

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD MILTON GILBERT, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44740

FILED

OCT 24 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

On May 11, 1999, appellant Edward Milton Gilbert, Jr., was convicted, pursuant to a jury verdict, of one count of sexual assault. The district court sentenced Gilbert to serve a prison term of 10 to 25 years. Gilbert filed a direct appeal, and this court affirmed the judgment of conviction.¹ The remittitur issued on March 6, 2001.

On November 1, 2001, Gilbert, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus and a supplement to the petition. The State filed an opposition to the petition and a motion for partial dismissal. Counsel for Gilbert filed a response to the State's opposition, and a supplemental opposition to the partial motion to dismiss. Additionally, counsel for Gilbert filed a supplemental motion for psychological evaluation of the victim. The State opposed the motion, and counsel for Gilbert filed a reply to the State's opposition.

¹Gilbert, Jr. v. State, Docket Nos. 34153 & 34242 (Order of Affirmance, February 6, 2001).

Subsequently, the district court denied the motion for a psychological evaluation of the victim and granted the State's partial motion for dismissal. After conducting an evidentiary hearing on Gilbert's remaining claims, the district court denied the petition. Gilbert filed this timely appeal.

Gilbert contends that the district court erred in denying his petition because his trial and appellate counsel were ineffective. 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 prejudiced the defense.² To establish prejudice based on the deficient assistance of trial counsel, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the outcome of the trial would have been different.³ To establish prejudice based on the deficient assistance of appellate counsel, a defendant must show that the omitted issue would have had a reasonable probability of success on appeal.⁴

Gilbert first contends that his trial counsel was ineffective for failing to effectively cross-examine the victim.⁵ In particular, Gilbert

²See Strickland v. Washington, 466 U.S. 668 (1984).

³Strickland, 466 U.S. at 694.

⁴Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

⁵Gilbert also contends that his trial counsel was ineffective for failing to effectively cross-examine the victim's mother about whether she was at home when the victim returned after being sexually assaulted. We conclude that the district court did not err in rejecting Gilbert's claim because trial counsel cross-examined the victim's mother on that issue.

contends that defense counsel failed to ask the victim how many times he had been interviewed by police officers and point out that the victim's account of events was inconsistent each time he was interviewed. Gilbert notes that the victim gave inconsistent statements and testimony about "whether he had been molested, what he was wearing, whether he was locked in [the apartment], whether he could leave, whether he painted [the apartment], whether he drank [alcohol], and whether his mother was home when he got home."

In this case, after conducting an evidentiary hearing, the district court found that defense counsel's cross-examination, both in subject matter and scope, was not deficient. Additionally, the district court found that Gilbert failed to identify any subject for cross-examination that was overlooked by defense counsel that would have changed the outcome of the proceeding. The district court's factual findings are entitled to deference when reviewed on appeal. Gilbert has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong.⁶ Moreover, Gilbert has not demonstrated that the district court erred as a matter of law.⁷

Second, Gilbert contends that his trial and appellate counsel was ineffective for failing to challenge Gilbert's conviction on the ground that it was based solely on the perjured testimony of the victim. Gilbert contends that the victim's testimony was the product of suggestive interviewing and "was fraught with inconsistencies which amounted to

⁶See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁷Id.

lies," and notes that the victim initially told Dr. Howle, the defense expert witness, that he had not been molested. We conclude that Gilbert's contention lacks merit.

In this case, the district court found that "there has been no evidence presented that satisfies the Court that there is any presentation of perjured evidence on the part of the district attorney's office." The district court's finding is supported by substantial evidence. Although the victim's testimony may have been inconsistent at times,⁸ there is no indication in the record on appeal that the victim committed perjury when he testified that Gilbert sexually assaulted him.⁹

Third, Gilbert contends that his trial counsel was ineffective for failing to renew the motion to gain access to the victim's juvenile record.¹⁰ In particular, Gilbert contends that the evidence of the prior juvenile sexual assault conviction was relevant to show that the victim

⁸See United States v. Sloan, 465 F.2d 406, 407 (9th Cir. 1972) (recognizing that the mere fact that a witness has made inconsistent statements does not prove that the witness committed perjury).

⁹Cf. Riley v. State, 93 Nev. 461, 462, 567 P.2d 475, 476 (1977) (conviction reversed where it was determined, after post-conviction hearing, that most of the witnesses lied on the stand, and some of the perjured testimony concerned the critical issue of the case).

¹⁰To the extent that Gilbert alleges that the State withheld evidence of the juvenile conviction in violation of Brady v. Maryland, 373 U.S. 83 (1963), we conclude that the district court did not err in rejecting that contention. The evidence of the juvenile adjudication was known to the defense and was litigated prior to trial. Moreover, because the juvenile adjudication was not admissible, Gilbert has failed to show that there is a reasonable possibility that any deficiency in the nature of the disclosure would have changed the outcome of the proceeding. See Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996).

was not naïve and had knowledge of sexual acts. We conclude that Gilbert's contention lacks merit.

After reviewing the records of the juvenile adjudication before trial, the district court concluded that the records were not admissible because: (1) they could not be used to impeach the victim under NRS 50.095(4); (2) a juvenile conviction was never entered because the victim successfully completed a diversion program; and (3) even assuming the records were admissible, the prejudicial nature of the prior bad act would outweigh the probative value. Although defense counsel did not renew the motion to admit the juvenile conviction, he did challenge the district court's order denying the motion on direct appeal. This court considered and rejected his claim, concluding that the district court did not abuse its discretion in excluding the evidence because it had minimal probative value. This court has already determined that the juvenile record was not admissible. Gilbert has failed to establish any new grounds or changed circumstance that would have rendered the juvenile adjudication admissible.¹¹ Accordingly, the district court did not err in rejecting Gilbert's claim that his trial counsel was ineffective by failing to renew the motion.

Fourth, Gilbert contends that the district court erred in dismissing his claims without conducting an evidentiary hearing. Specifically, Gilbert contends that "[t]he claims that were improperly dismissed by the District Court included the failure to adequately cross-examine key witnesses, the use of perjured testimony to sustain the

¹¹See 50.095(4) ("Evidence of juvenile adjudications is inadmissible" to attack the credibility of a witness).

conviction, [and] failure to appeal key issues to this Court." We conclude that Gilbert's contention lacks merit.

The record indicates that the district court granted Gilbert an evidentiary hearing on his claims of ineffective assistance of counsel. In particular, the district court order granting the State's motion to dismiss in part expressly ordered an evidentiary hearing on Gilbert's allegation that his trial and appellate counsel was ineffective for failing to adequately cross-examine the victim, the victim's mother, a co-worker of the victim, and a police detective. Likewise, the district court ordered an evidentiary hearing on Gilbert's claim that his trial and appellate counsel was ineffective for not raising ten specific issues, including whether Gilbert's constitutional rights were violated "in allowing the alleged victim to put perjured testimony into evidence." Accordingly, Gilbert's claim that he was improperly denied an evidentiary hearing on his claims of ineffective assistance of counsel is belied by the record.

To the extent that Gilbert alleges that the district court should have conducted an evidentiary hearing on his substantive claims involving the deprivation of constitutional rights, which were not specifically pleaded as claims of ineffective assistance of counsel, we disagree. This court has stated repeatedly that "claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings."¹² Moreover, a habeas petitioner must demonstrate good cause and prejudice for raising claims that could have

¹²See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); see also State v. Bennett, 119 Nev. 589, 606, 81 P.3d 1, 12 (2003).

been raised in earlier proceedings.¹³ Gilbert has failed to demonstrate good cause and prejudice and, therefore, has waived his right to raise those issues by failing to raise them on direct appeal.

Fifth, Gilbert contends that the district court erred in denying his motion for a psychological interview of the victim. At the hearing on his motion, Gilbert argued that he needed to retain a different expert witness to reinterview the victim in order to prove his claim that his trial counsel was deficient in retaining Dr. Jerry Howle, an ineffective expert witness. Gilbert also argues that the district court should have granted his motion because he had a right to interview the victim to investigate whether he would recant and to determine the victim's emotional and physical status. We conclude that Gilbert's contention lacks merit.

NRS 34.780(2) provides that discovery may be permitted in a post-conviction proceeding only for good cause and by leave of the court. A petitioner has shown "good cause" where he alleges specific allegations that give the court reason to believe that, "if the facts are fully developed," petitioner may be entitled to relief.¹⁴

In this case, we conclude that the district court did not abuse its discretion in finding that Gilbert failed to demonstrate good cause to have a different expert witness reinterview the victim. Gilbert failed to articulate how counsel was deficient in his selection of Dr. Howle as an expert witness. The record indicates that Dr. Howle was an experienced and qualified expert witness who had the opportunity to interview the

¹³See NRS 34.810(3).

¹⁴Bracy v. Gramley, 520 U.S. 899, 908-09 (1997) (quoting Harris v. Nelson, 394 U.S. 286, 300 (1969)).

victim prior to trial. At trial, Dr. Howle testified favorably for the defense, explaining that the victim was mildly mentally retarded and was susceptible to suggestibility by the interviewer. Dr. Howle also testified about inconsistencies in the victim's statements describing the sexual assault. Additionally, Gilbert had an opportunity to confront the victim and question his veracity at trial and, in fact, cross-examined the victim extensively about the inconsistent statements he made about the sexual assault. Accordingly, we conclude that the district court did not err in denying the motion to conduct a psychological evaluation of the victim because Gilbert failed to show good cause.

In a related argument, Gilbert contends that the district court erred in denying his motion to conduct a psychological evaluation of the victim because its ruling was based on retroactive application of this court's holding in State v. District Court (Romano).¹⁵ In Romano, this court held that a defendant is not entitled to an independent psychological evaluation of the victim in cases where the State does not intend to call an expert witness at trial.¹⁶ We conclude that the district court did not retroactively apply the holding in Romano to Gilbert's case. While the district court order denying the motion for psychological evaluation cites Romano, the district court did not deny the motion based solely on the fact that the State did not retain an expert witness at trial. To the contrary, the district court considered the factors discussed in Lickey v. State,¹⁷ and

¹⁵120 Nev. 613, 97 P.3d 594 (2004).

¹⁶Id. at 624, 97 P.3d at 601.

¹⁷108 Nev. 191, 827 P.2d 824 (1992).

properly exercised its discretion in determining whether a reinterview of the victim was warranted.

Having considered Gilbert's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Rose, J.
Rose

Parraguirre, J.
Parraguirre

cc: Second Judicial District Court Dept. 9, District Judge
Karla K. Butko
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk