

IN THE SUPREME COURT OF THE STATE OF NEVADA

ATRIS LONDELL MOORE A/K/A
ARTIS MOORE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44514

FILED

DEC 01 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

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

Atris Moore was convicted, pursuant to a jury verdict, of one count of burglary while in possession of a firearm, one count of conspiracy to commit a robbery, two counts of robbery with the use of a deadly weapon, two counts of murder with the use of a deadly weapon, seven counts of second-degree kidnapping with the use of a deadly weapon, and one count of battery with the use of a deadly weapon. Moore's sentence included life without the possibility of parole, with a consecutive term for the use of a deadly weapon on one of the murder counts.

Moore's conviction arose from the robberies and murders at O'Aces Bar and Grill in Las Vegas. On May 18, 1998, Lashawn Levi, Kenshawn Maxey, and Moore drove to O'Aces. While Levi and Maxey entered O'Aces, Moore remained outside as a getaway driver and lookout. Once inside, Levi and Maxey robbed the O'Aces, and Levi and Sal Zendano, a bartender, were shot during a struggle. Zendano was killed immediately.

Maxey ran out, told Moore to bring the car around back, and ran back in to get Levi. Maxey was unable to carry Levi out of O'Aces and fled out the back door where he was apprehended by the Las Vegas Metropolitan Police (LVMP), who had arrived at O'Aces for breakfast. On seeing the officers arrive, Moore fled. Later, Moore, along with several acquaintances, went to the hospital where Levi, who later died, was being treated. The LVMP interviewed and then arrested Moore at the hospital.

After Moore was charged, the district court appointed Paul Wommer as trial counsel for Moore. During the trial, Moore contacted one of the jurors by phone. The district court dismissed the juror and continued the trial. The jury convicted Moore on all charges. On Moore's direct appeal, Wommer asked to withdraw, but this court directed that Wommer serve as Moore's appellate counsel. Moore's direct appeal concerned whether the district court abused its discretion when it denied Moore's motion for a mistrial after his jury tampering. This court affirmed the district court's judgment.

Moore filed a proper person petition for a writ of habeas corpus in January 2001. On appeal from the district court's denial of that petition, this court remanded the matter and directed the district court to reconsider whether counsel should be appointed for Moore.¹ After appointing counsel and conducting an evidentiary hearing, the district court denied the petition. Moore appealed.

¹Moore v. State, Docket No. 37941 (Order of Reversal and Remand, July 22, 2002).

Moore argues that Wommer provided ineffective assistance because he (1) failed to conduct an investigation into Moore's background and IQ, (2) failed to move to suppress Moore's statement to the police, (3) failed to object to improper comments by the State and its witnesses and to raise prosecutorial misconduct on appeal, and (4) had a conflict of interest and breached attorney-client privilege when he told the court what Moore told him regarding the jury tampering. Moore also argues that these events constitute cumulative error.²

We conclude that Wommer did not render ineffective assistance and that the claimed errors do not constitute cumulative error. Consequently, we affirm the district court's order. We address each of Moore's contentions in turn.

Ineffective assistance of counsel

Wommer's representation of Moore was ineffective if (1) Wommer's performance was so deficient that it was "outside the wide range of professionally competent assistance"³ and "below an objective

²Moore argues that Wommer was ineffective when he did not adequately voir dire the jurors and failed to appeal the district court's denial of Moore's Batson challenge. However, the record reveals that Wommer was active in voir dire, questioning jurors and exercising preemptory challenges and challenges for cause. The record also reveals non-discriminatory reasons for the State's preemptory challenge to one African-American juror. See Batson v. Kentucky, 476 U.S. 79 (1986); Williams v. State, 121 Nev. ___, ___, 125 P.3d 627, 634 (2005). Consequently, we conclude that these arguments are without merit.

³Strickland v. Washington, 466 U.S. 668, 690, 694 (1984).

standard of reasonableness,”⁴ and (2) there was a “reasonable probability that, but for [Wommer]’s unprofessional errors, the result of the proceeding would have been different.”⁵

Investigation into Moore’s background

First, Moore argues that Wommer failed to conduct an investigation into his IQ and upbringing, which may have negated the intent required for specific intent crimes or mitigated his sentence. While Wommer does have a duty to investigate, it is not limitless.⁶

In this case, Wommer stated that he never questioned Moore’s intellect because Moore was conversant with him, even discussing religious philosophy. To the extent that Moore argues that counsel should always look for IQ/special education issues, counsel is not required to go on fishing expeditions that the evidence does not support.⁷ To the extent that Moore argues that he was unaware that a robbery was occurring, the evidence shows otherwise.

Regarding investigation into mitigating witnesses, Wommer called Moore’s father and attempted to call his grandmother, who could not be found when her time to testify arrived. Wommer did not call Moore’s aunt because “her abrasiveness would have been picked up by the jury, and it would have inured badly to Mr. Moore.” Wommer did not call

⁴Id. at 688.

⁵Id. at 694.

⁶United States v. Tucker, 716 F.2d 576, 584 (9th Cir. 1983).

⁷Id.

the mother of Moore's child because Wommer felt that the fact that they were not married may have had a negative connotation with the jury.

Thus, Wommer's decisions regarding placement of Moore's family members on the stand in mitigation were tactical and do not give rise to a presumption of ineffectiveness simply because they did not succeed.⁸ We conclude that Wommer's investigation was not ineffective.

Moore's statement to the police

The police interviewed Moore at the hospital after the robbery and murders. Moore claims that his statements during his interview should have been suppressed because they were involuntary and he was not advised of his rights.⁹

Our review of the facts indicates no unlawful deception or coercion. Moore gave his consent to the LVMP to search his car.¹⁰ Detective Thowsen read Moore his Miranda rights from a card, which both the detective and Moore signed. Moore then voluntarily agreed to speak with the detective. While Moore never specifically refused to answer a question, at some point during the questioning he stated that "he was through talking with [Thowsen]." At the end of the questioning, Moore got up and "demanded to go to jail immediately." Only at that time, after the

⁸See Emerson v. Gramley, 91 F.3d 898, 906 (7th Cir. 1996). Moore's citation to Emerson in support of his argument is unpersuasive because counsel's failure to put on mitigating evidence in Emerson resulted from a failure to perform any investigation at all. Id.

⁹See Kaczmarek v. State, 120 Nev. 314, 329, 91 P.3d 16, 26 (2004).

¹⁰Moore briefly challenges the search of his vehicle, but Moore signed a consent form for the officers to search his vehicle.

detectives had finished questioning Moore, did Thowsen forcibly reseal him until he could be transported to jail.

It is true that Thowsen continued speaking to Moore after Moore stated that “he was through talking with [Thowsen],” and that Moore did not receive new Miranda warnings after Thowsen stepped out of the room for a few minutes. However, Moore never stopped answering questions and the detective’s absence from the room for a few minutes during questioning did not require new Miranda warnings.¹¹ Even if Thowsen’s continued questioning after Moore said that he was done speaking to detectives does constitute a violation of Moore’s Fifth Amendment rights, the State limited the information it introduced at trial to statements Moore made before that point. Moore suffered no prejudice. Therefore, we conclude that the district court did not err when it allowed the interview into evidence, and Wommer was not ineffective.

Failure to object to or appeal prosecutorial misconduct

Moore next argues that Wommer failed to object to the State’s derogatory comments about Moore and statements of victim impact during trial. He also argues that Wommer failed to raise these issues on appeal.

First, during opening statements, the State said “[h]orrible things came in three’s [sic] on the morning of May the 18th, 1998, and they came in the persons of this defendant, Artris or Atris Moore, Kenshawn Maxey, and Lashawn Levi.” While the State does have the

¹¹See Arterburn v. State, 111 Nev. 1121, 1126-27, 901 P.2d 668, 671 (1995).

duty to refrain from denigrating the defendant,¹² this metaphor does not rise to the level of an egregious personal attack meriting a new trial.

The second set of statements is the state's use of victim impact testimony during the guilt phase of Moore's trial. Christie Bloomquist testified that she had trouble working evenings. Cheryl Koehn testified that she had only been back to O'Aces three times, lived in fear, continued to wake up in the morning at exactly the time of the robbery, and that she had trouble going to work and coming home in the dark. The State also incorporated the victim impact testimony into its closing arguments.

Victim impact testimony is recognized as one of the most prejudicial forms of testimony.¹³ It is irrelevant to guilt and is usually excluded from a trial's guilt phase.¹⁴ Thus, Bloomquist's and Koehn's testimony in this regard was irrelevant to Moore's guilt and erroneously admitted. Wommer never made any objection to these arguments, thus not preserving the issue for appeal. And he did not appeal the victim impact statements for this court's plain error review. Therefore, we conclude that Wommer's performance in this regard fell below what was expected of trial and appellate counsel.¹⁵

¹²Darden v. Wainwright, 477 U.S. 168, 179-181 (1986).

¹³Bennett v. Com., 978 S.W.2d 322, 325-26 (Ky. 1998).

¹⁴Id.

¹⁵The State's argument on appeal that fear of jury animosity from continuous objection to these statements may override their prejudicial effect and form a valid trial strategy is without merit.

However, counsel's deficient performance must also prejudice the defendant.¹⁶ Our review of the evidence indicates that the State presented overwhelming evidence of Moore's guilt. Thus, the State's prosecutorial misconduct is harmless error. Therefore, we conclude that Wommer's performance did not constitute ineffective representation.¹⁷

The potential conflict of interest from jury tampering

Moore also argues that Wommer was ineffective because he had a conflict of interest with Moore stemming from Moore's jury contact that required new counsel be appointed for Moore. During trial, the lone African-American juror told the district court that her husband had been contacted by an anonymous male who said that she "was on the jury on his case." During the ensuing jury tampering investigation, Wommer spoke with Moore. After their conversation, Wommer expressed concern regarding possible ethical conflicts to the district court. The district court ordered Wommer to disclose any information regarding "any possible criminal activity." Wommer related that Moore initially said that he had contacted the dismissed juror and other jurors as well, but denied doing so when asked a second time.

