IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES E. CROSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45194

FILED

DEC 21 2005

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

ORDER OF AFFIRMANCE

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

On July 15, 1998, the district court convicted appellant, pursuant to a jury verdict, of murder of the first degree with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and failure to stop required on signal of a police officer. The district court sentenced appellant to serve two consecutive terms of life without the possibility of parole, two consecutive terms of seventy-two to one hundred ninety months, and a concurrent term of twenty-four to sixty months in the Nevada State Prison. This court dismissed the direct appeal.[1] The remittitur issued on September 6, 2000.

[1]Cross v. State, Docket No. 32533 (Order Dismissing Appeal, August 11, 2000).

On November 2, 2000, appellant 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 appellant, but conducted an evidentiary hearing on April 22, 2005. On May 10, 2005, the district court denied appellant's petition.[2] This appeal followed.

In his petition below, appellant contended that his trial counsel 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 fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.[3] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[4] A petitioner must demonstrate the factual allegation underlying his

---

[2]Appellant filed an amended petition on November 26, 2003, which was denied by the district court on February 24, 2004. This court was unable to determine whether the petition filed on November 26, 2003, was a second petition for writ of habeas corpus, or an amended petition, and thus, reversed and remanded appellant's case back to the district court. Cross v. State, Docket No. 42931 (Order of Reversal and Remand, August 26, 2004). It is now apparent from the record that the district court treated the November 26, 2003 petition as an amended petition.

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

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

ineffective assistance of counsel claim by a preponderance of the evidence.[5] Further, the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[6]

Appellant claimed that his counsel was ineffective for failing to request jury instructions based on the defense theory of diminished capacity due to a psychological disorder. Appellant failed to demonstrate that his counsel was deficient. This court has rejected the doctrine of partial responsibility or diminished capacity.[7] Thus, it would have been inappropriate for counsel to request any jury instruction which improperly instructed the jury to consider a defense theory of diminished capacity.[8] Thus, we conclude the district court did not err in denying this claim.

Further, appellant appeared to claim that his counsel was ineffective for failing to request jury instructions on lesser-included offenses.

> A defendant may only demand a jury instruction on a lesser included offense when the following conditions are satisfied:

---

[5]Means v. State, 120 Nev. ___, ___, 103 P.3d 25, 33 (2004).

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

[7]Crawford v. State, 121 Nev. ___, 121 P.3d 582, 591 (2005); Ogden v. State, 96 Nev. 258, 262, 607 P.2d 576, 578 (1980); see also Fox v. State, 73 Nev. 241, 244-45, 316 P.2d 924, 926 (1957).

[8]Crawford, 121 Nev. at ___, 121 P.3d at 591 (stating that Nevada law recognizes the M'Naghten standard, and not the technical defense of diminished capacity).

> (1) the offense for which the instruction is sought is a lesser included offense of the charged offense, (2) the defendant's theory of defense is consistent with a conviction for the lesser included offense, and (3) evidence of the lesser offense exists.[9]

An offense is lesser-included if the charged offense cannot be committed without committing the lesser offense.[10]

Appellant claimed that counsel should have requested a jury instruction for manslaughter as a lesser-included offense of murder. Appellant failed to demonstrate that counsel's performance was deficient. The crime of manslaughter includes the element of provocation.[11] There was no evidence of provocation presented at the trial. Further, appellant failed to demonstrate that, even if counsel had been successful in admitting the proposed jury instructions, there would have been a reasonable probability of a different verdict. The jury was instructed as to first and second-degree murder, and returned a verdict of first-degree murder even though the defense had presented evidence that appellant may have suffered from a psychological disorder to some degree. Appellant failed to demonstrate that counsel's performance was ineffective. Thus, the district court did not err in denying this claim.

Appellant claimed that counsel was ineffective for failing to request an instruction for resisting arrest as a lesser-included offense of

---

[9]Walker v. State, 110 Nev. 571, 575, 876 P.2d 646, 648 (1994).

[10]Slobodian v. State, 98 Nev. 52, 639 P.2d 561 (1982).

[11]NRS 200.040(2).

failure to stop on the signal of a police officer. Appellant failed to demonstrate that counsel's performance was deficient. Resisting arrest is not a lesser-included offense of failure to stop on the siren of a police officer.[12] Additionally, appellant failed to demonstrate that the jury's verdict would have been different had counsel been successful in having the instruction admitted. Appellant drove his vehicle at a high-rate of speed for a significant distance, even though a police vehicle with lights and siren activated was in pursuit. In so doing, appellant endangered, not only the public, but also his child, who was inside the vehicle at the time.[13] There was no evidence presented at trial tending to reduce the greater offense.[14] Thus, the district court did not err in denying this claim.

Appellant claimed that counsel was ineffective for failing to request a jury instruction on assault with a deadly weapon as a lesser-included offense of attempted murder. Assault with a deadly weapon is a lesser-included offense of attempted murder with a deadly weapon.[15] However, appellant failed to demonstrate that the jury's verdict would have been different had counsel been successful in admitting a jury

---

[12]1997 Nev. Stat. ch. 203, § 25, at 547; NRS 199.280.

[13]NRS 484.348(3)(b) (a person that operates a vehicle in a manner likely to endanger other persons or property is guilty of a category B felony).

[14]Wilmeth v. State, 96 Nev. 403, 408, 607 P.2d 735, 737-39 (1980).

[15]Walker, 110 Nev. at 575, 875 P.2d at 648.

instruction for the lesser-included offense of assault with a deadly weapon. Appellant fired a weapon at a police officer several times at a relatively close distance. The officer testified at trial that he could hear bullets "whizzing" by his head. Appellant failed to demonstrate that the jury would have found that he did not have the intent to kill the officer. Thus, the district court did not 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.[16] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Rose, J.
Rose

Parraguirre, J.
Parraguirre

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

cc: Hon. Donald M. Mosley, District Judge
James E. Cross
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk