IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES DEJUAN MORRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44983

FILED

JUN 09 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Appellant Charles Morris was convicted by the district court, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, robbery with the use of a firearm, and conspiracy to commit robbery. He was sentenced to various consecutive and concurrent terms of imprisonment. On direct appeal, this court reversed in part and remanded to the district court to correct an improper sentence enhancement regarding the conspiracy charge, but affirmed his conviction and sentence in all other respects.[1]

Morris thereafter filed a post-conviction petition for a writ of habeas corpus in the district court in proper person. He was later appointed counsel, and a supplement to his petition was filed. An evidentiary hearing was held, where several witnesses testified, including Morris's trial and appellate counsel, Dennis Widdis. The district court

[1]Morris v. State, Docket No. 35030 (Order Affirming In Part, Reversing In Part, And Remanding In Part, November 12, 2001).

later denied Morris relief on his petition. Morris now appeals, raising six claims that Widdis provided him with ineffective representation.

A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review.[2] To establish that counsel's assistance was ineffective, a petitioner must satisfy a two-part test.[3] First, he must demonstrate that his trial or appellate counsel's performance was deficient, falling below an objective standard of reasonableness.[4] Second, he must show prejudice.[5]

Where the claim involves trial counsel, prejudice is demonstrated by showing that, but for trial counsel's errors, there is a reasonable probability that the result of the proceedings would have been different.[6] Where the claim involves appellate counsel, prejudice is demonstrated by showing that an omitted issue had a reasonable probability of success on appeal.[7] Both parts of the test do not need to be considered if an insufficient showing is made on either one.[8]

Morris first contends that the district court improperly denied his claim that Widdis had a conflict of interest that deprived him of his

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[2]See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[3]See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

[4]See Strickland, 466 U.S. at 687-88.

[5]Id. at 687.

[6]Id. at 694.

[7]Kirksey, 112 Nev. at 998, 923 P.2d 1113-14.

[8]See Strickland, 466 U.S. at 697.

constitutional right to counsel. He contends that Widdis defended him while also representing Reno Police Detective Ron Dreher in an estate probate matter. Such dual representation was improper, Morris asserts, because Detective Dreher participated in the investigation of his case. We disagree.

"Every defendant has a constitutional right to the assistance of counsel unhindered by a conflict of interest."[9] Where a defendant can show an actual conflict of interest existed, the prejudice necessary to support an ineffective assistance of counsel claim is presumed.[10] However, a defendant may waive objections to any actual or potential conflict by his counsel and continue to be represented by him, so long as the district court personally addresses the defendant and determines that he made a voluntary, knowing, and understanding waiver of the conflict.[11]

The record reveals that prior to trial Widdis at least twice disclosed to the district court, the State, and Morris what he believed could be a potential conflict between his probate work with Detective Dreher and his defense of Morris. To address Morris's concerns, Widdis explained in open court the nature and scope of his representation of Detective Dreher. Thereafter, the district court asked: "Mr. Morris, based on that disclosure, are you satisfied with this issue?" Morris replied, "Yes."

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[9]Harvey v. State, 96 Nev. 850, 852, 619 P.2d 1214, 1215 (1980) (citing Holloway v. Arkansas, 435 U.S. 475 (1978)).

[10]See Strickland, 466 U.S. at 692.

[11]Kabase v. District Court, 96 Nev. 471, 473, 611 P.2d 194, 195-96 (1980); see Hayes v. State, 106 Nev. 543, 557, 797 P.2d 962, 970-71 (1990).

During the post-conviction evidentiary hearing, Widdis testified that he informed Morris of his probate work with Detective Dreher, and Morris acknowledged that Widdis advised him of the matter and he agreed to have Widdis continue defending him. Even assuming that Widdis had a conflict of interest, the district court found that Morris waived it. Substantial evidence supported this conclusion, and it was not clearly wrong.[12] We conclude the district court properly denied Morris relief on this claim.

Second, Morris contends that the district court improperly denied his claim that Widdis was ineffective for failing to challenge on direct appeal the admission of victim impact evidence during his penalty hearing. He contends that a booklet of pictures, poems, and letters, several of which were read to the jury, were outside the scope of admissible victim impact evidence. Had Widdis brought this issue to the attention of this court on direct appeal, Morris maintains, he would have been granted relief and a new penalty hearing ordered. We disagree.

A district court's decision to admit victim impact evidence during a penalty hearing is reviewed for an abuse of discretion.[13] NRS 176.015(3)(b) provides that a victim shall be afforded an opportunity to "[r]easonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for

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

[13]See Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996).

restitution."[14] And this court has held that "individuals outside the victim's family can present victim impact evidence,"[15] which has included letters from them.[16] However, the admission of victim impact evidence is not without limitations. Such evidence must be excluded if it renders the proceedings fundamentally unfair, its probative value is substantially outweighed by the danger of unfair prejudice, it confuses the issues, or it misleads the jury.[17]

We have reviewed the impact evidence at issue. Even if Morris had challenged the impact evidence on direct appeal, we conclude that any error by the district court in admitting it was harmless. Thus, there is no reasonable likelihood that Morris would have received any relief had Widdis raised this matter on direct appeal. We conclude the district court properly denied Morris relief on this post-conviction claim.

Third, Morris contends that the district court improperly denied his claim that Widdis was ineffective for failing to challenge his sentence on direct appeal. He maintains that the district court abused its discretion in sentencing him to the same sentence as codefendant, Ryan Moore, because Moore had a more violent criminal history and greater involvement in the instant crimes than he did. We disagree.

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[14]See NRS 175.552(3) (during a penalty hearing evidence may be presented regarding the "victim and on any other matter which the court deems relevant to sentence"); see also NRS 176.015(5), (6).

[15]Wesley, 112 Nev. at 519, 916 P.2d at 804.

[16]See Lane v. State (Lane I), 110 Nev. 1156, 1165-66, 881 P.2d 1358, 1365 (1994), vacated in part on other grounds by Lane v. State (Lane II), 114 Nev. 299, 956 P.2d 88 (1998).

[17]See Thomas v. State, 120 Nev. 37, 46, 83 P.3d 818, 824 (2004).

A district court is afforded wide discretion when sentencing,[18] and this court will not interfere with its decision "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."[19]

Morris's sentence was within the statutory limits,[20] and he has failed to demonstrate that the district court abused its discretion in imposing it. That his codefendant Moore may have received an identical sentence is not a basis for relief. Thus, a challenge to Morris's sentence on direct appeal on these grounds had no likelihood of success. We conclude the district court properly denied Morris relief on this claim.

Fourth, Morris contends that the district court improperly denied his claim that Widdis was ineffective for failing to challenge Jury Instruction 50 on direct appeal.[21] He contends that the instruction was

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[18]See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).

[19]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

[20]See NRS 193.165; NRS 199.480; NRS 200.030; NRS 200.380.

[21]Jury Instruction 50 provided:

> As used throughout these instructions, a firearm is a deadly weapon.
>
> If you find the defendant guilty of any of the counts charged, it will be your duty to determine whether such crimes were committed with the use of a deadly weapon and to state that in your verdict.
>
> In order to "use" a deadly weapon, there need not be conduct which actually produces harm but only conduct which produced a fear of harm or

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erroneous and he should not have been held criminally liable for a deadly weapon enhancement for the robbery or the murder because he neither used a deadly weapon nor was aware one was going to be used in those crimes. We disagree.

Jury Instruction 50 was an accurate statement of the law.[22] Moreover, this court concluded on direct appeal that sufficient evidence supported Morris's conviction, which included the jury's finding that he was criminally liable for the use of a deadly weapon—a firearm—in the commission of both the robbery and the murder. Morris has failed to demonstrate that there was any likelihood of success had Widdis challenged Jury Instruction 50 on direct appeal. We conclude the district court properly denied Morris relief on this claim.

Fifth, Morris contends that the district court improperly denied his claim that Widdis was ineffective for advising him not to testify in his own defense at trial because two prior convictions could be admitted by the State to impeach him. We disagree.

Widdis testified during the evidentiary hearing that he advised Morris not to testify because he "didn't believe that he would be a persuasive witness." Widdis could not recall whether he also advised Morris that his prior convictions might be admitted to impeach him.

. . . *continued*

> force by means or display of a deadly weapon in adding the commission of a crime.

We note that Morris incorrectly refers to this instruction as number 49, instead of 50, in his opening brief.

[22]See Allen v. State, 96 Nev. 334, 336, 609 P.2d 321, 322 (1980); see also NRS 193.165.

Morris testified at the hearing only that Widdis advised him not to testify because his prior convictions "might come in," not that they definitely would. Even assuming Morris's testimony was true, he failed to demonstrate that Widdis's advice was unreasonable. He also failed to show that had he testified there was a reasonable probability of a different outcome to his trial. We conclude the district court properly denied Morris relief on this claim.

Finally, Morris contends that the district court improperly denied his claim that Widdis was ineffective for failing to move to suppress DNA evidence from his hair samples relied upon by the State to prove his guilt. He asserts that this evidence was "planted" by authorities and that Widdis was ineffective for not conducting a more thorough investigation into its chain of custody. We disagree.

The district court did not specifically address this issue in its final order, and our review of the pleadings reveals that this claim is buried within the text of a memorandum filed to support Morris's petition. It is questionable whether this claim was properly raised below in the first instance. The State, however, does not make this argument, and this issue was discussed, albeit briefly, during Morris's evidentiary hearing.

Assuming that this claim is properly before us,[23] we conclude that it is without merit. Although Widdis acknowledged during the evidentiary hearing that he could have investigated this matter better, Morris failed to demonstrate that Widdis was ineffective for not doing so.

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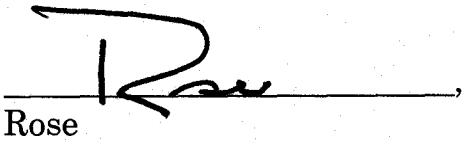
[23]See generally Barnhart v. State, 122 Nev. ___, ___, 130 P.3d 650, 651-52 (2006).

His assertion that samples of his hair were "planted" is a speculative, naked allegation void of any evidentiary support.[24]

Morris also failed to demonstrate that a more thorough investigation by Widdis into this matter would have revealed any such support. We conclude that Morris was not entitled to relief on this matter. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Rose

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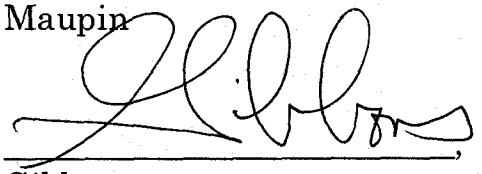

_____, J.
Gibbons

cc: Hon. Robert H. Perry, District Judge
Karla K. Butko
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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