IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON A. TAYLOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44062

FILED

OCT 21 2005

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On June 18, 2001, the district court convicted appellant, pursuant to a jury trial, of one count of second-degree kidnapping with the use of a deadly weapon (count I), two counts of burglary while in possession of a firearm (counts II and V), two counts of first-degree murder with the use of a deadly weapon (counts III and VI), and one count of conspiracy to commit murder (count IV). The district court sentenced Taylor to serve a term of 35 to 156 months in the Nevada State Prison for count I, plus an equal and consecutive term for the deadly weapon enhancement; two terms of 35 to 156 months for counts II and V; two terms of life with the possibility of parole after 20 years for counts III and VI, plus equal and consecutive terms for the deadly weapon enhancements; and 24 to 96 months for count IV. Counts I, II, IV, V and VI were imposed to run concurrently with each other and count III was imposed to run consecutive to counts I and II. This court affirmed the



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judgment of conviction and sentence on direct appeal.[1] The remittitur issued on May 6, 2003.

On October 24, 2003, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On April 21, 2004, appellant's counsel filed a supplemental petition. The State opposed the petition. On September 29, 2004, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

On appeal, appellant contends that the district court erred in denying his claims of ineffective assistance of trial and appellate counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.[2] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[3] "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington."[4] Appellate counsel is not

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[1]Taylor v. State, Docket No. 38179 (Order of Affirmance, April 8, 2003).

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

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

[4]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

required to raise every non-frivolous issue on appeal.[5] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[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] The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[8]

First, appellant contends that the district court erred in finding that his trial counsel was not ineffective for failing to advise him that his prior statements would only be admitted at trial if he testified. Appellant asserts that the district court erred in determining that appellant's trial counsel were more believable than appellant because appellant's trial counsel did not make a written record regarding their advisement to appellant.

Appellant has failed to demonstrate that the district court erred in denying this claim. The record reveals that at the evidentiary hearing appellant testified that his trial counsel never informed him that his prior statements would only be admitted at trial if he testified. Appellant further testified at the evidentiary hearing that had he been so

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

[6]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

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

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

informed, he would not have testified at trial. Appellant also testified that he testified on his own behalf at trial so he could tell the jury in his own words what had occurred.

At the evidentiary hearing, both of appellant's trial counsel testified that they had several discussions with appellant about his testifying and informed him on more than one occasion that if he testified his prior statements to the police would be admitted at trial. Trial counsel also testified that appellant wanted to testify on his own behalf in order to present his side of what occurred. Trial counsel further testified that because appellant's prior statements were incriminating, they would have preferred that appellant not testify at all, but it was appellant's choice and aside from informing appellant of the pros and cons of testifying, they did not try to keep appellant from testifying. Finally, trial counsel testified that because appellant chose to testify at trial, they raised appellant's prior statements in their direct examination of appellant in order to minimize, if possible, the affect of the statements.

The district court found appellant's trial counsel to be more believable than appellant and determined that his trial counsel were not ineffective in this regard. The district court's determination was supported by substantial evidence and was not clearly wrong.[9] Accordingly, we conclude that the district court did not err in denying this claim.

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[9]Id.

Second, appellant claims that the district court erred by denying his claims that his trial counsel were ineffective for failing to have a purportedly sleeping juror removed from the jury and his appellate counsel was ineffective for failing to challenge his conviction based on the presence of a sleeping juror. Appellant has failed to demonstrate that the district court erred in denying this claim.

Although the district court order denying appellant's petition did not specifically address this claim, the order denied appellant's petition in its entirety, and the district court concluded that the evidence against appellant was overwhelming and appellant was not prejudiced by his counsel's actions. Moreover, we conclude that this claim is belied by the record on appeal. The record reveals that at the trial, the prosecutor and an alternate juror expressed concern that another juror had been sleeping during the trial. The district judge held a short hearing regarding this issue during the trial. The district judge stated that he had been watching the juror at issue closely since the prosecutor had expressed concerns and had never noticed an incident where the juror appeared to be sleeping. The juror in question was brought before the judge and expressly denied having slept during the trial. The juror sitting next to the juror in question was also questioned, and she stated that she had never observed the juror in question sleeping or snoring during the trial. Finally, counsel for appellant's co-defendant stated that he had been watching the juror in question closely and had never observed that juror sleeping during trial. Based on this testimony, the district court

determined that there was insufficient information presented to remove the juror from the jury and allowed the trial to proceed.

The district court determined that appellant failed to demonstrate that his trial counsel were ineffective or that appellant was prejudiced by his counsel's conduct. Further, appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. The district court's determination was supported by substantial evidence and was not clearly wrong.[10] Accordingly, we conclude that the district court did not err in denying these claims.

Third, appellant claims that the district court erred by denying his claim that giving jury instructions 26 and 27, defining malice, were erroneous. Appellant has failed to demonstrate that the district court erred by denying this claim.

The record reveals that appellant waived this claim by failing to raise this issue on direct appeal and by failing to demonstrate good cause for his failure to do so.[11] Additionally, this claim was without merit. Jury instruction 26 defined malice aforethought, and jury instruction 27 accurately informed the jury of the distinction between express and implied malice.[12] This court has previously considered and rejected a

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[10]Id.

[11]See NRS 34.810(1)(b)(2), (2) and (3).

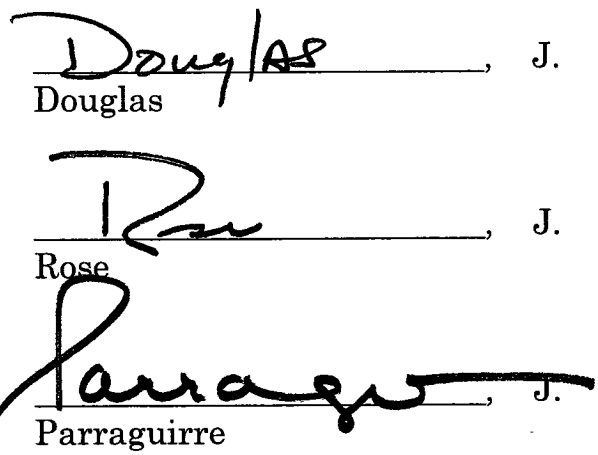
[12]See NRS 200.020.

similar claim that the definition of malice is unconstitutionally vague because it refers to an "abandoned and malignant heart."[13]

The district court's denial of this claim was supported by substantial evidence and was not clearly wrong.[14] Accordingly, we conclude that the district court did not err in denying this claim.

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

ORDER the judgment of the district court AFFIRMED.



Douglas, J.

Rose, J.

Parraguirre, J.

[13]See Leonard v. State, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001).

[14]Riley, 110 Nev. at 647, 878 P.2d at 278.

cc: Hon. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk