IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN MARSTON STINCHFIELD, JR.,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Respondent.

No. 44130

FILED

JAN 20 2005

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying in part and granting in part appellant John Stinchfield, Jr.'s post-conviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; Archie E. Blake, Judge.

On December 12, 2000, the district court convicted Stinchfield, pursuant to a jury verdict, of two counts of first-degree murder and one count of attempted murder. The district court sentenced Stinchfield to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole, and a consecutive term of 96 to 240 months. This court affirmed Stinchfield's judgment of conviction and sentence on direct appeal.[1] The remittitur issued on January 8, 2002.

On November 27, 2002, Stinchfield filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel to

[1]Stinchfield v. State, Docket No. 37227 (Order of Affirmance, December 12, 2001).

represent Stinchfield and counsel filed a supplement.[2] On August 25, 2004, the district court conducted an evidentiary hearing,[3] and subsequently denied in part and granted in part Stinchfield's petition.[4] Stinchfield appeals from the denial of his petition.

In his petition, Stinchfield raised several claims of ineffective assistance of trial counsel.[5] 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.[6] 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.[7] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[8]

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[2]See NRS 34.750.

[3]See NRS 34.770.

[4]The district court granted Stinchfield a penalty hearing before a jury, concluding that Stinchfield's trial counsel was ineffective for failing to object to the district court's dismissal of the jury after the guilt phase and subsequent failure to conduct a penalty hearing. See NRS 175.552.

[5]Stinchfield additionally argued that his appellate counsel was ineffective for failing to raise the following issues, independently from his ineffective assistance of trial counsel claims, as plain error. For the reasons discussed below, Stinchfield failed to demonstrate that his appellate counsel was ineffective. See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

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

[7]Id.

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

The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[9]

First, Stinchfield contended that his trial counsel was ineffective for not objecting to the State's failure to gather exculpatory evidence. Specifically, Stinchfield argued that the Lyon County Sheriff's Office erred in failing to ascertain his blood alcohol level at the time he was arrested and his trial counsel was deficient for not seeking sanctions against the State. We disagree.

This court has adopted a two-prong approach in ascertaining whether sanctions against the State are appropriate for failure to gather evidence.[10] First, the defense must demonstrate that if the evidence had been available, there is a reasonable probability that the results of the proceedings would have been different.[11] The defense must further establish that the State's failure to gather the evidence was due to mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case.[12] Dismissal of the charges may be warranted only in an instance of bad faith.[13]

Stinchfield did not establish that evidence of his blood alcohol level would have altered the outcome of his trial. To the extent that Stinchfield argued that evidence of his blood alcohol level would have

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

[10]See Daniels v. State, 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998).

[11]Id. at 267, 956 P.2d at 115.

[12]Id.

[13]Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001).

demonstrated that his statement to police was involuntary due to intoxication, we reject this contention. The detective who interviewed Stinchfield shortly after his arrest testified that he "was talking straight" and did not appear intoxicated. Likewise, we reject any allegation that evidence of Stinchfield's blood alcohol level would have altered the outcome of his trial by establishing that he was unable to form the requisite specific intent to commit first-degree murder and attempted murder,[14] as Stinchfield's theory of defense was that his father committed the murders. Further, Stinchfield did not establish that the State's failure to ascertain his blood alcohol level was anything more than mere negligence, at worst.[15] For these reasons, Stinchfield did not demonstrate that his trial counsel acted unreasonably in neglecting to seek sanctions against the State for failure to gather evidence, and the district court did not err in denying him relief on this claim.

Second, Stinchfield alleged that his trial counsel was ineffective for failing to request that the settling of the jury instructions be recorded so as to preserve the record for appeal. However, Stinchfield did not specify how he was prejudiced by his counsel's actions in this regard.[16] Consequently, we affirm the district court's denial of this claim.

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[14]See NRS 193.220.

[15]Cf. Randolph, 117 Nev. 970, 36 P.3d 424; Daniels, 114 Nev. 261, 956 P.2d 111. If the State's failure to gather evidence was the result of mere negligence, no sanctions are imposed but the defense can examine the prosecution's witnesses about the investigative deficiencies. Id. at 267, 956 P.2d at 115. We note that Stinchfield's trial counsel did question several of the State's witnesses about the failure to determine Stinchfield's blood alcohol level.

[16]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Third, Stinchfield claimed that his trial counsel was ineffective for failing to object to jury instruction three, which concerned reasonable doubt. Jury instruction three correctly stated the law, however. NRS 175.211 provides a statutory definition of reasonable doubt, which the court is required to give juries in criminal cases. The language used in jury instruction three was identical to that found in the statute. Further, this court has held that the statutory definition of reasonable doubt does not "dilute the state's burden to establish guilt beyond [a] reasonable doubt and does not shift the burden of proof."[17] Therefore, Stinchfield did not demonstrate that his trial counsel was ineffective for failing to object to jury instruction three.

Fourth, Stinchfield contended that jury instructions twenty-five, twenty-six, and twenty-nine, taken together, were misleading and his trial counsel's failure to object to these instructions rendered his assistance deficient.[18] Stinchfield specifically argued that jury instruction

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[17]Cutler v. State, 93 Nev. 329, 337, 566 P.2d 809, 813-14 (1977); see also Bollinger v. State, 111 Nev. 1110, 1114-15, 901 P.2d 671, 674 (1995); Lord v. State, 107 Nev. 28, 38-40, 806 P.2d 548, 554-56 (1991).

[18]Jury instruction twenty-five was as follows:

> Intoxication alone does not automatically make a confession inadmissible. A confession is inadmissible only if it is shown that the accused was intoxicated to such an extent that he was unable to understand the meaning of his comments.

Jury instruction twenty-six was, in relevant part, as follows:

> To be admissible a confession must be made freely and voluntarily, without compulsion or inducement. The voluntariness of the confession

continued on next page . . .

twenty-nine misinformed the jury that it was the role of the district court, rather than the jury, to make a factual determination concerning the voluntariness of Stinchfield's confession.

Stinchfield did not demonstrate that his trial counsel was ineffective with respect to these instructions. Jury instruction twenty-six specifically informed the jury that they were to determine whether Stinchfield's confession was voluntarily made. Further, during closing arguments, both the prosecution and defense stated that a confession must be voluntary to be admissible. Therefore, Stinchfield failed to demonstrate that the jury was not accurately informed by these instructions, such that his counsel acted unreasonably in failing to object to them. Therefore, the district court did not err in denying this claim.

Fifth, Stinchfield alleged that his trial counsel was ineffective for failing to request a directed verdict with respect to the attempted murder count. Although the district court may enter a judgment of acquittal,[19] there is no provision in Nevada law for the entry of a directed verdict in a criminal case. To the extent that Stinchfield is arguing that

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. . . *continued*

> must be determined from the effects of the totality of the circumstances.

Jury instruction twenty-nine was, in relevant part, as follows:

> At times through the trial, the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw inferences from them. Whether offered evidence is admissible is purely a question of law.

[19]See NRS 175.381(2).

his counsel should have requested a judgment of acquittal, a review of the record reveals sufficient evidence to sustain his conviction for attempted murder.[20] Therefore, Stinchfield failed to demonstrate that his counsel was ineffective in this regard.

Next, Stinchfield claimed that his appellate counsel was ineffective. To establish ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.[21] "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."[22] Appellate counsel is not required to raise every non-frivolous issue on appeal.[23]

First, Stinchfield argued that his appellate counsel was ineffective for neglecting to raise his direct appeal claims as violations of the federal constitution. Stinchfield claimed that this prejudiced his ability to raise these claims in federal court. However, Stinchfield did not demonstrate that the result of his direct appeal would have been different if his counsel had raised the issues as violations of the United States Constitution. Thus, he failed to establish that his appellate counsel was ineffective on this issue.

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[20]See id.

[21]See Strickland, 466 U.S. 668; Kirksey, 112 Nev. 980, 923 P.2d 1102.

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

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

Second, Stinchfield contended that his appellate counsel was ineffective for failing to raise the allegations of ineffective assistance of trial counsel that Stinchfield claimed in the instant petition. However, ineffective assistance of counsel claims are generally not appropriately raised on direct appeal.[24] Thus, Stinchfield did not establish that his appellate counsel was ineffective in this regard, and we affirm the order of the district court.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Stinchfield is not entitled to relief and that briefing and oral argument are unwarranted.[25] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Maupin

_____, J.
Douglas

_____, J.
Parraguirre

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[24]See Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

[25]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Archie E. Blake, District Judge
John Marston Stinchfield Jr.
Attorney General Brian Sandoval/Carson City
Lyon County District Attorney
Lyon County Clerk