IN THE SUPREME COURT OF THE STATE OF NEVADA

KELLY EUGENE RHYNE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43761

FILED

JUL 26 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

Appellant Kelly Rhyne was convicted by the district court, pursuant to a jury verdict, of one count of first-degree murder and was sentenced to death on May 1, 2000. This court affirmed Rhyne's conviction and sentence on direct appeal.[1]

On November 13, 2002, Rhyne filed a post-conviction petition for a writ of habeas corpus in the district court. A two-day hearing was later held on the claims raised in the petition. The district court denied Rhyne relief, and this appeal followed.[2]

Rhyne raised several claims of ineffective assistance of counsel in the district court below and now contends on appeal that the district court improperly denied him relief.

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[1]Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002).

[2]The district court issued its original order denying Rhyne's petition on July 7, 2004. This order was amended on May 6, 2005.

A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review.[3] To establish that counsel's assistance was ineffective, a petitioner must satisfy a two-part test.[4] First, he must demonstrate that his trial or appellate counsel's performance was deficient, falling below an objective standard of reasonableness.[5] Second, he must show prejudice.[6] Where the claim involves trial counsel, prejudice is demonstrated by showing that, but for trial counsel's errors, there is a reasonable probability that the result of the proceedings would have been different.[7] Where the claim involves appellate counsel, prejudice is demonstrated by showing that an omitted issue had a reasonable probability of success on appeal.[8] Both parts of the test do not need to be considered if an insufficient showing is made on either one.[9] And a district court's findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and not clearly wrong.[10]

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[3]See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[4]See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

[5]See Strickland, 466 U.S. at 687.

[6]Id.

[7]Id. at 694.

[8]Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

[9]See Strickland, 466 U.S. at 697.

[10]See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Rhyne contends that the district court improperly denied his claim that his trial and appellate counsel were ineffective in handling issues related to his competence to stand trial. He maintains that additional competency hearings should have been held because serious doubts existed about his competency.

During the post-conviction hearing regarding this claim, Rhyne called his three former counsel as witnesses: Mary Lou Wilson, Matthew Stermitz, and Jeff Kump. All three indicated that Rhyne did not provide them with any meaningful assistance to aid in his defense, and Wilson and Kump had some recurring doubts about his competence. Rhyne also called a former doctor who had previously evaluated him and opined that serious doubts existed about Rhyne's competence. However, the district court concluded that the issue of Rhyne's competence had been thoroughly litigated and that "[n]othing had transpired to cause the [c]ourt to question the validity of its prior findings."

The record reveals that the issue of Rhyne's legal competence was repeatedly addressed both before and during the course of his trial, including evaluations that occurred between the guilt and penalty phases. A majority of the doctors who ultimately evaluated Rhyne concluded that he was able to aid and assist his counsel in his defense. The district court reached a similar conclusion through its observations of Rhyne's behavior during courtroom proceedings, and found that Rhyne's unwillingness to assist his counsel was the result of his own choice, rather than mental illness.

Our review of the record reveals that Rhyne did not present any new evidence during post-conviction proceedings on this matter, other

than his counsel's experiences and opinions, to invalidate the district court's original determination that he was legally competent.[11]

Absent any new evidence, Rhyne has failed to demonstrate that had his trial counsel requested additional competency hearings it would have altered the district court's original findings. Moreover, despite Rhyne's appellate counsel's apparent failure to raise the issue of Rhyne's competence on direct appeal, this court reviewed this issue[12] and concluded that "the record shows that Rhyne was competent at the time of the murder and during his trial."[13] Rhyne has failed to demonstrate that he was prejudiced by any deficiencies in either his trial or appellate counsel's performance on this matter. Thus, the district court did not err in rejecting this claim.

Rhyne next contends that the district court improperly denied his claim that his trial counsel, Matthew Stermitz, was ineffective for failing to investigate the possibility of changing his plea from "not guilty" to "not guilty by reason of insanity."[14]

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[11]See NRS 178.400; see also Dusky v. United States, 362 U.S. 402, 402 (1960).

[12]This court addressed the issue of Rhyne's competence pursuant to its mandatory appellate review of his death sentence under NRS 177.055(2).

[13]See Rhyne, 118 Nev. at 14, 38 P.3d at 171.

[14]See Finger v. State, 117 Nev. 548, 576, 27 P.3d 84-85 (2001) (to establish a valid insanity defense a defendant must show that he was "in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act"); NRS 174.035(4).

During post-conviction proceedings, Rhyne's trial counsel testified that he did not consider the possibility of a plea change. Thus, Rhyne's claim has some merit in this limited respect. However, merely because his trial counsel did not investigate the possibility of changing his plea to one of "not guilty by reason of insanity" does not mean that his trial counsel provided him with ineffective representation. Moreover, even if his trial counsel had investigated the possibility of such a plea, Rhyne does not assert that he would have entered it.

Further, to establish a meritorious claim, Rhyne must demonstrate a reasonable probability that a plea of "not guilty by reason of insanity" would have been successful. He has failed to do so.

