dismissing Appeal, December 30, 1997).

counsel, and counsel filed a supplemental petition on October 7, 2003. Pursuant to NRS 34.770, the district court declined to conduct an evidentiary hearing. On April 5, 2004, the district court denied Ennis' petition. This appeal followed.

In his petition, Ennis claimed that his trial counsel was ineffective. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.[2] A petitioner must further establish there is a reasonable probability that, in the absence of counsel's errors, the results of the proceedings would have been different.[3] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[4]

Ennis contended that his trial counsel was ineffective for failing to adequately investigate the victim's violent character. Ennis argued that he informed his trial counsel of two past occasions during which the victim used a switchblade as a weapon, but his counsel neglected to conduct an investigation. Ennis further argued that his counsel was deficient in failing to question Ennis about the victim's violent character when Ennis was testifying in his own defense. We conclude that Ennis failed to demonstrate that his trial counsel was ineffective with respect to this claim. A review of the record reveals that Ennis testified that the victim threatened him with a switchblade, and Ennis subsequently shot the victim in self-defense. Further, several witnesses

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[2]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[3]Id.

[4]Strickland, 466 U.S. at 697.

testified that the victim had a violent character, especially when under the influence of alcohol. We conclude that Ennis did not establish that the outcome of his trial would have been different if his trial counsel had not made these alleged errors, and the district court therefore did not err in denying him relief on this claim.

Ennis next argued that his appellate counsel was ineffective.[5] To establish ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.[6] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[7] Appellate counsel is not required to raise every non-frivolous issue on appeal.[8]

First, Ennis contended that his appellate counsel was ineffective for failing to challenge the reasonable doubt jury instruction. We conclude that this claim is without merit. The reasonable doubt jury instruction given at Ennis' trial correctly stated the law. NRS 175.211 provides a statutory definition of reasonable doubt, which the court is required to give juries in criminal cases. The language used at Ennis' trial

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[5]To the extent that Ennis raised any of the following issues independently from his ineffective assistance of counsel claims, we conclude that they are waived. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

[6]See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

[7]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[8]Jones v. Barnes, 463 U.S. 745, 751 (1983).

was identical to that found in the statute. Further, this court has held that the statutory definition of reasonable doubt does not "dilute the state's burden to establish guilt beyond a reasonable doubt and does not shift the burden of proof."[9] Therefore, Ennis failed to demonstrate that this issue had a reasonable likelihood of success on appeal, and we affirm the order of the district court.

Second, Ennis claimed that his appellate counsel was ineffective for failing to argue that the jury instruction concerning premeditation and deliberation impermissibly removed the distinction between first and second-degree murder.[10] In Kazalyn v. State,[11] this court approved a jury instruction regarding premeditation that is almost identical to the one given by the district court in the instant case. Subsequent to the resolution of Ennis' direct appeal, however, this court

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[9]Cutler v. State, 93 Nev. 329, 337, 566 P.2d 809, 813-14 (1977); see also Bollinger v. State, 111 Nev. 1110, 901 P.2d 671 (1995); Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991).

[10]The district court instructed the jury as follows:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

[11]108 Nev. 67, 75, 825 P.2d 578, 583 (1992) overruled in part by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

expressly disapproved of the Kazalyn instruction and set forth an alternative jury instruction for future use.[12] Nevertheless, a conviction in which the Kazalyn instruction was given is not automatically overturned.[13] This court reviews the case to determine if sufficient evidence was adduced at trial to establish premeditation and deliberation.[14] Here, multiple witnesses testified that Ennis borrowed David Nix's sawed-off shotgun and stated his intention to kill the victim. Therefore, sufficient evidence of premeditation and deliberation was presented at trial, such that an appeal of this issue did not have a reasonable likelihood of success.[15] Consequently, Ennis did not establish that his appellate counsel was ineffective in this regard, and the district court did not err in denying him relief on this claim.

Ennis lastly claimed that there was insufficient evidence introduced at trial to support his conviction for first-degree murder with the use of a deadly weapon. This court already considered and rejected this claim on direct appeal, however. The doctrine of the law of the case prevents further litigation of this issue and "cannot be avoided by a more detailed and precisely focused argument."[16] Thus, the district court did not err in denying this claim.

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[12]See Byford, 116 Nev. at 233-37, 994 P.2d at 712-15.

[13]Buchanan v. State, 119 Nev. 201, 221, 69 P.3d 694, 708 (2003).

[14]Id.

[15]We further note that because this court's decision in Byford occurred after the resolution of Ennis' direct appeal, he did not demonstrate that his appellate counsel acted unreasonably in failing to challenge the Kazalyn instruction.

[16]Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Ennis is not entitled to relief and that briefing and oral argument are unwarranted.[17] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Douglas

cc: Hon. Jackie Glass, District Judge
Bruce Mayo Ennis
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

[17]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).