IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN JOSEPH SEKA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44690

FILED

JUN 08 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant John Seka's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On May 9, 2001, the district court convicted Seka, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon, one count of second-degree murder with the use of a deadly weapon and two counts of robbery. The district court sentenced Seka to serve a term of life in the Nevada State Prison without the possibility of parole for the first-degree murder conviction, plus an equal and consecutive term for the deadly weapon enhancement; a term of life with the possibility of parole for the second-degree murder conviction, plus an equal and consecutive term for the deadly weapon enhancement; and two consecutive terms of 35 to 156 months for the robbery convictions. All sentences were imposed to run consecutively. This court affirmed the

05-11217

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

On February 13, 2004, Seka filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent Seka. The district court conducted an evidentiary hearing, and on January 31, 2005, the district court denied Seka's petition. This appeal followed.

In his petition, Seka raised several claims of ineffective assistance of trial counsel. 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.[2] A petitioner must further establish there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.[3] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[4] The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[5]

---

[1] Seka v. State, Docket No. 37907 (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] Id.

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

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

First Seka claimed that his trial counsel were ineffective for failing to investigate and document Thomas Cramer's psychological and drug history prior to trial. Seka asserts that as a result, his counsel did not conduct a proper cross-examination of Cramer. At the evidentiary hearing, Seka's former trial counsel testified that they repeatedly attempted to obtain Cramer's psychological records but were unable to do so. Further, the record on appeal reveals that Seka's trial counsel cross-examined Cramer regarding his psychological problems, his admittance into psychiatric and alcoholic treatment programs and the drugs Cramer was taking for his psychological problems. Seka failed to demonstrate that his trial counsel were ineffective in this regard. Accordingly, we conclude that the district court did not err in denying this claim.

Second, Seka claimed that his trial counsel were ineffective for failing to retain a psychologist to testify about Cramer's mental, emotional and substance abuse problems. The record reveals that Cramer admitted on the stand that he suffered from severe depression and alcoholism and that he had previously been in three treatment programs for those problems. He further admitted that he was taking several prescription drugs for his problems and testified regarding the effects of those drugs. Seka failed to demonstrate that retaining an independent psychologist to testify about Cramer's problems would have altered the outcome of his trial. Accordingly, we conclude that the district court did not err in denying this claim.

Third, Seka claimed that his trial counsel were ineffective for failing to adequately investigate, contact or personally interview former employees, friends and other business associates of Seka. Seka

specifically alleges that his trial counsel should have contacted Justin Nguyen, Marilyn Mignone, Amir Mohomid and Ken Bates. Seka asserted that all of these individuals would have testified as to the relationship between the victim Peter Limanni and Seka. At the evidentiary hearing, Seka's former trial counsel testified that they attempted to contact all of these individuals, however, they were unable to locate any of them, even with the use of an investigator. Further, Seka testified at the evidentiary hearing that he could not identify any specific testimony that Mignone would have given that could have helped his case. Seka failed to demonstrate that his trial counsel were ineffective in this regard. Accordingly, we conclude that the district court did not err in denying this claim.

Fourth, Seka claimed that his trial counsel were ineffective for failing to retain DNA experts and experts in forensic pathology to challenge the DNA evidence and to testify as to the time of death. At the evidentiary hearing, Seka's counsel testified that although they did not hire a DNA expert, they did consult a forensic pathologist with regard to the case. The record reveals that Seka's trial counsel cross-examined and challenged the State's DNA expert regarding his findings and cross-examined the coroners regarding the times of death. The record further reveals that several of the DNA samples were used in their entirety and therefore independent DNA testing of those samples would not have been possible. Seka failed to demonstrate that his trial counsel were ineffective in this regard. Accordingly, we conclude that the district court did not err in denying this claim.

Fifth, Seka claimed that his trial counsel were ineffective for failing to investigate, research and present at trial Cinergi's bank and phone records and Limanni's correct cell phone records. Seka alleged that these records could have contained exculpatory evidence. At the evidentiary hearing, Seka's former trial counsel testified that they obtained Cinergi's phone records and Limanni's cell phone records prior to trial. Seka's former trial counsel further testified that they made a strategic decision not to present the phone records to the jury. Seka's former trial counsel testified that their strategy was to impeach the State's witness by demonstrating during cross-examination that the detective subpoenaed the incorrect phone records for Limanni. "[T]his court will not second-guess an attorney's tactical decisions where they relate to trial strategy and are within the attorney's discretion."[6] Seka failed to demonstrate that his trial counsel were deficient in this regard. Accordingly, we conclude that the district court did not err in denying this claim.

Sixth, Seka claimed that his trial counsel were ineffective for failing to meaningfully challenge the State's case with expert testimony and adequate cross-examination and impeachment of prosecution witnesses. Seka failed to support this claim with sufficient factual allegations.[7] Further, the record on appeal reveals that Seka's trial counsel engaged in meaningful cross-examination of the prosecution's

---

[6]Davis v. State, 107 Nev. 600, 603, 817 P.2d 1169, 1171 (1991).

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

witnesses. Therefore, Seka's claim is also partially belied by the record.[8] Accordingly, we conclude that the district court did not err in denying this claim.

In his petition, Seka also raised several claims of ineffective assistance of appellate counsel.[9] 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.[10] "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 of appeal."[11] Appellate counsel is not required to raise every non-frivolous issue on appeal.[12]

First, Seka claimed that his appellate counsel was ineffective because his appellate counsel was also his trial counsel. Seka alleged that a conflict of interest arose because his appellate counsel would have had to raise claims against himself and therefore his appellate counsel failed to

---

[8]Id., at 503, 686 P.2d at 225.

[9]To the extent that Seka raised any of these claims outside of the context of his ineffective assistance of appellate counsel claims, we conclude that Seka failed to demonstrate good cause for his failure to raise these claims in his direct appeal and they are waived. See NRS 34.810(1)(b)(2).

[10]See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P. 2d 1102 (1996).

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

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

identify and raise meritorious claims on direct appeal. Ineffective assistance of counsel claims are generally not appropriately raised on direct appeal.[13] Thus, Seka did not establish that his appellate counsel was ineffective in this regard, and we affirm the order of the district court.

Second, Seka claimed that his appellate counsel was ineffective for failing to argue that the State failed to disclose Brady material[14] regarding Cramer, including exculpatory and impeachment evidence. At the evidentiary hearing, Seka's counsel testified that they received all documents that the State had pertaining to Cramer. Further, counsel for the State testified that they were unable to obtain any documents regarding Cramer's psychological history or treatment programs. We conclude that Seka did not establish that his appellate counsel was ineffective and the district court did not err in denying this claim.

Third, Seka claimed that his appellate counsel was ineffective for failing to argue that the district court gave erroneous instructions on the lesser included offenses. It appears that Seka was specifically concerned with the jury instructions regarding second-degree murder and the felony murder rule. Our review of the record on appeal reveals that these jury instructions provided a correct statement of the law.[15] Consequently, we conclude that Seka did not establish that his appellate

---

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

[14]See Brady v. Maryland, 373 U.S. 83 (1963).

[15]See NRS 200.030(1)(b), (2).

counsel was ineffective and the district court did not err in denying this claim.

Fourth, Seka claimed that his appellate counsel was ineffective for failing to argue that the district court's instructions regarding reasonable doubt, malice aforethought, express malice, deliberation and premeditation improperly lowered the State's burden. Our review of the record on appeal reveals that these jury instructions provided a correct statement of the law and did not lower the burden imposed on the State.[16] Consequently, we conclude that Seka did not establish that his appellate counsel was ineffective and the district court did not err in denying this claim.

Fifth, Seka claimed that his appellate counsel was ineffective for failing to argue that the district court erred in giving instruction number 14 regarding a unanimous verdict. Seka argued that the instruction as written reduced the burden on the State. Jury instruction 14 instructed the jury that although their verdict must be unanimous, the jury did not have to be unanimous regarding the theory of guilt as long as all of the jurors agreed that the evidence established that Seka was guilty

---

[16]See NRS 175.211(1) (defining reasonable doubt); NRS 200.020 (defining malice); Leonard v. State, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001) (concluding that the instructions for express malice and malice aforethought were sufficient); Leonard v. State, 114 Nev. 1196, 1208, 969 P.2d 288, 296 (1998) (approving use of archaic language in instruction for malice aforethought); Byford v. State, 116 Nev. 215, 236-37, 994 P.2d 700, 714-15 (2000) (identifying instructions to be used for premeditation and deliberation).

of first-degree murder. The district court properly gave this instruction.[17] Sufficient evidence was adduced at trial to support either premeditated or felony murder. Consequently, we conclude that Seka did not establish that his appellate counsel was ineffective and the district court did not err in denying this claim.

Sixth, Seka claimed that his appellate counsel was ineffective for failing to argue that the Las Vegas Metropolitan Police Department ("LVMPD") failed to adequately investigate the murders and robberies. Seka alleged that the LVMPD failed to: (1) compare latent prints found at the crime scenes with prints of other possible suspects; (2) discover that the victim Eric Hamilton had no money or wallet just days before his death; (3) follow up on witness statements; (4) timely file incident reports; (5) find out the exact time and place of Limanni's death; (6) adequately investigate two potential suspects; and (7) obtain correct cell phone records for Limanni. Seka also alleged that the LVMPD improperly told Limanni's sister to file a missing person report regarding Limanni. Seka failed to demonstrate that his counsel was deficient or that this claim would have had a reasonable probability of success on appeal. The record on appeal reveals that Seka's trial counsel raised all of these issues at trial and argued all of these purported errors to the jury. Despite being informed of the purported errors, the jury concluded beyond a reasonable doubt that Seka was guilty of the murders and robberies. Consequently, we conclude that Seka did not establish that his appellate counsel was ineffective and the district court did not err in denying this claim.

---

[17]Evans v. State, 113 Nev. 885, 944 P.2d 253 (1997).

Seventh, Seka claimed that his appellate counsel was ineffective for failing to argue that the prosecutor committed misconduct. Seka claimed that the prosecutor improperly failed to give notice that a DNA expert would be testifying at trial. The record reveals that although the prosecutor did not notify Seka that a DNA expert would be testifying at trial until the start of trial, the district court held a hearing regarding the late notification and ruled that the failure was inadvertent, not deliberate. Due to the late notice, however, the district court also ruled that the defense would be granted additional time to prepare, if necessary. We conclude that any potential harm caused by the late notification was mitigated by the district court's ruling. Consequently, Seka failed to establish that this issue would have had a reasonable probability of success on appeal, and failed to demonstrate that his counsel was ineffective with regard to this claim.

Seka also claimed that the prosecutor improperly failed to disclose Cramer's psychiatric, criminal and substance abuse history. As noted above, this claim is belied by the record.[18] At the evidentiary hearing, the State testified, and Seka's counsel confirmed, that the State made all documents pertaining to Cramer available to Seka's trial counsel and the State never obtained Cramer's treatment records. Consequently, we conclude that Seka did not establish that his appellate counsel was ineffective and the district court did not err in denying this claim.

Seka also claimed that the prosecutor improperly expressed his personal opinion by stating "I find that interesting" and improperly

---

[18]Hargrove, 100 Nev. at 503, 686 P.2d at 225.

shifted the burden to the defense by asking the DNA expert if the defense could have tested the remaining evidence. The record on appeal reveals that Seka's trial counsel objected to both of these statements during trial. These objections were sustained and the statements were never referred to later in argument to the jury. We conclude that Seka failed to establish that this issue would have had a reasonable probability of success on appeal, and failed to demonstrate that his counsel was ineffective with regard to this claim.

Seka also claimed that the prosecutor improperly told the jury that a witness was incorrect when testifying as to a specific date and informed the jury of what date the witness likely meant. The record on appeal reveals that the challenged statement was made by the prosecutor during closing arguments when the prosecutor was summarizing the testimony. The prosecutor argued that the witness might have been mistaken regarding the date he last saw Limanni and the date the police interviewed the witness because all other testimony presented at trial was contradictory. We conclude that trial counsel's argument was not improper. However, even if the prosecutor's comments amounted to misconduct, we conclude that in light of the considerable evidence introduced at trial against Seka, any error would have been harmless. Consequently, Seka failed to establish that this issue would have had a reasonable probability of success on appeal, and failed to demonstrate that his counsel was ineffective with regard to this claim.

Seka also claimed that the prosecutor improperly vouched for the truthfulness of one of the witnesses. The record on appeal reveals that in response to a defense statement in closing arguments that they were

not condemning one of the witnesses, the prosecutor argued that to believe the defense statement the jury would have to believe that the witness, a police officer, perjured himself and put his career on the line when testifying under oath with a man's life at stake. We conclude that the prosecutor's remarks did not rise to the level of improper argument that would justify overturning Seka's conviction.[19] Consequently, Seka failed to establish that this issue would have had a reasonable probability of success on appeal, and failed to demonstrate that his counsel was ineffective with regard to this claim.

Eighth, Seka claimed that his appellate counsel was ineffective for failing to "federalize" his direct appeal issues in order to preserve them for federal appellate review. Seka failed to demonstrate that the results of his direct appeal would have been different if counsel had "federalized" the issues. Accordingly, we conclude that he did not establish that appellate counsel was ineffective on this claim.

Finally, Seka also claimed that due to the cumulative effect of all the errors committed at his trial, his conviction was invalid. To the extent that Seka raised this claim independently of his ineffective assistance of counsel claim, he waived this claim.[20] We further conclude that because Seka's ineffective assistance of counsel claims are without

---

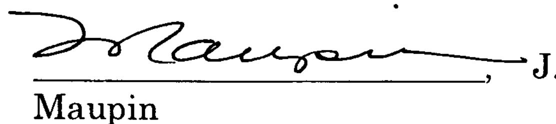
[19]See Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118-19 (2002); Greene v. State, 113 Nev. 157, 169-70, 931 P.2d 54, 62 (1997), modified prospectively on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

[20]See NRS 34.810(1)(b)(2).

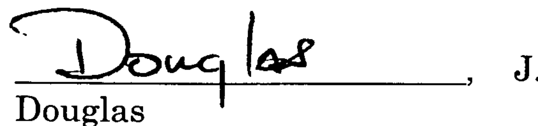
merit, he failed to demonstrate any cumulative error and is therefore not entitled to relief on this basis.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Seka is not entitled to relief and that briefing and oral argument are unwarranted.[21] Accordingly, we

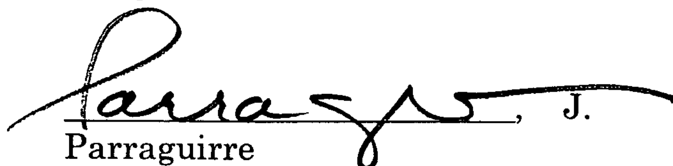
ORDER the judgment of the district court AFFIRMED.



_______________, J.
Maupin



_______________, J.
Douglas



_______________, J.
Parraguirre

cc: Hon. Donald M. Mosley, District Judge
John Joseph Seka
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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