

IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE O'CONNER BEARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45416

FILED

APR 05 2006

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court denying appellant George Beard's post conviction petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; Steve L. Dobrescu, Judge.

Beard's amended judgment of conviction was filed on June 27, 2002. On March 18, 2002, Beard appealed and this court affirmed the district court's amended judgment of conviction and sentence.¹ On March 3, 2003, Beard filed a post-conviction petition for writ of habeas corpus. Beard now appeals the district court's denial of his post-conviction petition for a writ of habeas corpus.

First, Beard contends the district court erred by denying his petition without an evidentiary hearing. "A defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual

¹Beard v. State, Docket No. 39738 (Order affirming amended judgment of conviction, November 5, 2002).

allegations belied or repelled by the record."² The district court based its decision to deny an evidentiary hearing "because even if his factual allegations are accepted as true, he is not entitled to relief."

Next, Beard alleged trial court was biased and that he was therefore entitled to a new trial. Beard asserts that the presiding judge gave signals to the prosecutor to indicate when objections should be raised. The issue of judicial bias could have been raised on direct appeal, rather than in a post-conviction habeas petition. Failure to raise an issue on direct appeal is grounds for dismissal.³

Beard raises four claims that counsel was ineffective. First, Beard alleges ineffective assistance for failing to sever the ex-felon counts from his remaining charges. Misjoinder will result in reversal "only if the error has a substantial and injurious effect or influence in determining the jury's verdict."⁴ Beard has failed to demonstrate prejudice for reversal based on improper joinder, especially when considering the evidence of his guilt was overwhelming. Additionally, this court did not rule severance of ex-felon in possession counts would be required until 1998, and that the rule was clarified to be applied prospectively, not retroactively until 1999,

²Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

³NRS 34.810(1)(b)(2).

⁴Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 564 (1990) (quoting Mitchell v. State, 105 Nev. 735, 739, 782 P.2d 1340, 1343 (1989)).

one year after Beard's trial concluded.⁵ Finally, Beard's claim of prejudice from his counsel's direct examination resulting in Beard's admission to being an ex-felon ignores the fact that this information would have been admissible upon cross-examination.

Second, Beard claims trial counsel's failure to require the State's compliance with the expert witness disclosure statute⁶ constituted ineffective assistance of counsel. The district court properly denied his claim as not satisfying either prong from the Strickland test.⁷ Beard failed to allege what part of counsel's cross-examination was ineffective or how the expert testimony contributed to his convictions and failed to acknowledge his own expert was permitted to testify without abiding by the same notice provisions.

Third, Beard asserts trial counsel's failure to object to the prosecutions vouching for the credibility of witnesses constituted ineffective assistance of counsel. The district court found the incident to be so marginal that further discussion was unwarranted. Our review upon the record indicates the vouching consisted of a brief statement and the error was harmless.⁸ Furthermore, Beard made incriminating

⁵Brown v. State, 114 Nev. 1118, 967 P.2d 1126 (1998); Schoels v. State, 115 Nev. 33, 975 P.2d 1275 (1999).

⁶NRS 174.234(2).

⁷See Strickland v. Washington, 466 U.S. 668 (1984).

⁸See Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997) (determining the harm caused by vouching "depends in part on the
continued on next page . . .

admissions and the case was therefore not close. The prejudicial effect of the vouching, if any, was inconsequential.

Finally, Beard contends counsel was ineffective for failing to object to prosecutorial misconduct in closing argument. Our review of the prosecutor's entire closing argument and the proceedings overall persuades us that the outcome of the proceedings would not have been different had the comments not been made.⁹ We conclude counsel's errors were not so severe that they rendered the jury's verdict unreliable.¹⁰ In light of the overwhelming evidence of guilt, the alleged misconduct does not mandate reversal.¹¹

The district court was correct in its conclusion that perhaps the best evidence that counsel was not ineffective, is that Beard was found not guilty of a serious charge, involuntary manslaughter, and that three of

... continued

closeness of the case") (quoting U.S. v. Frederick, 78 F.3d 1370, 1378 (9th Cir. 1996).

⁹See Castillo v. State, 114 Nev. 271, 281, 956 P.2d 103, 109-10 (1998) (inappropriate comment by prosecutor warrants reversal only if it so infects the proceeding with unfairness as to make the result a denial of due process); Williams v. State, 113 Nev. 1008, 1018, 945 P.2d 438, 444 (1997), cert. denied, 525 U.S. 830 (1998); see also Darden v. Wainwright, 477 U.S. 168, 181 (1986) (in reviewing a prosecutor's comments, the relevant inquiry is whether the comments were so unfair that they deprived the defendant of due process).

¹⁰See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

¹¹Barron v. State, 105 Nev. 767, 777, 783 P.2d 444, 451 (1989).

his convictions were overturned on appeal. We conclude that the alleged errors committed do not warrant reversal. Therefore, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Steve L. Dobrescu, District Judge
David H. Neely III
Attorney General George Chanos/Carson City
Nye County District Attorney/Pahrump
Nye County District Attorney/Tonopah
Nye County Clerk