

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYON LEON GARNETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44330

FILED

MAY 10 2006

ORDER OF AFFIRMANCE

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

This is an appeal from an order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge. The jury found Garnett guilty of one count of burglary while in possession of a deadly weapon, two counts of robbery with use of a deadly weapon. Garnett was also found guilty of being an ex-felon in possession of a firearm pursuant to a bench trial.

On direct appeal this court affirmed the judgment of conviction and the remittitur was issued on January 29, 2002.¹ Garnett filed a timely petition for writ of habeas corpus. An evidentiary hearing was held and the district court denied Garnett's writ and this appeal followed.

Garnett argues three issues on appeal. First, he contends this court should decline to give deference to the district court's order denying the petition because it was prepared by the State with minimal direction from the district court and was submitted to the district court ex parte.

¹Garnett v. State, Docket No. 38088 (Order of Affirmance, January 2, 2002).

"[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous."² Garnett has failed to make a showing that the findings were clearly erroneous or that the findings issued do not represent the district court's conclusions.³ Therefore, "[t]here is no reason to subject those findings to a more stringent appellate review than is called for by the applicable rules."⁴ Accordingly, the district court's factual findings are entitled to deference when reviewed on appeal.⁵

Second, Garnett contends he is actually innocent and his conviction should therefore be reversed.⁶ Specifically, Garnett contends that expert testimony, not disclosed at trial, but offered at the evidentiary hearing, indicates it is irrefutable that he is actually innocent of these crimes because of a height disparity. Garnett's expert testified the perpetrator in the video surveillance of the incident was about "5'8" give or take an inch." The expert testified his calculations in determining height were accurate within approximately one inch, but it was also shown that the expert's calculations of three of the police officers in the videotape

²Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 572 (1985).

³Id. at 573.

⁴Id.

⁵See Riley v. State, 110 Nev. 638, 878 P.2d 272, 278 (1994).

⁶While similar, Garnett's claim of actual innocence is different than the insufficiency of the evidence claim he presented on direct appeal. Therefore, the State's position that Garnett's claim should be barred according to the law of the case doctrine is without merit.

were incorrect by more than an inch on all three officers. Additionally, the expert incorrectly estimated all three officers were shorter than they were as measured in the courtroom. We conclude that the district court did not err in finding this claim to be without merit.

Third, Garnett contends his trial counsel was ineffective. He cites two specific instances where his counsel was allegedly so ineffective as to warrant his conviction being vacated. 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.⁷ This court begins with the presumption of effectiveness and then must determine whether or not appellant has demonstrated by strong and convincing evidence otherwise that counsel was ineffective.⁸

The first allegation is that counsel neglected to hire an expert to examine the store surveillance tape. We agree with the district court, that the expert's testimony is not "irrefutable objective proof," of Garnett's actual innocence, nor does it demonstrate by strong and convincing evidence counsel was ineffective. The expert could not at any time give anything more than an estimation of the perpetrator's height. As a result, Garnett has failed to show counsel was deficient for not using this expert

⁷See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁸Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996).

at trial or that the result at trial would have been different had the jury heard the expert's estimates.⁹

Next, Garnett contends counsel was ineffective for failing to present expert testimony regarding eyewitness identification. At the evidentiary hearing, counsel testified as to making a tactical decision to focus his defense on enhancing the video surveillance rather than attacking the eyewitness identification. Counsel's tactical decisions are "virtually unchallengeable absent extraordinary circumstances."¹⁰ Garnett has failed to demonstrate extraordinary circumstances or that counsel's performance was deficient in this regard. Accordingly, we conclude 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 Garnett is not entitled to relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

⁹Strickland, 466 U.S. at 668.

¹⁰Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

cc: Eighth Judicial District Court Dept. 16, District Judge
JoNell Thomas
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk