

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY WAYNE PRATT,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44833

**FILED**

JUL 06 2005

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant Gary Pratt's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

On October 4, 2002, the district court convicted Pratt, pursuant to a jury verdict, of one count of first-degree murder. The district court sentenced Pratt to serve a term of life in the Nevada State Prison without the possibility of parole. This court affirmed the judgment of conviction and sentence on direct appeal.<sup>1</sup> The remittitur issued on March 16, 2004.

On June 7, 2004, Pratt 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 and 34.770, the district court declined to appoint counsel to represent Pratt or to conduct an evidentiary hearing. On February 2, 2005, the district court denied Pratt's petition. This appeal followed.

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<sup>1</sup>Pratt v. State, Docket No. 40361 (Order of Affirmance, February 18, 2004).

In his petition, Pratt 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.<sup>2</sup> 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.<sup>3</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>4</sup>

First, Pratt claimed that his trial counsel was ineffective for failing to procure an expert pathologist to testify at trial. Pratt specifically alleged that an expert pathologist would have been able to testify as to the following: (1) the manual strangulation markings on the victim's neck consisted of distinguishable shapes of the actual murderer's fingers and did not match Pratt; (2) the victim's death was similar to at least two other murders involving transients; (3) the extensive blunt force trauma on the victim's body, face and head was inconsistent with the minor injuries on Pratt's hand; (4) the absence of considerable amounts of Pratt's DNA underneath the victim's fingernails was inconsistent with the victim inflicting the long, deep scratches on Pratt's back; and (5) based on the extensive blunt force trauma to the victim, Pratt's clothing should have had blood-splatter stains, rather than transfer bloodstains on them. This claim lacks merit.

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

<sup>3</sup>Id.

<sup>4</sup>Strickland, 466 U.S. at 697.

Initially, Pratt failed to demonstrate that an expert pathologist would have been qualified to testify regarding: (1) other murders involving transients; (2) the relationship between the amount of DNA found under the victim's fingernails and the scratches on Pratt's back; and (3) the presence of blood transfer stains rather than blood-splatter stains on Pratt's clothing.<sup>5</sup> Additionally, the record on appeal reveals that pathologist Dr. Clark testified on behalf of the State. Dr. Clark testified that the manual strangulation markings were consistent with marks made by fingers or fingernails, but that the marks were not exquisitely patterned so that finger ridges were present. The record also reveals that the jury was provided with a statement from pathologist Dr. Olsen that she would have expected additional injuries or abrasions on Pratt's hands if they had been used to inflict all of the injuries to the victim's head. Further, Pratt's counsel intensively cross-examined the State's expert DNA witness and demonstrated for the jury that only a single sample of DNA from one fingernail on the victim's right hand was found to be consistent with Pratt's DNA. Pratt failed to demonstrate that his counsel was deficient in this regard. Accordingly, we conclude the district court did not err in denying this claim.

Second, Pratt claimed that his trial counsel was ineffective for stipulating to allow Dr. Clark to testify regarding the victim's autopsy because she did not personally conduct the autopsy. Pratt failed to demonstrate that his trial counsel was deficient in this regard. The record on appeal reveals that the pathologist who conducted the autopsy, Dr.

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<sup>5</sup>See NRS 50.275 (providing that "a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge").

Olsen, was unavailable and out of the state during Pratt's trial and Pratt's counsel stipulated to allow Dr. Clark to testify to everything that Dr. Olsen would have testified to. Dr. Clark testified that although she did not conduct the autopsy of the victim, she reviewed and signed off on Dr. Olsen's autopsy protocols as was normal practice. Dr. Clark further testified that she reviewed the autopsy protocols and autopsy photographs to prepare for her testimony. Accordingly, we conclude that the district court did not err in denying this claim.

Third, Pratt claimed that his trial counsel was ineffective for failing to consult with an expert regarding the autopsy results. Pratt alleged that without such an expert his counsel was unable to effectively cross-examine Dr. Clark because his counsel did not know what specific questions to pursue. Pratt failed to identify what additional questions his counsel should have asked that would have altered the outcome of his trial. Accordingly, Pratt failed to demonstrate that his counsel was deficient in this regard and the district court did not err in denying this claim.

Fourth, Pratt claimed that his trial counsel was ineffective for failing to hire an investigator to find a transient named "Steve" whom Pratt alleged killed the victim. Pratt's defense at trial was that, although Pratt hit the victim a few times, an individual named Steve actually killed the victim. Pratt was charged under alternate theories for the murder of the victim, one of which was aiding and abetting. Pratt failed to demonstrate that Steve would have provided testimony that would have altered the outcome of his trial. Even assuming Steve would have testified that he strangled the victim, sufficient evidence was adduced at trial to convict Pratt of aiding and abetting in the murder of the victim.

Accordingly, we conclude that the district court did not err in denying this claim.

Fifth, Pratt claimed that his trial counsel was ineffective for failing to obtain DNA samples from two transients named Steve who were questioned by the police. Pratt argued that an unidentified DNA profile found at the crime scene may have matched either of these men. Pratt failed to demonstrate that his counsel was deficient in this regard. The record on appeal reveals that the police investigated both of these men and neither matched Pratt's description of the Steve who allegedly killed the victim. The record further reveals that Pratt himself informed the police that one of the Steves interviewed by the police was not the Steve who killed the victim. Accordingly, we conclude the district court did not err in denying this claim.

Sixth, Pratt claimed that his trial counsel was ineffective for failing to have him testify on his own behalf and for failing to inform the district court that he wanted to testify. Pratt failed to demonstrate that his counsel was deficient in this regard. The record on appeal reveals that the district court informed Pratt of his right to testify and Pratt acknowledged that he understood the right. The record further reveals that Pratt did not inform the district court that he wished to testify on his own behalf. Accordingly, we conclude that the district court did not err in denying this claim.

Seventh, Pratt claimed that his trial counsel was ineffective for failing to object to the prosecution's leading of their witnesses Daley and Ipock. Pratt failed to demonstrate that his counsel was deficient in this regard. The record on appeal reveals that although the prosecution did ask some leading questions of both Daley and Ipock, the leading

questions were necessary in order to prevent the witnesses from speculating in their testimony and testifying as to events outside their direct scope of knowledge. Further, Pratt failed to demonstrate that objection to these questions would have altered the outcome of his trial. Accordingly, we conclude the district court did not err in denying this claim.

Eighth, Pratt claimed that his trial counsel was ineffective for failing to present character witnesses on his behalf at trial and at sentencing. Pratt specifically alleged that had Judy Braunel; Bonnie, Melvin and George Pratt; and Linda Luitze testified on his behalf they would have testified as to his good work skills, the absence of violence in his life and his close ties with friends and family. The evidence adduced against Pratt at trial was substantial and Pratt failed to demonstrate that such testimony would have altered the outcome of his trial. Accordingly, we conclude that the district court did not err in denying this claim.

Ninth, Pratt claimed that his trial counsel was ineffective for failing to have Freddy Poulick testify on his behalf. Pratt alleged that Freddy would have testified that he saw "Steve" in Reno the day before the murder. Pratt failed to demonstrate that Freddy's testimony would have altered the outcome of the trial. As previously noted, even assuming that Steve strangled the victim, enough evidence was adduced at trial to convict Pratt of first-degree murder under a theory of aiding and abetting. Accordingly, we conclude the district court did not err in denying this claim.

Tenth, Pratt claimed that the cumulative effect of his trial counsel's errors rendered his trial unfair. However, because appellant did

not demonstrate that his trial counsel erred, he necessarily failed to establish a claim of cumulative error.

Pratt also raised claims of ineffective assistance of appellate counsel. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonable effective assistance' test set forth in *Strickland v. Washington*."<sup>6</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>7</sup> "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."<sup>8</sup>

First, Pratt claimed that his appellate counsel was ineffective for failing to appeal the denial of a pretrial motion to suppress. Pratt alleged that his statements to the police were obtained in violation of his Miranda rights.<sup>9</sup> Pratt failed to demonstrate that his counsel was ineffective for failing to appeal this issue. The record on appeal reveals that the district court denied Pratt's pretrial suppression motion, finding that his first statement and a portion of his second statement to police were voluntarily made outside the scope of a custodial interrogation, and the remaining portion of his second statement and his third statement were voluntarily and knowingly given after Pratt was advised of his Miranda rights. After reviewing the record on appeal, we conclude that the district court's determination that Pratt's statements were freely and

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<sup>6</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

<sup>7</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>8</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>9</sup>Miranda v. Arizona, 384 U.S. 436 (1966).

voluntarily given is supported by substantial evidence and the district court did not err in denying the motion to suppress.<sup>10</sup> Pratt failed to demonstrate that this issue had a reasonable probability of success on appeal. Accordingly, we conclude the district court did not err in denying this claim.

Second, Pratt claimed that his appellate counsel was ineffective for failing to appeal the filing of the amended information. Pratt argued that the amendment of the information to include aiding and abetting as an alternate theory for first-degree murder violated his due process rights. Pratt failed to demonstrate that his substantial rights were prejudiced by the amendment alleging aiding and abetting.<sup>11</sup> "Amendment of the information to set forth added alternative theories of the mental state required for first-degree murder does not charge an additional or different offense."<sup>12</sup> Further, the record on appeal reveals that Pratt was afforded adequate notice of the amendment to prepare his defense.<sup>13</sup> The amended information was filed more than a month prior to trial and set forth additional information as to the specific acts constituting the means of aiding and abetting. Pratt failed to demonstrate

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<sup>10</sup>See e.g. Chambers v. State, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997) (holding that the voluntariness of a confession is primarily a factual question and a district court's determination that a confession is admissible will not be disturbed on appeal so long as it is supported by substantial evidence).

<sup>11</sup>See State v. District Ct., 116 Nev. 374, 378-79, 997 P.2d 126, 129 (2000).

<sup>12</sup>See Jennings v. State, 116 Nev. 488, 490, 998 P.2d 557, 55 (2000).


<sup>13</sup>State v. District Ct., 116 Nev. at 378-379, 997 P.2d at 129.




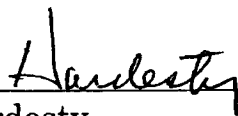
that this claim had a reasonable probability of success on appeal. Accordingly, we conclude the district court did not err in denying this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>14</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>15</sup>

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Brent T. Adams, District Judge  
Gary Wayne Pratt  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>14</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>15</sup>We have reviewed all documents that Pratt has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted.