

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY SHEPARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45481

FILED

NOV 08 2006

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court dismissing appellant Gary Shepard's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

On June 15, 2001, the district court convicted Shepard, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced Shepard to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This court affirmed Shepard's conviction on direct appeal.¹ The remittitur issued on October 8, 2002.

On August 25, 2003, Shepard filed a post-conviction petition for a writ of habeas corpus in the district court, claiming that (1) trial counsel was ineffective for conceding Shepard's guilt and arguing for a conviction of voluntary manslaughter rather than murder; (2) the malice

¹Shepard v. State, Docket No. 38308 (Order of Affirmance, September 10, 2002).

instruction was unconstitutional; (3) trial counsel was ineffective for failing to call expert witnesses; and (4) trial counsel was ineffective for failing to request a self-defense instruction. The State filed a motion to dismiss Shepard's second, third, and fourth claims, but conceded an evidentiary hearing was required on Shepard's first claim. On February 17, 2005, the district court granted the State's motion and dismissed Shepard's second, third, and fourth claims. The district court held an evidentiary hearing on Shepard's first claim on May 13, 2005. On May 18, 2005, the district court dismissed Shepard's first claim. This appeal followed.

In his petition, Shepard claimed he received ineffective assistance of counsel. 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.² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³ A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.⁴ The district court's

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

³Strickland, 466 U.S. at 697.

⁴Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁵

First, Shepard argues that the district court erred in dismissing his claim that counsel was ineffective for conceding Shepard's guilt and arguing for a conviction of voluntary manslaughter rather than murder. At the evidentiary hearing, Shepard testified that counsel did not obtain his permission to concede guilt. On cross-examination, Shepard admitted that he never expressed dissatisfaction or conflict with counsel, even after counsel argued for a conviction of voluntary manslaughter in his opening argument. Counsel testified that he discussed the possible defenses with Shepard several times and that Shepard consented to conceding that he was guilty of voluntary manslaughter. Counsel's investigator testified that he was present during a number of discussions between Shepard and counsel about possible defenses and lesser included offenses, and while he did not recall a specific discussion about arguing for voluntary manslaughter, Shepard never expressed disagreement with counsel during the discussions of possible defenses and strategies. The district court's factual determination on this point was supported by substantial evidence and was not clearly wrong.⁶ Accordingly, we conclude the district court did not err in ruling counsel was not ineffective in this regard, and we affirm the dismissal of this claim.

⁵Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁶See id.

Second, Shepard argues the district court erred in dismissing his claim that the malice instruction given at trial unconstitutionally impinged upon the presumption of innocence and was impermissibly vague due to its archaic language. This claim was waived by Shepard's failure to bring it before the trial court or raise it on direct appeal, and Shepard failed to demonstrate good cause and prejudice sufficient to overcome this bar.⁷ Further, as a separate and independent ground for denying relief, the claim lacked merit. The instruction stated in relevant part, "Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." We have previously upheld such an instruction and concluded that it does not impinge upon the presumption of innocence or shift the burden of proof and is not impermissibly vague or archaic.⁸ We decline to revisit those conclusions in this case. Accordingly, we conclude the district court did not err in dismissing this claim.

Third, Shepard argues the district court erred in dismissing his claim that counsel was ineffective for failing to call expert witnesses. In his petition, Shepard claimed counsel should have called experts to testify regarding Shepard's wounds and their age, to rebut the State's expert's testimony regarding human bite marks on the victim, and to support a claim of self-defense. Shepard failed to identify these experts or

⁷See NRS 34.810(1)(b); NRS 34.810(3).

⁸See, e.g., Cordova v. State, 116 Nev. 664, 666-67, 6 P.3d 481, 483 (2000); Thomas v. State, 120 Nev. 37, 49-50, 83 P.3d 818, 827 (2004).

to state how they would have testified. A petitioner is not entitled to an evidentiary hearing on "bare" or "naked" claims for relief that are unsupported by any specific factual allegations.⁹ Accordingly, we conclude the district court did not err in dismissing this claim.

Fourth, Shepard argues the district court erred in dismissing his claim that counsel was ineffective for failing to request a self-defense instruction. As noted, Shepard's trial counsel testified below that Shepard consented to presenting a defense theory that conceded Shepard was guilty of voluntary manslaughter. The district court found counsel's testimony to be credible. A theory of self defense would have been inconsistent with the theory of voluntary manslaughter and with the weight of the evidence presented at trial. Thus, Shepard failed to demonstrate that requesting a self-defense instruction would have changed the outcome of his trial.

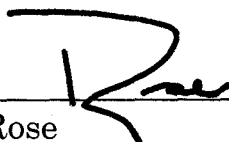
For example, trial testimony established that Shepard had no definite knife-wounds and only superficial injuries when treated by paramedics and hospital staff after the killing. Trial testimony also established that, over the course of at least fifteen minutes, the victim sustained sixty-one separate blunt and sharp force trauma wounds, including two life-threatening stab wounds to the right chest that pierced the lung, one life-threatening stab wound to the "right flank" that damaged the kidney and liver, a "significant" stab wound to the back of the head, at least one deep stab wound to the back of the neck and one to


⁹Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

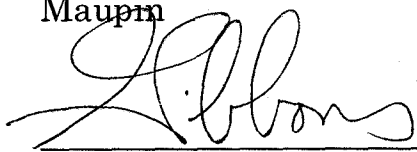
the right leg, stab wounds in or near both eyes, and twenty-one defensive wounds to the hands and arms. There was a human bite mark on the back of the victim's right shoulder, and bloody clumps of the victim's hair, which had been forcibly removed, were found in the house and the street, as were her clothing, jewelry, and a dental retainer. Only one weapon was found; it belonged to Shepard and was in Shepard's hand when police arrived. Shepard was combative with police and medical personnel and had to be sedated and restrained at the hospital. Accordingly, we conclude the district court did not err in dismissing this claim.

Having considered Shepard's contentions and concluded they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

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