

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY LAMAR BAGLEY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43587

**FILED**

JAN 25 2005

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant Anthony Bagley's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On October 5, 1999, the district court convicted Bagley, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon. The district court sentenced Bagley to serve a term of life in the Nevada State Prison with the possibility of parole after 20 years, plus an equal and consecutive term for the deadly weapon enhancement. This court affirmed the judgment of conviction and sentence on appeal.<sup>1</sup> The remittitur issued on July 10, 2001.

On July 11, 2002, Bagley 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 and 34.770, the district court declined to appoint counsel to represent Bagley or to conduct an evidentiary hearing. On December 6, 2002, the district court denied

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<sup>1</sup>Bagley v. State, Docket No. 35100 (Order of Affirmance, June 12, 2001).

Bagley's petition. On appeal from that order, this court entered an order reversing and remanding to the district court for additional proceedings.<sup>2</sup> On June 29, 2004, the district court again denied Bagley's petition. This appeal followed.

Ineffective Assistance of Trial Counsel:

In his petition, Bagley raised several claims of ineffective assistance of trial counsel. 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.<sup>3</sup> 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.<sup>4</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>5</sup>

First, Bagley claimed that his trial counsel was ineffective for failing to have the victim's shirt examined for gunshot residue. Bagley also claimed that his trial counsel was ineffective for failing to obtain expert testimony regarding gunshot residue on the victim's shirt. Bagley asserted that such examination and testimony would have demonstrated that the victim was not shot from a distance, thereby supporting Bagley's defense that the shooting was unintentional. Although a forensic

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<sup>2</sup>Bagley v. State, Docket No. 40524 (Order of Reversal and Remand, November 5, 2003).

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

<sup>4</sup>Id.

<sup>5</sup>Strickland, 466 U.S. at 697.

pathologist testified that he believed that the gun was more than eighteen or twenty-four inches from the body when the victim was shot, other witness testimony indicated that the victim was approximately nine inches away from the gun when he was shot. Bagley has failed to demonstrate how additional testimony regarding the gunshot residue on the victim's shirt would have altered the outcome of his trial. Accordingly, we conclude that the district court did not err in denying these claims.

Second, Bagley claimed that his trial counsel was ineffective for failing to investigate and present evidence that the victim was the initial aggressor and had a propensity for violence. Bagley asserted that such evidence would have supported his claim of self-defense. However, Bagley's defense was that the shooting was unintentional. The presentation of testimony that the victim was the initial aggressor and that the victim had a propensity for violence would have been inconsistent with Bagley's claim that the shooting was unintentional. Bagley has failed to demonstrate that his trial counsel's conduct fell below an objective standard of reasonableness in this regard. Accordingly, we conclude the district court did not err in denying this claim.

Third, Bagley claimed that his trial counsel was ineffective for failing to file a motion in limine to exclude the testimony of Vernon Jackson regarding an unsubstantiated uncharged act. Bagley has failed to demonstrate how the filing of a motion in limine to exclude this testimony would have altered the outcome of his trial. Bagley's trial counsel objected more than once to the admission of Mr. Jackson's testimony during trial. His counsel's objections were overruled at trial. Further, on appeal this court concluded that the district court did not err in admitting Mr.

Jackson's testimony. Accordingly, we conclude that the district court did not err in denying this claim.

Fourth, Bagley claimed that his trial counsel was ineffective for failing to personally conduct pretrial interviews and investigation. Bagley asserted that this failure diminished his counsel's ability to effectively cross-examine the witnesses. Bagley has failed to demonstrate that pretrial interviews of the witnesses, conducted personally by his trial counsel, would have altered the outcome of his trial. Our review of the record on appeal reveals that Bagley's counsel thoroughly cross-examined the witnesses produced at trial and revealed inconsistencies in the witnesses' statements. Further, Bagley failed to identify what additional information would have been obtained if his counsel personally interviewed the witnesses before trial.<sup>6</sup> Accordingly, we conclude that the district court did not err in denying this claim.

Fifth, Bagley claimed that his trial counsel was ineffective for failing to remain an active advocate for him and failing to function as an adversary to the State. This claim is belied by the record.<sup>7</sup> Accordingly, we conclude that the district court did not err by denying this claim.

Ineffective Assistance of Appellate Counsel:

In his petition, Bagley also raised several claims of ineffective assistance of appellate counsel.<sup>8</sup> "A claim of ineffective assistance of

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<sup>6</sup>See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

<sup>7</sup>See id. at 503, 686 P.2d at 225.

<sup>8</sup>To the extent that Bagley raised any of these claims independently from his ineffective assistance of appellate counsel claims, we conclude that they are waived. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d

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appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in *Strickland v. Washington*.<sup>9</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>10</sup> "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."<sup>11</sup>

First, Bagley claimed that his appellate counsel was ineffective for failing to raise the claim that Alexia Conger's testimony regarding statements made by Jeffrey Hall constituted inadmissible hearsay. Bagley has failed to demonstrate that this claim had a reasonable probability of success on appeal. Hall testified at the trial that he was not present when the victim was killed, he had no recollection of the incident and he had no recollection of prior statements he had given regarding the incident. Hall acknowledged that he had a meeting with Conger and gave a statement at that time. Conger testified that she had previously taken a statement from Hall and testified as to the content of that statement. Conger's testimony regarding Hall's statement did not constitute inadmissible hearsay.<sup>12</sup> Accordingly, we conclude the district court did not err in denying this claim.

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*... continued*

1058, 1059 (1994) overruled on other grounds by *Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999).

<sup>9</sup>*Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

<sup>10</sup>*Jones v. Barnes*, 463 U.S. 745 (1983).

<sup>11</sup>*Kirksey*, 112 Nev. at 998, 923 P.2d at 1114.

<sup>12</sup>See NRS 51.035(2)(a).

Second, Bagley claimed that his appellate counsel was ineffective for failing to raise a claim that the State violated Brady v. Maryland.<sup>13</sup> Specifically, Bagley claimed that the State failed to provide him with a written diagram produced by Hall, Hall's statement to Conger, and Conger's notes from her interview with Hall.

Brady requires a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment.<sup>14</sup> "[T]here are three components to a Brady violation: the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material."<sup>15</sup> Due process requires more than the disclosure of simply "exculpatory" evidence.<sup>16</sup> The prosecution must also disclose evidence that provides grounds for the defense, among other things, to impeach the credibility of prosecution witnesses.<sup>17</sup>

Two standards exist to determine the materiality of the withheld evidence. If there was a general request for information, the standard to determine the materiality is that a reasonable probability existed that the result would have been different if the evidence had been disclosed.<sup>18</sup> If there was a specific request for information, the standard in

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<sup>13</sup>373 U.S. 83 (1963).

<sup>14</sup>Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

<sup>15</sup>See id. at 67, 993 P.2d at 37.

<sup>16</sup>See id.

<sup>17</sup>See id.

<sup>18</sup>See id. at 66, 993 P.2d at 36.

Nevada to determine materiality is whether there was a reasonable possibility that the result would have been different had the evidence been disclosed.<sup>19</sup> "In determining its materiality, the undisclosed evidence must be considered collectively, not item by item."<sup>20</sup>

The State failed to provide Bagley's counsel with a copy of the written diagram produced by Hall, Hall's statement to Conger, or copies of Conger's notes from her interview with Hall prior to trial. However, Bagley failed to demonstrate that the evidence was favorable to his defense or that the evidence was material. Because Bagley failed to demonstrate that this issue would have had a reasonable probability of success on appeal, the district court did not err in denying this claim.

Third, Bagley claimed that his appellate counsel was ineffective for failing to raise a claim that the State knowingly introduced perjured testimony through their investigator Conger. Appellant has failed to demonstrate that any of Conger's testimony was false. Bagley failed to demonstrate that this issue would have had a reasonable probability of success on appeal. Accordingly, we conclude that the district court did not err in denying this claim.

Fourth, Bagley claimed that his appellate counsel was ineffective for failing to raise a claim that the State "limited his right to present a complete defense by threatening to introduce alleged accusations of uncharged acts." After Bagley stated that he would be testifying on his own behalf, the State informed Bagley's counsel that if Bagley testified that he was carrying a gun on the night of the shooting because Bagley's

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<sup>19</sup>See id.

<sup>20</sup>Id.

son was killed in an unsolved shooting a few years prior, then the State was ready to provide witnesses stating that Bagley is a suspect for that shooting.

"[B]efore evidence of a prior bad act can be admitted, the state must show, by plain, clear and convincing evidence that the defendant committed the offense."<sup>21</sup> Such a showing must be made outside the presence of the jury.<sup>22</sup> It was within Bagley's power to require the State to offer sufficient proof of the uncharged act before evidence of the uncharged act was presented to the jury. Our review of the record indicates that, after consulting with his client, Bagley's trial counsel chose to limit defendant's testimony rather than "sit through another trial in which this misconduct is going to be brought in by five or so witnesses." Bagley has failed to demonstrate that this issue would have had a reasonable probability of success on appeal. Accordingly, we conclude that the district court did not err in denying this claim.

Fifth, Bagley claimed that his appellate counsel was ineffective for failing to raise the claims that were raised on direct appeal as United States Constitutional violations, thereby depriving him of his right to pursue federal relief. Bagley has failed to demonstrate that raising those claims as United States Constitutional violations would have had a reasonable probability of success on appeal. Accordingly, we conclude that the district court did not err in denying this claim.

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<sup>21</sup>Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).


<sup>22</sup>See id. at 51, 692 P.2d at 507.

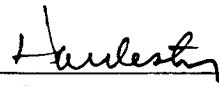


Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>23</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 \_\_\_\_\_, C.J.  
Becker

 \_\_\_\_\_, J.  
Rose

 \_\_\_\_\_, J.  
Hardesty

cc: Hon. Joseph T. Bonaventure, District Judge  
Anthony Lamar Bagley  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>23</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).