IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS WAYNE CRUMP,
Appellant,
vs.
WARDEN, ELY STATE PRISON,
PETER DEMOSTHENES,
Respondent.

No. 46033

FILED

NOV 29 2006

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

ORDER OF AFFIRMANCE

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. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

Appellant Thomas Crump was convicted in 1984, pursuant to a jury verdict, of murder with the use of a deadly weapon and robbery with the use of a deadly weapon. He was sentenced to death. This court affirmed his conviction and sentence on direct appeal.[1]

In 1986, Crump filed a timely, first petition for post-conviction relief in the Eighth Judicial District Court. The district court appointed attorney Barbara Schubel as his post-conviction counsel as mandated by NRS 177.345.[2] Schubel filed a supplement to the petition and the district

[1]Crump v. State (Crump I), 102 Nev. 158, 716 P.2d 1387 (1986).

[2]See NRS 177.345 (1986 version) (providing for the mandatory appointment of counsel for indigent petitioners), amended by 1987 Nev. Stat., ch. 539, § 42, at 1230-31, and repealed by 1991 Nev. Stat., ch. 44 § 31, at 92; NRS 34.820(a) (now providing that the appointment of counsel

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court conducted an evidentiary hearing. Afterward, the district court dismissed the petition, and this court affirmed the dismissal on appeal.[3]

In 1989, Crump filed a second state post-conviction petition in the First Judicial District Court, seeking habeas relief. After numerous amendments and supplements, the district court denied the petition as procedurally barred. In 1997, this court held on appeal that because Crump's first post-conviction counsel, Schubel, was appointed pursuant to statutory mandate, Crump was entitled to effective assistance of that counsel.[4] This court remanded Crump's petition to the district court for an evidentiary hearing to resolve the merits of Crump's claims that Schubel was ineffective.[5]

The district court held an evidentiary hearing on April 20, 2004, where three experts who evaluated Crump's mental health testified and Schubel's deposition was entered into evidence. After further briefing,

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to assist in a first post-conviction habeas corpus petition is mandatory when the petitioner has been sentenced to death).

[3]Crump v. State (Crump II), Docket No. 18226 (Order Dismissing Appeal, August 31, 1988).

[4]Crump v. Warden (Crump III), 113 Nev. 293, 934 P.2d 247 (1997); see also Crump v. District Court (Crump IV), 114 Nev. 590, 958 P.2d 1200 (1998).

[5]Crump III, 113 Nev. 293, 934 P.2d 247.

the district court issued an order on August 10, 2005, denying Crump habeas relief. He appeals.

On remand, the issue before the district court was whether Crump could demonstrate that his post-conviction counsel was ineffective.[6] The district court determined that Crump failed to do so. We affirm.

A claim of ineffective assistance of counsel presents a mixed question of law and fact subject to independent review.[7] To establish that counsel was ineffective, a two-part test must be satisfied.[8] First, the petitioner must demonstrate that counsel's performance was deficient, falling below an objective standard of reasonableness.[9] Second, a petitioner must demonstrate prejudice.[10] Prejudice may be demonstrated by showing that, but for the errors of counsel, there is a reasonable probability that the result of the proceedings would have been different.[11]

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[6]Id. at 304-05, 934 P.2d at 254.

[7]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[8]Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

[9]Strickland, 466 U.S. at 687.

[10]Id.

[11]Id. at 694.

1. Failure of counsel to challenge the depravity-of-mind instruction

Crump contends that the district court improperly denied his claim that Schubel was ineffective for failing to raise a claim in his first post-conviction petition that his trial counsel, Richard Maurer, was ineffective for failing to challenge the depravity-of-mind aggravator instruction on the basis that it violated the United States Supreme Court's holding in Godfrey v. Georgia.[12]

Initially, we note that Maurer objected to the depravity-of-mind instruction during Crump's trial, arguing that "no facts were elicited through the guilt phase or the penalty phase that would show depravity of mind." Although Maurer did not raise his objection pursuant to Godfrey, the record belies any suggestion that Maurer entirely disregarded the issue.

This court's prior decision in Browning v. State[13] is on point, but overlooked by both parties. Like Crump's appeal, Browning involved an appeal from a district court's denial of a petition for post-conviction relief in a death penalty case.[14] Unlike prior cases where this court approved of the use of the depravity-of-mind instruction,[15] two factors

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[12]446 U.S. 420 (1980).

[13]120 Nev. 347, 91 P.3d 39 (2004).

[14]Id. at 353, 91 P.3d at 43-44.

[15]Id. at 363, 91 P.3d at 50-51 (citing Neuschafer v. State, 101 Nev. 331, 336-37, 705 P.2d 609, 612-13 (1985), and Rogers v. State, 101 Nev. 457, 467-68, 705 P.2d 664, 671-72 (1985)).

distinguished Browning's case from this court's previous decisions. First, Browning's jury was not also instructed on either torture or mutilation.[16] Second, there was no evidence that Browning mutilated or tortured the victim.[17] Thus, this court held in Browning that Browning's appellate counsel was objectively unreasonable in failing to argue that the depravity-of-mind instruction was unconstitutional pursuant to Godfrey.[18] After striking the depravity-of-mind aggravator and reweighing, this court concluded that Browning was prejudiced by this failure.[19] Thus, this court vacated his death sentence and remanded for a new penalty hearing.[20]

Like Browning, the jury in Crump's case was not instructed on torture and mutilation and there was no direct evidence that Crump tortured and mutilated Jameson. We conclude that the reasoning in Browning is applicable to Crump's appeal. But even if the performance of Crump's trial and post-conviction counsel fell below an objective standard of reasonableness in this matter, unlike the petitioner in Browning, Crump has failed to demonstrate prejudice. Striking the depravity-of-mind aggravator and reweighing, we conclude beyond a reasonable doubt

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[16]Id. at 363, 91 P.3d at 51.

[17]Id.

[18]Id. at 362-65, 91 P.3d at 50-52.

[19]Id.

[20]Id. at 372, 91 P.3d at 56.

that the jury would have still sentenced Crump to death. Several factors weigh into our conclusion.

During Crump's penalty hearing, the State presented evidence that Crump had previously been convicted of at least three prior first-degree murders, and he confessed to murdering and robbing Jodie Jameson.

This evidence supports the two remaining aggravators: Crump had previously been convicted of another murder or felony involving the use or threat of violence pursuant to NRS 200.033(2), and Crump committed the murder during the commission of or flight after committing a robbery pursuant to NRS 200.033(4). Crump presented no mitigating evidence, and the jury found no mitigating circumstances. Even without the depravity-of-mind aggravator, weighing the two remaining aggravators against the mitigating evidence, we conclude beyond a reasonable doubt that the jury would have still found Crump death eligible.

The State also presented compelling "other matter" evidence[21] showing Crump's long history of unprovoked, violent, and murderous deeds that preceded and anteceded the 1980 murder and robbery of Jameson. These witnesses presented testimony about the facts surrounding Crump's multiple prior convictions for first-degree murder, attempted murder, robbery, kidnapping, and numerous other offenses.

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[21]See NRS 175.552(3).

Crump confessed to detectives in 1983 during a videotaped interview, which was played for the jurors, that he had actually committed seven murders and seven attempted murders, as well as numerous other crimes. Crump even confessed in the interview to having participated in a prison uprising in New Mexico where a prison guard had been taken hostage and killed. And he warned during the interview, "If I was to get out of here today, I'd hurt somebody today."

Evidence was also presented concerning Crump's 1982 escape from a New Mexico prison and subsequent criminal acts, including one murder and one attempted murder. Officer Richard Campbell of the Albuquerque City Police Department testified that when Crump was captured after his 1982 prison escape, Crump told him that he had "a hit list" and planned to kill several other people, including three former police officers and a detective. Officer Campbell asked Crump, "[H]ow does it feel to kill someone?" Crump replied: "Well, how do you feel when you swat a fly?"

Given these considerations, as well as other damning evidence presented to the jury that we have carefully reviewed, we conclude beyond a reasonable doubt that absent the depravity-of-mind aggravator the jury would have still sentenced Crump to death. We conclude that Crump was not prejudiced by the performance of Maurer or Schubel in this respect.

2. Failure of counsel to present and investigate mitigating evidence

Crump contends that the district court improperly denied his claim that Schubel was ineffective for failing to allege in his first post-conviction petition that Maurer was ineffective for neglecting to

investigate and present several pieces of alleged mitigating evidence—concerning his mental health, childhood stories, and family concerns in particular—to the jury during his penalty hearing. We disagree. Crump's claim has two separate aspects: the failure of his counsel to present mitigating evidence and the failure of his counsel to investigate it. We will analyze both.

Schubel contended in Crump's first post-conviction petition that Maurer was ineffective for failing to present mitigating evidence during Crump's penalty hearing. The district court denied the claim, and this court affirmed on appeal.[22] This court's prior decision is the law of the case and bars reconsideration of this issue.[23] We conclude that the district court properly denied Crump relief on this aspect of his claim.

Crump's separate contention—that Schubel should have alleged that Maurer was ineffective for failing to investigate possible mitigating evidence—warrants further discussion. This court has recognized that the failure of trial counsel "to adequately investigate the availability of mitigating evidence . . . might undermine the defendant's decision not to present mitigating evidence and thereby support a claim of ineffective assistance."[24] But we conclude that such a circumstance is not present here.

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[22]Crump II, Docket No. 18226, at 5-7.

[23]See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

[24]Kirksey, 112 Nev. at 996, 923 P.2d at 1112.

The United States Supreme Court has stated that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."[25] Here, Crump directed Maurer not to present mitigating evidence during his penalty hearing. And during a 1987 post-conviction evidentiary hearing, Maurer explained that Crump "made it quite clear that he wouldn't tolerate any type of a defense that put in question his mental health." Maurer also explained that Crump refused to discuss his family background and forbade Maurer from contacting his family.

Given Crump's demand that Maurer not present any mitigating evidence, present any defense based on Crump's mental health, or contact his family, we conclude that any decision by Maurer not to investigate possible mitigating evidence regarding Crump's mental health was reasonable. Crump cannot now complain that Maurer was ineffective for complying with his directives. Thus, even if Schubel had later gathered additional mitigating evidence that Maurer could have presented,[26] we conclude that it still would not have shown Maurer was ineffective in this regard.

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[25]Strickland, 466 U.S. at 691.

[26]We recognize that much evidence regarding mental health evaluations performed on Crump in 1998 and 1999 was presented during his 2004 post-conviction evidentiary hearing. Also presented was information about his impoverished childhood. For the reasons explained above, however, we conclude that this evidence did not demonstrate that either Maurer or Schubel, respectively, were ineffective for failing to

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Because Crump has failed to demonstrate that Maurer was ineffective for failing to investigate possible mitigating evidence, we conclude further that he cannot demonstrate that he was prejudiced by any failure of Schubel to raise such a claim or present evidence that might have supported it, including evidence by the mental health experts who testified during the 2004 post-conviction evidentiary hearing. Thus, the district court properly denied Crump relief on this aspect of this claim as well.

3. Failure of counsel to give an opening and closing argument

Crump contends that the district court improperly denied his claim that Schubel was ineffective for failing to contend that Maurer was ineffective for not giving opening and closing arguments to the jury during the penalty hearing. He argues that the United States Supreme Court's decision in United States v. Cronic[27] supports his contention. We disagree.

The Supreme Court held in Cronic that the failure of counsel to "subject the prosecution's case to meaningful adversarial testing"

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investigate this evidence during his trial or his first post-conviction proceeding. Moreover, Crump does not contend that he was incompetent at the time of his trial, and the district court found that he presented no evidence that would support such a contention.

[27]466 U.S. 648 (1984).

results in a denial of the right to counsel guaranteed by the Sixth Amendment to the United States Constitution.[28]

Here, although Maurer waived opening argument at the penalty hearing, so did the State. The decision of Maurer to waive opening argument was tactical in nature and presumptively reasonable given that the State also waived opening argument.[29] Crump has failed to demonstrate that Maurer was ineffective in this regard and therefore that Schubel was ineffective for not raising this aspect of his claim concerning his opening argument.[30] Schubel did claim that Maurer was ineffective for failing to give a closing argument. However, this court affirmed the district court's dismissal of this claim,[31] and that prior ruling is the law of the case.[32] We conclude that Crump has failed to demonstrate that either Maurer or Schubel was ineffective regarding the closing argument.

Additionally, this court stated in its order affirming the district court's denial of his first post-conviction petition that "Maurer

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[28]Id. at 659.

[29]See Strickland, 466 U.S. at 689.

[30]See United States v. Rodriguez-Ramirez, 777 F.2d 454, 458 (9th Cir. 1985) ("The timing of an opening statement, and even the decision whether to make one at all, is ordinarily a mere matter of trial tactics and . . . will not constitute the incompetent basis for a claim of ineffective assistance of counsel.").

[31]Crump II, Docket No. 18226, at 6.

[32]See Hall, 91 Nev. at 315-16, 535 P.2d at 798-99.

conducted a vigorous defense and served his client diligently."[33] We reject Crump's assertion that Maurer's representation at trial did not subject the State's case against him to "meaningful adversarial testing," and we conclude that his reliance upon the Supreme Court's decision in Cronic is misplaced. The district court properly denied Crump relief on this basis.

4. Failure of counsel to challenge the jury instruction regarding the possibility of executive clemency and parole

Crump contends that the district court improperly denied his claim that Schubel was ineffective for failing to challenge jury instruction seven. Jury instruction seven provided:

> The sentence of life imprisonment without the possibility of parole does not exclude executive clemency in the form of a pardon.
>
> If the punishment is fixed at life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of twenty years has been served.

Crump asserts that the instruction misled the jury into believing that he could be eligible for parole if he was given a sentence less than death when in reality it is "inconceivable" that he would have ever been eligible for parole under NRS 213.1099. Crump maintains that he is entitled to relief on this basis. We disagree.

Because Crump does not contend that Schubel was ineffective for failing to raise this claim as one of ineffective assistance of trial counsel, but only as an independent claim, it is procedurally barred unless

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[33]Crump II, Docket No. 18226, at 2.

Crump can show that Schubel could have shown good cause and prejudice to raise the claim.[34] He has failed to do so.

Both sentences of instruction seven contain accurate statements of the law as it existed at the time of Crump's trial.[35] Moreover, this court has affirmed the use of an executive clemency instruction containing nearly identical language to the one given at Crump's trial and under similar circumstances.[36]

Further, contrary to Crump's contention, the first sentence of the instruction did not address parole—it only addressed the possibility of "executive clemency through the form of a pardon." With respect to the second sentence, this court held in a 1996 decision that it was error to instruct the jury regarding a defendant's possibility for parole when the defendant would not be eligible for parole under NRS 213.1099.[37] However, that decision was made under "unique circumstances"[38] that are not present here. That decision also has no retroactive application to

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[34]See NRS 34.810(1), (3).

[35]NRS 175.161(7); NRS 193.165; NRS 200.030(4)(b) (1983 version).

[36]See Rogers, 101 Nev. at 468-69 & n.4, 705 P.2d at 672 & n.4 (citing California v. Ramos, 463 U.S. 992 (1983)).

[37]See Geary v. State, 112 Nev. 1434, 1440-45, 930 P.2d 719, 723-26 (1996); see also McDaniel v. Gallego, 124 F.3d 1065 (9th Cir. 1997).

[38]Geary, 112 Nev. at 1440-41, 930 P.2d at 724.

Crump's case.[39] Moreover, whether the second sentence may have misled the jury about Crump's prospects for parole if given a sentence of life with the possibility of parole is immaterial because Crump received a death sentence even though the jury had the intermediate option of sentencing him to life without the possibility of parole.

Given the overwhelming evidence supporting the jury's decision to sentence Crump to death, we conclude that any error in the instruction would have been harmless beyond a reasonable doubt.[40] For these reasons, we conclude that Crump has failed to demonstrate a reasonable probability that had Schubel challenged instruction seven she could have shown good cause or prejudice to overcome the procedural bar to the claim. Thus, we conclude that the district court properly denied him relief in this instant petition.

5. Failing to object to the prosecutor's remarks

Crump contends that the district court improperly denied his claim that Schubel was ineffective for failing to contend that Maurer was ineffective for not objecting to numerous remarks by the prosecutor during his trial.

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[39]See Leonard v. State, 114 Nev. 639, 660, 958 P.2d 1220, 1235 (1998).

[40]See Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004).

Initially, we recognize that Schubel raised claims that Crump's counsel were ineffective for failing to challenge at least one of the various instances of prosecutorial misconduct that Crump now alleges. This court previously affirmed the district court's rejection of those claims. Nonetheless, we have carefully reviewed all of the instances of alleged misconduct now cited by Crump. Although we agree with Crump that several remarks by the prosecutor were improper, we conclude that because of the overwhelming evidence supporting his conviction and death sentence, Crump cannot demonstrate that he was prejudiced by any failure of Schubel to allege that Maurer was ineffective for not objecting to them. The district court properly denied Crump relief on this claim.

6. Claims incorporated by reference on appeal

Crump finally contends in his brief on appeal that he "incorporates herein by reference all other issues contained in the various supplements and addendums with the exception of any issue relating to Mr. Crump's waiver of his appearance at any post-conviction proceeding." Such generalized catchall provisions do not adequately raise or preserve claims for our review and are improper.[41]

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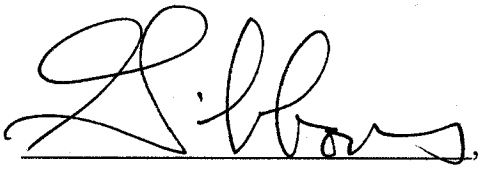
[41]See generally State v. Haberstroh, 119 Nev. 173, 186, 69 P.3d 676, 685 (2003); NRAP 28(e).

Having reviewed the claims Crump raises on appeal and concluded that they were properly denied by the district court, we ORDER the judgment of the district court AFFIRMED.



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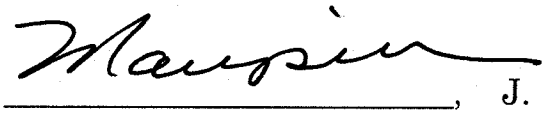

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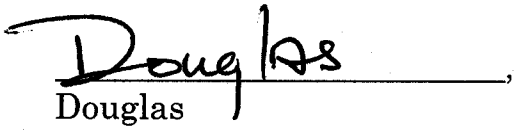

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cc: Hon. Michael R. Griffin, District Judge
State Public Defender/Carson City
Attorney General George Chanos/Carson City
Carson City Clerk