

IN THE SUPREME COURT OF THE STATE OF NEVADA

TONY MARTIN SMITH,  
Appellant,  
vs.  
WARDEN, ELY STATE PRISON, E.K.  
MCDANIEL,  
Respondent.

No. 43827

**FILED**

**JAN 18 2006**

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

Appellant Tony Smith was convicted on July 9, 1999, by the district court, pursuant to a jury verdict, of first-degree murder, burglary, robbery, and conspiracy to commit robbery. Smith was adjudicated a habitual criminal and sentenced to two consecutive and two concurrent terms of life in prison without the possibility of parole. This court affirmed his conviction on direct appeal.<sup>1</sup>

Smith filed in the district court a timely post-conviction petition for a writ of habeas corpus in proper person. The district court later appointed counsel to represent Smith, and a supplemental petition was filed. An evidentiary hearing was held on October 21, 2003. The district court issued an order on August 6, 2004, denying Smith relief. Smith appeals, contending that the district court improperly denied several claims of ineffective assistance of counsel.

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<sup>1</sup>Smith v. State, Docket No. 34617 (Order of Affirmance, January 24, 2002).

A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review.<sup>2</sup> To establish that counsel's assistance was ineffective, a petitioner must satisfy a two-part test.<sup>3</sup> First, he must demonstrate that his trial or appellate counsel's performance was deficient, falling below an objective standard of reasonableness.<sup>4</sup> Second, he must show prejudice.<sup>5</sup> 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.<sup>6</sup> Where the claim involves appellate counsel, prejudice is demonstrated by showing that an omitted issue had a reasonable probability of success on appeal.<sup>7</sup> Both parts of the test do not need to be considered if an insufficient showing is made on either one.<sup>8</sup> 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.<sup>9</sup>

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<sup>2</sup>See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

<sup>3</sup>See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

<sup>4</sup>See Strickland, 466 U.S. at 687.

<sup>5</sup>Id.

<sup>6</sup>Id. at 694.

<sup>7</sup>Kirksey, 112 Nev. at 998, 923 P.2d 1113-14.

<sup>8</sup>See Strickland, 466 U.S. at 697.

<sup>9</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Failure of trial counsel to investigate alleged additional witnesses

Smith first contends that the district court improperly denied his claim that his trial counsel were ineffective for failing to conduct an adequate pretrial investigation. Specifically, Smith contends that his trial counsel were ineffective for failing to locate, interview, and call eight witnesses to testify who were included on a list of about ten witnesses that he had provided them. He maintains that these witnesses would have "bolstered" his alibi defense.

Smith has failed to provide the names of these additional witnesses, and neither of Smith's two trial counsel could specifically recall at the evidentiary hearing having ever received such a witness list from him. Smith has also failed to articulate with any factual specificity what the testimony of these additional witnesses would have been,<sup>10</sup> and to establish that he was prejudiced by their absence from his trial, *i.e.*, that there is a reasonable probability that their testimony would have led to a different result. It was his burden to do so.<sup>11</sup> Rather, Smith testified at trial about his alibi, and at least two witnesses corroborated his story.<sup>12</sup> The jury apparently did not believe him, and Smith has failed to show that any additional witnesses might have altered this outcome. We conclude that Smith has failed to show that his counsel were ineffective on this basis, and his claim was properly denied.

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<sup>10</sup>See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

<sup>11</sup>See Bejarano v. Warden, 112 Nev. 1466, 1471, 929 P.2d 922, 925 (1996) ("A petitioner for post-conviction relief has the burden of establishing the factual allegations supporting his petition.").

<sup>12</sup>See Rowland v. State, 118 Nev. 31, 37, 39 P.3d 114, 118 (2002).

### Failure of trial counsel to locate a portable fan

Smith next contends that the district court improperly denied his claim that his trial counsel were ineffective for failing to investigate a potential piece of evidence—a portable fan. The State argued during Smith's trial that the fan belonged to the victim, Steven Silva, but was found in Smith's prison cell after the murder. Prison officials, however, (unaware at the time of the fan's evidentiary value), gave it away, so that the actual fan was never located and admitted into evidence. The State nevertheless relied upon the finding of the fan to inculcate Smith. He asserts that the fan had exculpatory value and that his trial counsel should have made a more thorough attempt to locate it by examining prison records.

Smith has failed to establish that any records showing the whereabouts of the fan or its exculpatory value exist. Nor has he established that the fan would have been located by his trial counsel had they conducted a more thorough investigation. Rather, Smith's trial counsel testified during the evidentiary hearing that they attempted to locate the fan, but that they were told by prison officials that no records were kept regarding its whereabouts. Smith has failed to establish that it was unreasonable for his trial counsel to rely upon the representations of prison officials, cease the investigation, and focus their defense energies elsewhere.<sup>13</sup> This court concluded on direct appeal that Smith had failed to establish the exculpatory value of the fan or any bad faith by prison officials associated with its disappearance. We conclude that Smith has

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<sup>13</sup>See Strickland, 466 U.S. at 691.

failed to demonstrate that his trial counsel were ineffective on this basis. The district court properly rejected this claim.

Failure of trial counsel to obtain a copy of an affidavit

Smith also contends that the district court improperly denied his claim that his trial counsel were ineffective with respect to an affidavit given by the State to the district court during a pretrial hearing. That affidavit outlined acts of intimidation by prison gangs against witnesses concerning the prosecution of Robert Rowland, with whom Smith was jointly tried. The affidavit alleged that Rowland was obtaining information about witnesses from his defense counsel and using it to intimidate witnesses, including beating them and making death threats. Smith maintains that his trial counsel were ineffective for never obtaining an actual copy of that affidavit because the information it contained erroneously linked him to prison gangs and would have aided in his motion to sever his trial from that of his codefendant, Rowland.

Smith's trial counsel, Rogers and Joffe, testified during the evidentiary hearing that they could not recall ever obtaining an actual copy of that affidavit. But Joffe testified that she did see it; thus, it is presumed that she was aware of its contents. Moreover, the district court had reviewed the affidavit in a pretrial hearing and was also aware of its contents. Smith has failed to show that had his trial counsel obtained a copy of the affidavit that it might have altered the district court's decision regarding severance of his trial from Rowland's. And to the extent that Smith asserts that he was erroneously linked to prison gangs by information in the affidavit, this assertion is belied by the record,<sup>14</sup> as

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<sup>14</sup>See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

Smith's own statements in open court established such a link. We conclude that Smith has failed to demonstrate that he was entitled to relief on this matter.

Failure of trial counsel with respect to Smith's opening statement

Smith further contends that the district court improperly denied his claim that his trial counsel were ineffective for advising him to give his own opening statement. And he contends that his trial counsel should have made sure that he did not give the opening statement without first being canvassed by the district court about the dangers of self-representation pursuant to Faretta v. California.<sup>15</sup>

Smith's trial counsel, Joffe, testified during the evidentiary hearing that she advised Smith to make his own opening statement, but that she also cautioned him about the dangers of doing so. She also testified that she discussed with Smith the contents of his opening statement and provided him with a script of what to say. Smith's other trial counsel, Rogers, testified during the hearing that Smith wrote his own opening statement, but that he reviewed it. And Smith testified during the evidentiary hearing that Joffe provided him with a script of what to say and that he ultimately agreed to make his own opening statement.

At no time did Smith relinquish his right to counsel or go without the services of his appointed counsel. Rather, the content of his opening statement was both prepared and reviewed by his trial counsel

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<sup>15</sup>422 U.S. 806, 835 (1975); see, e.g., Hymon v. State, 121 Nev. \_\_\_, \_\_\_, 111 P.3d 1092, 1096 (2005); Anderson v. State, 98 Nev. 539, 540-41, 654 P.2d 1026, 1027-28 (1982) (discussing Faretta canvass); see also SCR 253.

and they were present during the opening statement and throughout his trial. Canvassing Smith pursuant to Faretta was therefore not mandated, and his trial counsel were not ineffective for failing to ensure that this was done.

Additionally, assuming that Smith has overcome the strong presumption that his trial counsel's advice on this matter fell within the range of reasonable trial strategy,<sup>16</sup> he has failed to specify what he said during his opening statement that his trial counsel would not have said if they had given it. We note particularly that Smith chose later in the trial to testify consistently with his opening statement, essentially negating any possible prejudice from his opening statement. We conclude that relief on this claim was properly denied by the district court.

Failure of trial counsel to move to sever the trial

Smith next contends that the district court improperly denied his claim that his trial counsel were ineffective for failing to demand that his trial be severed from that of his codefendant, Rowland. However, the record reveals that Smith's trial counsel filed a pretrial motion to sever his

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<sup>16</sup>See Strickland, 466 U.S. at 690-91; cf. Wheby v. Warden, 95 Nev. 567, 568-69, 598 P.2d 1152, 1153 (1979) ("We have previously determined that although a criminal defendant may have both a right of self-representation and a right to assistance of counsel, this does not mean that a defendant is 'entitled to have his case presented in court both by himself and by counsel.'") (quoting Miller v. State, 86 Nev. 503, 506, 471 P.2d 213, 215 (1970)), overruled on other grounds by Keys v. State, 104 Nev. 736, 766 P.2d 270 (1988).

Because neither party on appeal challenges the validity of the district court's interpretation of NRS 175.141 that a defendant who is represented by counsel may still give his own opening statement, we do not reach this issue.

trial from Rowland's, but that the motion was denied by the district court.<sup>17</sup> This court affirmed the district court's decision on direct appeal, and it is the law of the case.<sup>18</sup> Smith's allegation is therefore belied by the record and is without merit on this basis alone.<sup>19</sup>

Smith nevertheless relies upon the rule in Bruton v. United States<sup>20</sup> and contends that his trial counsel should have moved to sever the penalty phase of his trial from Rowland's when Rowland testified during that phase and made some statements implicating Smith in the murder. The United States Supreme Court held in Bruton that "in a joint trial, evidence of an incriminating statement by one defendant which expressly refers to the other defendant violates the Confrontation Clause of the Sixth Amendment."<sup>21</sup> And this court has extended Bruton to penalty hearings.<sup>22</sup> Yet it is undisputed that Smith's trial counsel had a full opportunity to cross-examine Rowland and chose not to do so. The constitutional concerns underpinning Bruton were therefore not implicated, and Smith has failed to demonstrate that had his trial counsel moved to sever his penalty hearing on this basis that it had any chance of success. The district court correctly rejected this claim.

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<sup>17</sup>See also Rowland, 118 Nev. at 43-44, 39 P.3d at 122.

<sup>18</sup>See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

<sup>19</sup>See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

<sup>20</sup>391 U.S. 123 (1968).

<sup>21</sup>Ducksworth v. State, 114 Nev. 951, 953, 966 P.2d 165, 166 (1998) (citing Bruton, 391 U.S. at 127-28).

<sup>22</sup>See Lord v. State, 107 Nev. 28, 43-45, 806 P.2d 548, 557-59 (1991).



Failure of trial counsel to prevent the introduction of gang affiliation evidence

Smith also contends that the district court improperly denied his claim that his trial counsel were ineffective for failing to prevent the introduction of any evidence by the State showing that he was affiliated with a prison gang. He contends that this failure was exacerbated by his admission to being a member of a prison gang during his opening statement and his later testimony as a witness in his own defense.

The record, however, reveals that Smith's trial counsel raised this issue during pretrial proceedings and anticipated that evidence of Smith's gang affiliation was going to be admitted at his trial. They therefore made a strategic decision to address it. We conclude that Smith has failed to demonstrate that his trial counsel's decision on this matter was unreasonable, especially considering that this court concluded on direct appeal that the district court did not abuse its discretion by admitting evidence of Smith's gang affiliation and other bad act evidence associated with his prison incarceration. The district court properly denied him relief on this claim.

Failure of trial counsel to canvass jury after the verdict

Smith additionally contends that the district court improperly denied his claim that his trial counsel were ineffective for failing to demand that individual jurors be canvassed by the district court to determine if their verdict was influenced by fear of Smith's gang affiliation or dislike of his trial counsel, Joffee. Even assuming such a canvass was permissible,<sup>23</sup> Smith's claim is based on speculation, and he has failed to

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<sup>23</sup>But see NRS 50.065(2)(a) ("A juror shall not testify concerning the effect of anything upon his or any other juror's mind or emotions as  
*continued on next page . . .*

demonstrate how he was prejudiced by any failure by his trial counsel on this matter. This court concluded on direct appeal that Smith received a fair trial and that the issue of his guilt or innocence did "not appear to be particularly close." That the State pursued a death sentence against him and the jury returned a lesser sentence lend credence to the conclusion that the jury was fair and did not make its findings based on fear of Smith or any dislike of his trial counsel. We conclude that Smith was not entitled to relief on this claim.

Failure of trial counsel to move for a mistrial

Smith also contends that the district court improperly denied his claim that his trial counsel were ineffective for failing to move for a mistrial. He maintains that a mistrial should have been requested by his trial counsel for two reasons.

"A defendant's request for a mistrial may be granted for any number of reasons where some prejudice occurs that prevents the defendant from receiving a fair trial."<sup>24</sup> And a district court's decision to grant or deny that request rests within its sound discretion and will not be reversed on appeal "absent a clear showing of abuse."<sup>25</sup>

First, Smith contends that his trial counsel should have moved for a mistrial because of the district court's interruption of Smith's trial counsel's closing argument. At the close of his trial, Smith's trial counsel,

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*... continued*

influencing him to assent or to dissent from the verdict or indictment or concerning his mental processes in connection therewith.").

<sup>24</sup>Rudin v. State, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004).

<sup>25</sup>See Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001).

Rogers, argued to the jury that it needed to listen during its deliberations to an entire audiotape recording made by prison officials of a conversation between an inmate and his wife where the murder could allegedly be heard in the background. Doing so, Rogers argued, would reveal that the audiotape had been altered by the State. The district court, however, interrupted Rogers's argument and instructed the jury that it could only listen to that portion of the audiotape that was played to the jury and admitted into evidence. Smith maintains that his trial counsel should have moved for a mistrial at this time.

Although the district court's instruction to the jury on this matter may have been erroneous,<sup>26</sup> Smith has failed to establish that the audiotape had actually been altered by the State. He has also failed to specify what, if anything, the allegedly altered portion of the audiotape would have contained that would have materially aided his defense. Thus, he has failed to demonstrate the prejudice necessary for an ineffective assistance of counsel claim.

Second, Smith generally contends that a mistrial motion or a motion for a new trial was warranted because of all the alleged errors underlying his ineffective assistance of trial counsel claims.<sup>27</sup> Because we

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<sup>26</sup>See NRS 47.120(1) ("When any part of a writing or recorded statement is introduced by a party, he may be required at that time to introduce any other part of it which is relevant to the part introduced, and any party may introduce any other relevant parts.").

<sup>27</sup>Smith also contends that his trial counsel were ineffective for failing to resist all efforts by the State to portray Smith as a violent criminal during trial. Such a general allegation without specific factual support was properly denied by the district court. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

conclude that Smith has failed to demonstrate that he was prejudiced in regard to his claims of ineffective assistance of counsel, he cannot show that a motion for a mistrial or a new trial for these reasons had any reasonable likelihood of success. We conclude that the district court properly denied Smith relief on this claim.

Claims of ineffective assistance of appellate counsel

Smith also contends that his appellate counsel were ineffective for failing to raise the following issues on direct appeal: the jury's fear of prison gangs and evidence of Smith's gang affiliation; Smith's opening statement; the district court's restriction of access to an affidavit; and the district court's interruption of trial counsel's closing argument and jury instruction with respect to the audiotape recording. The merit underlying these claims has already been discussed in the context of Smith's claims of ineffective assistance of trial counsel. For the same reasons, we conclude that any failure to raise these issues on appeal would not entitle him to relief. These claims provided no basis for relief.

Finally, he contends that his appellate counsel were ineffective for failing to raise the issue as to whether the district court improperly engaged in an ex parte meeting with the jury. Although there is some indication in the record that the district court had ex parte contact with the jury, such contact is not improper "when a 'judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication,' and the judge promptly notifies the 'parties of the substance of the ex parte communication and allows an opportunity to

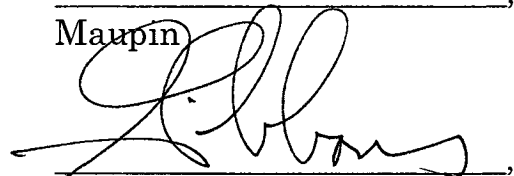
respond."<sup>28</sup> We conclude that Smith has failed to demonstrate that any ex parte contact by the district court with the jury was improper and that this issue on appeal had any likelihood of success.

Having considered all of Smith's claims and concluded that they lack merit, we


ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Hon. Michael R. Griffin, District Judge  
Crowell Susich Owen & Tackes  
Attorney General George Chanos/Carson City  
Carson City Clerk

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<sup>28</sup>Rudin, 120 Nev. at 141, 86 P.3d at 585 (quoting NCJC Cannon 3B(7)(a)(i) & (ii)).