

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN K. RAMBEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46500

FILED

DEC 05 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Seventh Judicial District Court, Eureka County; Steve L. Dobrescu, Judge.

Appellant Steven Rambel was convicted by the district court, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon, third-degree arson, and concealing evidence in the commission of a felony in the death of his wife, Betty Rambel. He was sentenced to serve two consecutive terms of life in prison with the possibility of parole in 10 years for the murder, a consecutive term of 34 months with the possibility of parole in 12 months for the arson, and a concurrent term of 12 months for concealing evidence. This court affirmed his conviction on direct appeal, but remanded for the limited purpose of correcting the judgment of conviction to reflect credit for time Rambel had served.¹ An amended judgment of conviction was later filed by the district court.

¹Rambel v. State, Docket No. 34087 (Order Affirming and Remanding for Correction of Sentence, November 14, 2000).

Rambel filed in the district court on December 4, 2001, a proper person post-conviction petition for a writ of habeas corpus. He was later appointed counsel, and a supplemental petition was filed. An evidentiary hearing on Rambel's petition was held on March 18, 2005, where Rambel testified. Depositions from Rambel's former trial counsel, Jerome Polaha and Marc Picker, were also received by the district court. The district court issued an order on December 5, 2005, denying Rambel's petition for post-conviction relief. Rambel appeals,² raising three claims of ineffective assistance of trial counsel.

A claim of ineffective assistance of counsel presents a mixed question of law and fact subject to independent review.³ To establish that counsel's assistance was ineffective, a two-part test must be satisfied.⁴ First, the petitioner must show that the performance of his trial counsel was deficient, falling below an objective standard of reasonableness.⁵ Second, the petitioner must show prejudice.⁶ Prejudice is demonstrated by

²Rambel failed to provide this court with copies of his original habeas corpus petition and his supplemental petition filed below. See generally NRS 34.575(3); NRAP 30(b)(2). However, the contents of these documents are not in dispute, and this failure does not prevent our review.

³See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

⁴See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

⁵See Strickland, 466 U.S. at 687.

⁶Id.

showing that, but for the errors of counsel, there is a reasonable probability that the result of the proceedings would have been different.⁷

First, Rambel contends that the district court improperly denied his claim that his trial counsel were ineffective for failing to retain independent expert witnesses to assist in his defense. Prior to trial, Rambel's counsel filed a motion for funds for court appointed experts. The district court denied the motion, concluding that Rambel failed to demonstrate he was indigent. Rambel maintains that his counsel should have pursued the motion and retained three experts: a forensic anthropologist, a forensic pathologist, and a tire specialist.

Although funding for expert witnesses was an issue, both of Rambel's trial counsel stated in their depositions that they ultimately concluded that retaining experts was unnecessary for Rambel's defense. In making this decision, Rambel's counsel informally consulted with a pathologist, reviewed reports prepared by the State's experts, and hired a criminalist investigator. Given Rambel's theory of defense—that the State lacked sufficient evidence to prove he committed the crimes—his trial counsel believed that thoroughly cross-examining the State's experts was sufficient for his defense. The decision by Rambel's trial counsel to not retain a forensic anthropologist, a forensic pathologist, and a tire specialist was strategic in nature and not challengeable absent extraordinary circumstances not present here.⁸ Thus, we conclude that this claim was properly denied by the district court.

⁷Id. at 694.

⁸Id. at 689.

Second, Rambel contends that the district court improperly denied his claim that his trial counsel were ineffective for failing to object to remarks by the prosecutor during closing arguments. He claims that the prosecutor repeatedly stated the phrase "[n]ot one word" in reference to Rambel's failure to testify or otherwise explain evidence admitted by the State against him. The prosecutor's repeated use of the phrase, Rambel maintains, improperly shifted the burden of proof to him.

However, this court reviewed on direct appeal the prosecutor's use of the phrase "[n]ot one word" during closing arguments and concluded that "the prosecutor was referring not to appellant's failure to testify, but to defense counsel's failure in closing argument to rebut certain evidence discussed in the State's closing argument."⁹ Since the prosecutor's remarks did not constitute misconduct, we conclude that Rambel's trial counsel could not have been ineffective for failing to object to them. Moreover, the record reveals that trial counsel Polaha did object to the prosecutor's remarks during closing argument, asserting that they were "improper if he is talking about me in my argument." The district court responded, "Well, it's rebuttal." Polaha then stated: "If I didn't say anything about those actions I didn't feel they were worth rebutting." Based upon this exchange, the record also belies Rambel's claim that his trial counsel wholly failed to object to the prosecutor's remarks.¹⁰ Thus, we conclude that this claim was properly denied by the district court.

⁹Rambel, Docket No. 34087, at 3.

¹⁰See Hargrove v. State, 100 Nev. 498, 502-03, 656 P.2d 222, 225 (1984).

Third, Rambel contends that the district court improperly denied his claim that his counsel were ineffective for failing to call him as a witness to testify in his own defense during trial. However, Rambel's former trial counsel Picker testified during his deposition: "[W]e couldn't put Mr. Rambel on the stand because he was a terrible witness." According to Picker, neither he nor Polaha believed that Rambel would be credible. Polaha testified during his deposition that he consulted with Rambel about whether or not Rambel should testify. And Rambel testified during his post-conviction evidentiary hearing that he was canvassed by the district court about his decision not to testify.

The decision on whether a defendant testifies in his own defense at trial is one for the defendant to make.¹¹ Rambel's trial counsel's advice that Rambel not testify in his own defense was strategic in nature, and Rambel has failed to demonstrate that this advice amounted to ineffective assistance.¹² Thus, we conclude that this claim was properly denied by the district court.

Finally, Rambel contends that the district court improperly denied his claim that his conviction is unconstitutional because his trial and direct appeal were conducted before elected state judges. However, this allegation is framed as a direct appeal claim and is procedurally barred absent a showing of good cause and prejudice.¹³


¹¹Lara v. State, 120 Nev. 177, 182, 87 P.3d 528, 531 (2004) (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)).

¹²See Strickland, 466 U.S. at 689.

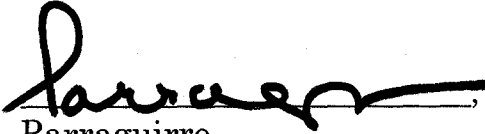
¹³See NRS 34.810(1), (3).

Rambel fails to allege good cause and prejudice to overcome the bar. Thus, we conclude that this claim, as well as the others Rambel raises on appeal, was properly denied by the district court. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Steve L. Dobrescu, District Judge
Lockie & Macfarlan, Ltd.
Attorney General George Chanos/Carson City
Eureka County District Attorney
Eureka County Clerk