The district court dismissed the juror and, outside Moore's presence, conducted voir dire. As a result, it was determined that no other jurors had been contacted. Moore rejoined the district court, at which time

¹⁶Strickland v. Washington, 466 U.S. 668, 694 (1984).

¹⁷Moore also argued that other statements constituted prosecutorial misconduct. We do not address them in detail here, but conclude that the State's other statements either do not constitute prosecutorial misconduct or are rendered harmless by the overwhelming evidence against Moore.

Wommer moved for a mistrial and to withdraw from the case. Wommer stated that Moore lacked any credibility with him. The district court denied both motions and continued the trial.

The exchange implicates (1) an attorney's duty of confidentiality and attorney/client privilege, (2) Wommer's ability to continue to represent Moore, (3) Wommer's conflict of interest with Moore, and (4) Moore's absence from the courtroom during voir dire.

First, Moore's jury tampering and statements to Wommer present a tension between an attorney's duty of confidentiality to his client and his duty of candor toward the court. In this instance, however, we conclude that Wommer, as an officer of the court, was bound to reveal the information to the district court so that it could take remedial action and declare a mistrial, if necessary. To conclude otherwise would endorse a defendant's criminal acts and a potential miscarriage of justice.

Second, Wommer's statement that Moore had no credibility with him does not indicate per se ineffective assistance of counsel. Wommer stated in the evidentiary hearing that he and Moore were able to amicably work together after the jury tampering.

Third, Wommer's duty, as an officer of the court, and the district court's order to reveal Moore's statements to the district court, present a conflict of interest between Moore's penal interest regarding the jury tampering and Wommer as a witness.¹⁸ The Sixth Amendment's

¹⁸See Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992) (holding a conflict of interest arose where a defendant sued his attorney); Mannon v. State, 98 Nev. 224, 645 P.2d 443 (1982) (holding a conflict arose where
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guarantee of effective assistance of counsel is violated when an attorney has a conflict with his client.¹⁹ But, “[a]ttorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense.”²⁰ While Wommer was a witness to Moore’s alleged jury tampering, Moore was not investigated or charged criminally for jury tampering and Wommer did not testify to the jury in this case. Thus, the potential conflict of interest did not prejudice Wommer’s representation of Moore. Accordingly, we conclude that the conflict of interest does not constitute ineffective assistance of counsel.

Fourth, Moore was absent from the courtroom while the district court investigated the jury tampering. While Moore has a right to be present and confront witnesses against him, the Constitution does not guarantee the defendant a right to be present where the defendant’s “presence would be useless.”²¹ An inquiry into Moore’s jury tampering and legal argument for a motion for mistrial do not involve witnesses testifying against Moore about the crimes for which he is being tried.

... continued

counsel was representing two people, one of them admitted to the crime, and counsel failed to present that admission in the trial of the other).

¹⁹Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993).

²⁰Gallego v. State, 117 Nev. 348, 363, 23 P.3d 227, 237 (2001) (quoting State v. Stenson, 940 P.2d 1239, 1272 (Wash. 1997)).

²¹Stein v. United States, 313 F.2d 518, 522 (9th Cir. 1962) (quoting Snyder v. Com. of Massachusetts, 291 U.S. 97, 106 (1934)).

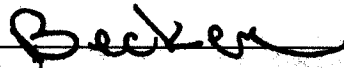
Therefore, we conclude that Moore was not denied his constitutional rights.

For the above reasons, we conclude that Wommer was not ineffective and that Moore was not prejudiced from the events surrounding his alleged jury tampering.

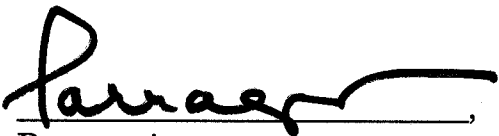
Cumulative Error

Finally, Moore argues that his conviction should be reversed because of cumulative error. "The considerations relevant to deciding whether error is harmless or prejudicial include whether the issue of innocence or guilt is close, the quantity and character of error, and the gravity of the crime charged."²² As we have stated, the State presented overwhelming evidence of Moore's guilt. Therefore, we conclude that the any errors do not amount to cumulative error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Becker

 J.
Hardesty

 J.
Parraguirre

²²Libby v. State, 109 Nev. 905, 918-19, 859 P.2d 1050, 1059 (1993).

cc: Hon. Michelle Leavitt, District Judge
Special Public Defender David M. Schieck
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk