

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKEY TODD MAJOR,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondent.

No. 45012

FILED

OCT 19 2006

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

On April 30, 1996, appellant Rickey Todd Major ("Major") was convicted, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon for the April 1988 murder of his girlfriend, Tina Dell.¹ The district court sentenced Major to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This court dismissed Major's direct appeal from his conviction.² The remittitur issued on September 23, 1998.

¹A corrected judgment of conviction was entered on June 1, 2005.

²Major v. State, Docket No. 28879 (Order Dismissing Appeal, September 3, 1998).

On November 3, 1998, Major filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Major's unverified "first amended petition for writ of habeas corpus" was apparently filed on April 10, 2000. Major later obtained counsel to represent him in the proceedings, and counsel filed supplemental points and authorities on September 25, 2002. The State opposed the petition. The district court held a bifurcated evidentiary hearing on December 5, 2003 and January 13, 2004. On December 20, 2004, the district court dismissed Major's petition. This appeal followed.

Major raises three issues in this appeal. First, Major argues the district court held him to an erroneous burden of proof. Second, Major contends the district court erred in ruling that his trial and appellate counsel, Matthew Stermitz, was not ineffective.³ Third, Major argues Stermitz's cumulative errors deprived him of a fair trial.

³To the extent Major raised them independently of his ineffective assistance of counsel claims, Major's other claims were barred by the law of the case or waived. See Pellegrini v State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001); NRS 34.810(1)(b). Major's claims regarding juror misconduct, the State's failure to disclose evidence, the State's participation in defense ex parte motions, insufficient evidence, the district court's abuse of discretion in sentencing and the district court's error in denying appellant's motion to admit polygraph evidence, refusing to give proffered jury instructions and failing to canvass appellant on his right to testify were resolved on their merits in Major v. State, Docket No. 28879 (Order Dismissing Appeal, September 3, 1998). Appellant's claim that his rights were violated by Stermitz's conflict of interest was also resolved on its merits in Major v. State, Docket No. 30521 (Order
continued on next page . . .

The burden of proof

Major argues the district court erred in requiring him to prove the factual allegations supporting his ineffective assistance of counsel claims by "strong and convincing proof." In Means v. State,⁴ this court rejected the "strong and convincing proof" burden that was articulated in Davis v. State⁵ in favor of the more lenient "preponderance of the evidence" standard. Means applies to Major because the Means holding related to procedure in post-conviction proceedings, and Major's post-conviction proceedings were pending when Means was decided.⁶ We conclude Major failed to prove his allegations under the "preponderance of

... continued

Dismissing Appeal, August 28, 1998). Major's claims regarding the State's expert witness's qualifications and methods, erroneous and/or unfair jury instructions, prosecutorial misconduct and overreaching, inability to seat an impartial jury due to pre-trial publicity, inability to testify on his own behalf due to the pendency of his appeal of a perjury conviction, and coerced and/or involuntary statements to investigators were waived by appellant's failure to present them to the trial court and/or raise them in his direct appeal. Major's claims regarding the propriety of his original sentence are moot, as Major successfully filed a motion to correct illegal sentence, and was resentenced. A corrected judgment of conviction was entered on June 1, 2005.

⁴120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

⁵107 Nev. 600, 817 P.2d 1169 (1991).

⁶See, e.g., Richmond v. State, 118 Nev. 924, 929, 59 P.3d 1249, 1252 (2002).

evidence" standard. Thus, we conclude that even if the district court did err in applying the "strong and convincing" standard of proof, any error was harmless.

Counsel's effectiveness

Major argues the district court erred in rejecting his claims that Stermitz was 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 was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.⁷ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁸ The district court's factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁹

First, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to communicate with Major. The district court found that Stermitz had the assistance of Major's former counsel's reports and notes and of Major's statements to and interviews

⁷Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁸Strickland, 466 U.S. at 697.

⁹Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

with investigators. At the evidentiary hearing, Stermitz testified he met at least four times in person with Major, who was living in Colorado while awaiting trial. Stermitz also testified to written communications with Major. Further, Major failed to specify what additional communication with Stermitz would have accomplished or how it would have changed the outcome of his trial. Thus, the district court did not err in rejecting this claim.

Second, Major claims the district court erred in rejecting his claim Stermitz was ineffective for failing to file pre-trial motions. The district court found that Major failed to state any facts to support this contention. We agree. The record before us reveals that Major failed to specify which pre-trial motions Stermitz should have filed or how those motions would have changed the outcome of his case. The district court did not err.

Third, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to object to testimony regarding statements Major made to investigators or to seek suppression of those statements based on Miranda¹⁰ violations or on Major's inability to make voluntary statements while under the influence of cocaine. Major failed to specify any facts to show that his Miranda rights were violated during any of the statements and interviews he gave to investigators or

¹⁰Miranda v. Arizona, 384 U.S. 436 (1966).

that his drug use rendered his statements involuntary. The district court noted that Major initiated most of his contact with investigators, that he was interviewed in his home in Colorado while his wife was in the next room, and that he was interviewed in Elko with his attorney present. Major also failed to state any facts to show his cocaine use rendered his statements involuntary. Further, we note that trial testimony established Major was using cocaine after Dell's disappearance, that people using cocaine can experience so-called cocaine paranoia, but that Major denied experiencing cocaine paranoia during that time. We therefore conclude the district court did not err in rejecting this claim.

Fourth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to argue for lesser included offenses or to attempt to explain Major's statements to police based on Major's cocaine use after Dell's disappearance. At the evidentiary hearing, Stermitz testified that Major told him he was innocent and that he was only interested in an acquittal, not conviction of a lesser included offense. Stermitz further testified that he thought the jury would disbelieve Major's claim of innocence if Stermitz first argued innocence but then argued for conviction of a lesser included offense. This was a tactical decision by Stermitz, and counsel's tactical decisions are "virtually

unchallengeable absent extraordinary circumstances."¹¹ Major failed to demonstrate extraordinary circumstances or that Stermitz's decision not to argue for lesser included offenses was unreasonable. In addition, Investigator Williams testified at trial that he had asked Major if he was experiencing cocaine paranoia and Major said he was not. Thus, the district court did not err in rejecting this claim.

Fifth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to move for a change of venue before trial. The district court ruled that this claim lacked merit. We agree. At the evidentiary hearing, Stermitz testified he did not believe a motion to change venue would succeed and that no juror during the voir dire indicated he or she could not be impartial.¹² Major failed to demonstrate that Stermitz's performance was deficient in this respect. Major also failed to demonstrate that pre-trial publicity rose to the level from which prejudice would be presumed.¹³ Although Major claimed Stermitz failed to properly voir dire the jury pool on pre-trial publicity, he

¹¹See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)).

¹²See NRS 174.455.

¹³See, e.g., Sonner v. State, 112 Nev. 1328, 1336, 930 P.2d 707, 712-13 (1996) (concluding pre-trial publicity in a high-profile capital murder case involving the murder of a police officer did not rise to the level of publicity for which prejudice would be presumed).

asserted no specific facts to support this claim and did not provide the transcript of the voir dire. "The burden to make a proper appellate record rests on appellant."¹⁴ Major has failed to demonstrate that the district court erred in rejecting this claim.

Sixth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to effectively examine a juror regarding whether she had discussed the case outside the proceedings. The trial court held an in-chambers meeting with the parties and the juror, where the juror related a comment a coworker had made to her and said she questioned the coworker's credibility. The juror also said the statement would have no effect on her ability to serve impartially as a juror. Stermitz objected to the juror's remaining on the jury, but the district court allowed her to remain. Major failed to state how further examination of the juror would have changed the outcome of his trial. The district court did not err in ruling that Major was not entitled to relief on this claim.

Seventh, Major claims the district court erred in rejecting the claim that Stermitz was ineffective for failing to call expert witnesses. Specifically, Major argued Stermitz should have called forensic anthropologist Dr. Walt Birkby, psychologist Frank Hadley (Major's brother), and a DNA expert. The district court found that Stermitz was

¹⁴See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980).

not ineffective, as Stermitz testified at the evidentiary hearing that Dr. Birkby had told Stermitz that his testimony would not be helpful to the defense. Stermitz further testified that he believed Frank Hadley thought Major had killed Dell, and that expert DNA testimony would not be useful because the blood found at the crime scene could not be matched to either Major or Dell. Stermitz's decisions to call or not call particular witnesses were tactical, and did not fall below an objective standard of reasonableness under the circumstances.¹⁵ We note that, contrary to Major's assertion, Stermitz had the DNA testing report admitted into evidence, and the jury therefore had the report to consider in its deliberations. We further note that the substance of Dr. Birkby's report that was beneficial to Major came into the record, as Stermitz cross-examined Dr. Brooks regarding Dr. Birkby's findings and her discussions with him. Thus, the district court did not err in finding that Major was not entitled to relief in this regard.

Eighth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to call his defense investigator, James Grady. Major claims Grady would have testified that he discovered evidence of Major's innocence as well as the existence of two

¹⁵See Doleman, 112 Nev. at 848, 921 P.2d at 280-81 (quoting Howard, 106 Nev. at 722, 800 P.2d at 180).

other suspects.¹⁶ Major has failed on appeal to point to anything in the record that would substantiate this claim or demonstrate that the district court erred in concluding that he was not entitled to relief on this ground. In the proceedings below, Major failed to allege or demonstrate what specific evidence Grady would have testified to discovering, whom Grady would have identified as a suspect, or how such testimony would have altered the outcome of Major's trial.¹⁷ Much to the contrary, during the State's cross-examination at the evidentiary hearing, Major acknowledged that he was not aware of anything specific that Grady had discovered that would have altered the result of Major's trial. The district court did not err in rejecting this claim.

Ninth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to voir dire the State's forensic anthropologist, Dr. Brooks, on her qualifications at the beginning of her testimony. At the beginning of its direct examination, the State established that Dr. Brooks had an M.A. and a Ph.D. in physical anthropology from the University of California, Berkeley, and had been a

¹⁶In his evidentiary hearing testimony, Major referred to a State's trial witness who was given a polygraph test and "flunked it." Major failed to state who this person was or to establish that evidence of this person's polygraph test results would have been admissible at trial and would have changed the outcome of the trial. See generally Corbett v. State, 94 Nev. 643, 584 P.2d 704 (1978).

¹⁷See Hargrove, 100 Nev. at 502, 686 P.2d at 222.

practicing forensic anthropologist for twenty years. After Dr. Brooks had given some testimony, Stermitz questioned her on voir dire as to whether her expertise allowed her to conclude what caused the injuries visible on Dell's skeletal remains beyond "something sharp." On cross-examination, Stermitz established that Dr. Brooks had only done approximately five investigations into potential sharp force trauma to skeletal remains.

In the post-conviction proceedings below, Major did not establish that Dr. Brooks was actually unqualified to give expert testimony in forensic anthropology. Thus, he failed to demonstrate that further or earlier voir dire would have changed the outcome of his trial. The district court did not err in rejecting this claim.

Tenth, Major claims the district court erred in rejecting the claim that Stermitz was ineffective for failing to consult outside experts in preparing to cross-examine Dr. Brooks. Stermitz testified at the evidentiary hearing that he spoke several times with Dr. Birkby. We conclude the district court did not err in determining that Major failed to demonstrate that Stermitz's performance was deficient or that further consultation would have changed the outcome of Major's trial.

Eleventh, Major claims the district court erred in rejecting the claim that Stermitz was ineffective for failing to challenge the chain of evidence or to impeach Dr. Brooks on her methods when Dr. Brooks testified that she had taken the skeletal remains to her home and laid them out on a sheet on her patio. Major also notes that when Dr. Birkby received the remains, some of the labels placed on them had detached.

The district court concluded that the chain of evidence was not broken, as the remains were accompanied by an investigator, the evidence custodian, at all times. We agree. Major failed to demonstrate that a challenge to the chain of evidence or impeachment of Dr. Brooks based on her methods would have changed the outcome of his case. Major's expert at the evidentiary hearing testified that any trauma to the remains that occurred on Dr. Brooks' patio would be identifiably post-mortem. Other than the testimony of Major's expert at the evidentiary hearing, nothing in the record indicates that Dr. Brooks' methods compromised the integrity of her scientific findings. The trial jury was capable of assessing Dr. Brooks' credibility. The district court did not err in rejecting this claim.

Twelfth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to challenge the reasonable doubt, premeditation and deliberation, and malice instructions. The district court found that the reasonable doubt instruction conformed to the language required by NRS 175.211 and that Stermitz was not deficient for failing to object. The district court also found that the premeditation and deliberation instructions tracked Kazalyn v. State, which was the proper instruction at the time of Major's trial.¹⁸

¹⁸Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992). The so-called "Kazalyn instruction" was later disapproved of in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), but Byford was held not to be retroactive in Garner v. State, 116 Nev. 770, 789, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

Although Major has failed to include the jury instructions in his appendix, his first amended petition purportedly quotes one of the instructions as stating: "Malice is implied where an involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent." Major contends this instruction improperly created a presumption of malice in the absence of provocation. We disagree. This instruction had no relation to the absence of provocation; rather, the instruction explained the difference between murder and involuntary manslaughter.¹⁹ We therefore conclude the district court did not err.

Thirteenth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to object to testimony by two witnesses about the existence and contents of at least one photograph of Dell's body. No such photographs were ever located or admitted into evidence at trial. James Guisti testified at trial, however, that Major showed him two photographs of Dell's body. A police investigator also testified that Major had claimed the man responsible for Dell's death showed Major a photograph of Dell's body. At the evidentiary hearing, Stermitz testified he did not believe he had grounds to object and that the district court would likely find the testimony about the photographs

¹⁹See 1983 Nev. Stat., ch. 409, § 2, at 1014 (NRS 200.070).

relevant and not more prejudicial than probative. Further, Stermitz testified that he did not know where the photographs were and had "no way to get them." Major also maintained that he never had possession of the photographs and did not know where they were.

NRS 52.255 provides in part that an original photograph is not required and "other evidence" of its contents "is admissible, if:"

1. All originals are lost or have been destroyed, unless the loss or destruction resulted from the fraudulent act of the proponent;
2. No original can be obtained by any available judicial process or procedure;
3. At the time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or
4. The . . . photograph is not closely related to a controlling issue.

Major failed to establish by a preponderance of the evidence that either he or Stermitz could have obtained or preserved the alleged photographs for admission at trial through any available judicial process or procedure. Therefore, the district court did not err in rejecting this claim.

Fourteenth, Major argues the district court erred in rejecting his claim that Stermitz was ineffective for failing to object to "prosecutorial misconduct and overreaching." Major contended Stermitz should have objected that the prosecution was engaging in "misconduct

and overreaching" by prosecuting him for the third time for this crime. Both prior prosecutions were dismissed without prejudice, and the State was entitled to prosecute Major again. Major failed to demonstrate how objecting on this ground would have changed the outcome of his trial. The district court did not err in rejecting this claim.

Fifteenth, Major claimed Stermitz was ineffective for failing to challenge and object to the manner of the search for Dell's skeletal remains, to discover what had happened to any additional remains, or to test a "thread" that Dr. Brooks reported finding attached to one of the vertebrae that showed a possible cut mark. At the evidentiary hearing, Stermitz testified he thought the lack of additional remains was good for Major's case because it limited the number of potential injuries that could be identified. Stermitz's decision not to risk producing evidence that could implicate Major was tactical, and counsel's tactical decisions are "virtually unchallengeable absent extraordinary circumstances."²⁰ Moreover, Major failed to demonstrate how the failure to assert any objections on these grounds fell below an objective standard of reasonableness or would have changed the outcome of the trial. Thus, the district court did not err in this regard.

Additionally we note that to the extent Major claims his original counsel, David Lockie, was ineffective for failing to obtain a

²⁰See Doleman, 112 Nev. at 848, 921 P.2d at 280-81 (quoting Howard, 106 Nev. at 722, 800 P.2d at 180).

dismissal with prejudice of the charges or to prevent the release of Dell's remains to her family, Major failed to show how Lockie's performance prejudiced him. Major has asserted no facts establishing he was entitled to dismissal with prejudice, and Dell's remains were examined by at least Dr. Brooks, Dr. Birbky, and the medical examiner before they were released. Accordingly, the district court did not err in rejecting this claim.

Sixteenth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to request a continuance of the first sentencing proceeding while the appeal of Major's perjury conviction was pending.²¹ This issue is moot. Major was subsequently resentenced after filing a successful motion to correct illegal sentence.

Seventeenth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to cross-examine James

²¹Major's brief in this appeal argues for the first time that Stermitz was ineffective for failing to seek a continuance of the trial while the perjury conviction appeal was pending so that Major could testify on his own behalf without being impeached by a perjury conviction. Major is barred from presenting this claim for the first time in this appeal. Further, as a separate and independent ground for denying relief on this claim, Major's perjury conviction was not the only factor weighing against his taking the stand. At the evidentiary hearing, Major and Stermitz both testified that Major had told Stermitz his previous cross-examination by the prosecutor in previous cases had "not gone well." Major also had another felony conviction, with which he could have been impeached. Major failed to state any grounds upon which Stermitz could have sought a trial continuance while the perjury conviction was pending.

Guisti. As noted, Guisti testified Major showed him photographs of a body that looked like Dell's with what appeared to be chest wounds. The record before us reveals, however, that Stermitz did cross-examine Guisti. Major has failed to demonstrate what additional questions Stermitz should have asked Guisti about the photographs or how such questions would have changed the outcome of the trial. Thus, Major failed to demonstrate any entitlement to relief in this respect, and the district court did not err in rejecting this claim.

Eighteenth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to cross-examine Gary Worthen about whether Worthen was a suspect in Dell's killing, had been questioned by investigators, or had taken a polygraph examination. Stermitz's cross-examination of Worthen at trial elicited that Worthen had helped Major conceal potential evidence and clean up the suspected crime scene and had possession of Dell's ring after her disappearance. Stermitz argued in closing that Worthen might have killed Dell. Major failed to demonstrate that further cross-examination of Worthen would have changed the outcome of the trial. The district court correctly rejected this claim.

Major also claims the district court erred in rejecting Major's claim that appellate counsel was ineffective.²² To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.²³ Appellate counsel is not required to raise every non-frivolous issue on appeal.²⁴ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.²⁵

Major claims Stermitz should have argued (a) trial counsel's conflict of interest, (b) Dr. Brooks' qualifications to serve as an expert witness, (c) reasonable doubt instruction, (d) premeditation and deliberation and malice jury instructions, (e) prosecutorial misconduct, (f) change of venue, (g) Miranda violations, and (h) denial of sentencing by jury. As stated above, we conclude issues (a) – (g) did not have a reasonable likelihood of success on appeal, and (h) was rendered moot by

²²Major was originally represented during his direct appeal by Matthew Stermitz; David Houston substituted in as counsel of record on January 29, 1997.

²³Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. 668).

²⁴Jones v. Barnes, 463 U.S. 745, 751 (1983).

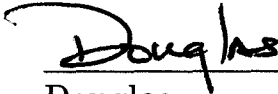
²⁵Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).


Major's successful motion to correct illegal sentence, which led to his resentencing in 2005. Thus, the district court did not err in concluding that Major failed to demonstrate that Stermitz's appellate representation fell below an objective standard of reasonableness or omitted any issues on appeal that would have had a reasonable probability of success.

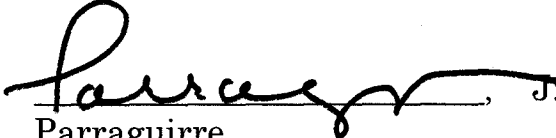
Cumulative error

Finally, Major argues that the prejudice from Stermitz's errors, taken cumulatively, rendered his trial unfair.²⁶ Because we conclude that none of Stermitz's alleged errors at trial were prejudicial, we disagree.

Having concluded Major's contentions lack merit, we
ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Becker


_____, J.
Parraguirre

²⁶See, e.g., Browning v. State, 120 Nev. 347, 372, 91 P.3d 39, 56 (2004).

cc: Hon. Andrew J. Puccinelli, District Judge
Steve E. Evenson
Attorney General George Chanos/Carson City
Elko County District Attorney
Elko County Clerk