

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOE W. SMITH A/K/A JOSEPH
WELDON SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45302

FILED

SEP 29 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Appellant Joe W. Smith was convicted of three counts of first-degree murder with the use of a deadly weapon for the murders of his wife Judith and Judith's two daughters, Wendy and Kristy. Smith was also convicted of the attempted murder with the use of a deadly weapon of Frank Allen. The jury found that Wendy's murder involved depravity of mind and mutilation and that Kristy's murder involved depravity of mind. The jury sentenced Smith to death for each of these murders. Smith was sentenced to life in prison without the possibility of parole for Judith's murder and two consecutive 20-year terms for the attempted murder of Allen. On appeal, this court affirmed Smith's convictions on all counts, but vacated the death sentences and the 20-year enhancement for the use

of a deadly weapon in the attempted murder of Allen and remanded for a new penalty hearing.¹

After the second penalty hearing, Smith was again sentenced to death for Wendy's and Kristy's murders. However, this court concluded that an improper depravity-of-mind instruction required it to vacate Smith's death sentence for Kristy's murder and imposed a sentence of life without the possibility of parole.² This court affirmed Smith's death sentence for Wendy's murder.³

Smith filed a timely post-conviction petition for a writ of habeas corpus, which the district court denied. This appeal followed.

Smith alleges that his counsel were ineffective on several grounds. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, Smith must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.⁴ A counsel's strategic or "[t]actical decisions are virtually unchallengeable

¹Smith v. State (Smith I), 110 Nev. 1094, 1106-07, 881 P.2d 649, 657 (1994).

²Smith v. State (Smith II), 114 Nev. 33, 39, 953 P.2d 264, 267 (1998).

³Id. at 40, 953 P.2d at 268.

⁴See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

absent extraordinary circumstances."⁵ Smith must demonstrate prejudice by showing "a reasonable probability that but for counsel's errors the result of the trial would have been different."⁶

Smith first complains that counsel should have challenged his competency because the record indicates that "Mr. Smith, if incorrect that the murders were committed by other individuals, was certainly laboring under some form of delusional paranoia" as evidenced by his refusal to meet with counsel. We conclude that Smith's claim is nothing more than a bare allegation.⁷ Nothing in the transcript or Smith's submissions to this court suggests incompetence or that his counsel should have questioned his competence. Therefore, we conclude that the district court did not err in denying this claim.

Smith next argues that counsel were ineffective for failing to investigate and challenge Allen's credibility based on alleged fraud and deceit in the sale of the house where the murders occurred. However, counsel called Allen's wife, whom he was divorcing, who contradicted Allen's testimony regarding the circumstances surrounding the sale of the home. Further, Smith does not explain what additional information his counsel should have produced in this regard. Nor has he demonstrated

⁵Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated on other grounds as recognized by Harte v. State, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000).

⁶See Thomas v. State, 120 Nev. 37, 43-44, 83 P.3d 818, 823 (2004).

⁷See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

any possibility that further challenges to Allen's credibility would have changed the outcome of his trial. Therefore, we conclude that the district court did not err in denying this claim.

Smith next argues that his counsel were ineffective for failing to attempt to establish the time of death of the victims because, had they done so, the evidence would have suggested that Allen was the murderer. However, Smith testified that three men entered his home, restrained him, and killed his family; thus, Smith's own testimony placed him in the house when the murders occurred. He fails to explain how the lack of more precise evidence of the time of death of the victims, assuming such evidence could have been secured, prejudiced him. Therefore, we conclude that the district court did not err in denying this claim.

Smith asserts that his counsel labored under a conflict of interest because the district court placed counsel in the precarious position of becoming witnesses in the proceedings. The Sixth Amendment guarantees the right to conflict-free counsel.⁸ "[T]he possibility of conflict is insufficient to impugn a criminal conviction [A] defendant must establish that an actual conflict of interest adversely affected his lawyer's performance."⁹ "A presumption of prejudice arises when an actual conflict

⁸See Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993).

⁹Leonard v. State, 108 Nev. 79, 81, 824 P.2d 287, 289 (1992) (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)).

of interest adversely affects counsel's performance."¹⁰ Having reviewed Smith's argument and relevant portions of the transcript, we conclude that he failed to make specific allegations that indicate an actual conflict arose. Consequently, the district court did not err in denying this claim.

Smith next contends that the district court lacked jurisdiction over his case because a criminal complaint was allegedly never filed in the justice court.¹¹ He contends that he was arrested via an arrest warrant issued by a justice of the peace for Las Vegas who misrepresented his position as a justice of the peace for Henderson. Smith further argues that the arrest warrant was invalid because it could only be issued upon the filing of a criminal complaint pursuant to NRS 171.106. Smith argues that because no criminal complaint was ever filed in his case, no arrest warrant could legally issue; therefore all subsequent proceedings including his trial were void. Smith does not suggest that the arrest warrant was not supported by probable cause or that he lacked adequate notice of the charges alleged.

We conclude that any challenge to the arrest warrant or the jurisdiction of the justice of the peace to issue it should have been made

¹⁰Rudin v. State, 120 Nev. 121, 145, 86 P.3d 572, 588 (2004); see Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992).

¹¹To the extent that Smith contends that his trial counsel and appellate counsel were ineffective for not challenging the district court's jurisdiction, we conclude that the district court did not err in denying this claim.

pretrial.¹² We further conclude that Smith failed to show that the warrant was infirm or that the justice of the peace who issued it lacked the authority to do so. Therefore, we conclude that the district court did not err in denying this claim.

Smith raised the following matters that were appropriate for our consideration only on direct appeal: the State committed prosecutorial misconduct by failing to disclose exculpatory or favorable evidence pursuant to Brady v. Maryland¹³ and by engaging in improper closing argument; the district court erred in admitting irrelevant and prejudicial testimony from Lawrence Cook; and cumulative error mandated reversal of Smith's conviction and sentence. We conclude that Smith has not shown good cause for failing to raise these claims earlier or actual prejudice.¹⁴ Therefore, the district court did not err in denying them.

Finally, in his opening brief, Smith "incorporate[d] herein all claims and issues previously raised in all appeals and prior petitions for post-conviction relief and makes a part hereof by reference." He further "reserve[d] the right to allege additional issues and grounds for relief as

¹²See State v. Plunkett, 62 Nev. 265, 271, 149 P.2d 101, 104 (1944) ("Jurisdiction of the magistrate to issue the warrant of arrest was beyond question when the defendant failed by appropriate proceeding to attack the complaint prior to the preliminary examination."); cf. Watson v. Sheriff, 93 Nev. 403, 404 n.1, 566 P.2d 416, 417 n.1 (1977).

¹³373 U.S. 83 (1963).

¹⁴See NRS 34.810(1)(b)(2), (3); State v. Williams, 120 Nev. 473, 476-77, 93 P.3d 1258, 1260 (2004).

may be identified in due course." We conclude that Smith has provided no basis for relief whatsoever in this regard.

Having considered Smith's argument and the documents submitted in this appeal and concluded that the district court did not err in denying the habeas petition, we

ORDER the judgment of the district court AFFIRMED.¹⁵

Becker, J.
Becker

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

¹⁵On September 11, 2006, appellant moved this court to supplement appellant's brief with an additional issue challenging jury instruction no. 6. Appellant alleges that the instruction that defines express and implied malice is unconstitutionally vague. We note, however, that appellant's additional argument does not address good cause or prejudice justifying this court's consideration of this direct appeal claim in this post-conviction matter. See NRS 34.810(1)(b)(2), (3). Nor has appellant pointed to any place in the record where this claim was presented below. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004). Under these circumstances, we deny appellant's motion.

cc: Hon. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk