

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN KYLE PICOTTE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43342

FILED

MAR 07 2005

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court denying appellant John Picotte's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On March 19, 1999, the district court convicted Picotte, pursuant to a jury verdict, of first-degree kidnapping with the use of a deadly weapon and battery with the use of a deadly weapon. The district court sentenced Picotte to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole for the kidnapping count, and a consecutive term of 48 to 120 months for the battery count. This court dismissed Picotte's appeal from his judgment of conviction and sentence.¹ The remittitur issued on October 4, 2000.

On June 8, 2001, Picotte filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750, the district court appointed counsel to represent Picotte, and counsel filed a supplement.

¹Picotte v. State, Docket No. 34088 (Order Dismissing Appeal, September 8, 2000).

The State filed an opposition. On April 9, 2004, the district court conducted an evidentiary hearing and subsequently denied Picotte's petition. This appeal followed.²

Picotte first argues that the district court erred in denying his ineffective assistance of counsel claim. 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.³ A petitioner must further establish a reasonable probability that, in the absence of counsel's errors, the results of the proceedings would have been different.⁴ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁵ The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁶

Picotte contends that his trial counsel was ineffective for failing to investigate his alibi defense. Picotte claims that he informed his attorney of potential alibi witnesses, but his trial counsel failed to interview these witnesses or present their testimony at trial.

We conclude that the district court did not err in denying this claim. Picotte's trial counsel, Robert Bell, testified at the evidentiary

²Picotte is represented by counsel in this appeal.

³See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴Id.

⁵Strickland, 466 U.S. at 697.

⁶Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

hearing that he did not recall discussing alibi witnesses with Picotte. Bell further testified that he would have explored an alibi defense if he had been aware of one. Although Picotte testified that he advised Bell of his alibi witnesses, the district court found Bell to be the more credible witness. The district court's determination was supported by substantial evidence and was not clearly wrong.⁷ Therefore, Picotte did not establish that his trial counsel acted unreasonably in failing to pursue an alibi defense.

Moreover, Picotte failed to demonstrate that the outcome of his trial would have been different if his counsel had presented an alibi defense. Potential alibi witnesses Shawnee George and Mitchell Pierce testified at the evidentiary hearing, and neither witness could account for Picotte's whereabouts on July 14, 1997—the day of the kidnapping. Although Allison McNery testified at Picotte's sentencing hearing that Picotte "was with [her] the whole time," Picotte did not provide specific information in the instant petition or at the evidentiary hearing concerning McNery as an alibi witness. Consequently, Picotte did not demonstrate that his trial counsel was ineffective for failing to investigate an alibi defense.⁸

Next, Picotte contends that his due process rights were violated because the district court improperly entered an order denying

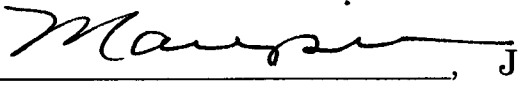
⁷See id.

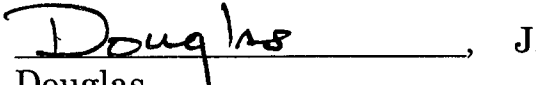
⁸To the extent that Picotte argues that he was prevented from adequately disclosing his alibi witnesses to his trial counsel due to a breakdown in their relationship, we conclude that Picotte failed to demonstrate that he was prejudiced by this alleged error.

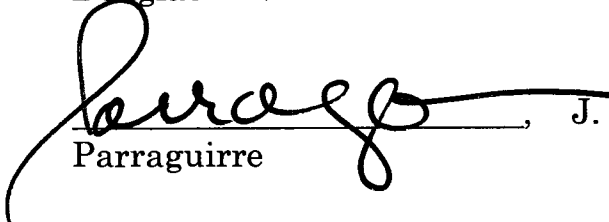
his petition that was prepared by the State.⁹ We conclude that the district court's findings and conclusions are sufficiently supported by the record before this court, and that appellant has failed to demonstrate any deprivation of due process.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Picotte is not entitled to relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Steven R. Kosach, District Judge
Roger R. Harada
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁹See DCR 21.