As previously discussed, this court concluded on direct appeal that Rhyne was competent at the time he committed the murder. And substantial evidence supports this conclusion. For example, there was evidence that Rhyne told Mendenhall that he hated the victim, Donald Brown, on the night of Brown's murder; Rhyne waited until Brown left the bar to kill him; Rhyne killed Brown in an alley at night where there would be few witnesses; and Rhyne disposed of incriminating evidence—Brown's body, Rhyne's tennis shoes, and Mendenhall's bloody shirt. This evidence shows that Rhyne was clearly aware of the wrongfulness of his acts when killing Brown and belies any reasonable probability that a jury would find him "not guilty by reason of insanity." We conclude that the district court properly denied this claim.

Rhyne also contends that the district court improperly denied his claim that his trial counsel, Jeff Kump, was ineffective for failing to call a doctor who had previously treated Rhyne for mental illness to testify during his penalty hearing.

During the post-conviction hearing, Kump testified that he did not call the doctor to testify because Rhyne expressly objected to the idea. Given Rhyne's objection to calling the doctor as a witness, we conclude that he waived the potentially mitigating evidence that could have been presented by the doctor and is estopped from now complaining that Kump's failure to call the doctor constituted ineffective assistance.[15] Rather, and as the district court concluded, it was Rhyne's own behavior that created this issue. Rhyne acknowledges this point on appeal, but maintains that his behavior was a result of his incompetence.

However, as previously discussed, substantial evidence supports the district court's finding that Rhyne was legally competent to stand trial, and his argument is unpersuasive in this respect. Moreover, the jury found two mitigating circumstances based on Rhyne's history of mental illness. Rhyne has failed to demonstrate how he was prejudiced by the absence of this doctor's testimony from the penalty hearing. Again, the district court did not err in denying Rhyne relief on this claim.

Rhyne finally contends that his trial counsel were ineffective for failing to give a doctor who testified during his penalty hearing a report prepared by another doctor who testified during the guilt phase of his trial. As a result, Rhyne contends that this particular doctor's credibility was improperly impeached.

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[15]See Kirksey, 112 Nev. at 995-96, 923 P.2d at 1112-13 (providing that "a defendant may waive the right to present mitigating evidence and defense counsel's acquiescence to such a waiver does not [standing alone] constitute ineffective assistance of counsel"); see also Hollaway v. State, 116 Nev. 732, 741, 6 P.3d 987, 994 (2000).

Although the State addresses the claim's merits, Rhyne does not cite on appeal to anywhere during the post-conviction proceedings where this claim was ever raised below. The district court did not address this specific claim in its order denying Rhyne's habeas petition, and it appears to be improperly raised for the first time in the instant appeal. We deny Rhyne relief on this claim for this reason.[16] Even if this court were to reach its merits, however, a transcript of Rhyne's penalty hearing and the particular doctor's testimony belie his claim and show it to be without merit.

In addition to claims of ineffective assistance of counsel, Rhyne appeals from the district court's denial of claims that this court has previously decided on direct appeal.

Rhyne contends on appeal that the district court improperly denied the following claims: the torture or mutilation aggravator found by the jury pursuant to NRS 200.033(8) was invalid and unconstitutional; the two aggravators based on two prior convictions involving the use or threat of violence found by the jury pursuant to NRS 200.033(2) were invalid and unconstitutional; and the testimony of his co-defendant James Mendenhall was materially false.

These claims were specifically reviewed and decided by this court on direct appeal.[17] This court's prior determinations on these issues are therefore the law of the case and relitigation of them is precluded. Thus, the district court did not err in rejecting these claims.

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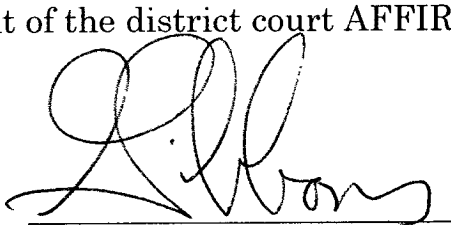
[16]See McNelton v. State, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

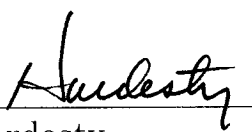
[17]See Rhyne, 118 Nev. at 11, 13-15, 38 P.3d at 169, 171-72.

Finally, Rhyne appeals from the district court's denial of his claim that this court's review of his death sentence on direct appeal was inadequate and arbitrary. However, this court conducted its review of Rhyne's death sentence on direct appeal pursuant to the mandates of NRS 177.055, and Rhyne has otherwise failed to demonstrate that this court's review fell below constitutional requirements. The district court properly denied Rhyne relief on this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons



_____, J.
Hardesty

ROSE, J., concurring:

I concur in the order of affirmance, but still maintain that the death penalty is excessive as stated in the dissent in Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002).

_____, J.
Rose

cc: Hon. J. Michael Memeo, District Judge
Lockie & Macfarlan, Ltd.
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk