

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN JOE PICOTTE,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondent.

No. 46849

FILED

NOV 15 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 denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On March 18, 1999, the district court convicted appellant Kevin Joe Picotte, pursuant to a jury verdict, of first-degree kidnapping with the use of a deadly weapon. The jury was unable to reach a verdict on an additional count of first-degree kidnapping or on a count of murder. The district court sentenced Picotte to serve two consecutive terms of life in prison without the possibility of parole. After a retrial, on September 27, 1999, the district court convicted Picotte of first-degree kidnapping with the use of a deadly weapon and first-degree murder with the use of a deadly weapon. Picotte was sentenced to serve four consecutive terms of life in prison without the possibility of parole. This court affirmed the judgments of conviction and sentences on direct appeal.¹

¹Picotte v. State, Docket Nos. 33979/35058 (Order of Affirmance, May 21, 2001).

Picotte filed a post-conviction petition for a writ of habeas corpus, which was supplemented by counsel. The district court held an evidentiary hearing on one claim pertaining to ineffective assistance of counsel but dismissed the remaining claims. On appeal from that order, this court affirmed in part and reversed in part and remanded for an evidentiary hearing on additional claims of ineffective assistance of trial and appellate counsel.² After conducting an evidentiary hearing, the district court denied the petition. This appeal followed.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's errors were so severe that they rendered the jury's verdict unreliable.³ "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."⁴

At the evidentiary hearing, the district court heard evidence pertaining to Picotte's claim that trial counsel was ineffective for failing to object to the admission of evidence of Picotte's first trial, in particular, to testimony from Picotte's codefendant Gregory Bennett. Bennett was also tried with Picotte in the first trial, but the jury was unable to reach verdicts on the charges against him. On direct examination of Bennett in

²Picotte v. State, Docket No. 41116 (Order Affirming in Part, Reversing in Part and Remanding, May 4, 2004).

³See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

their second trial, Bennett's counsel said that Picotte and Bennett had been previously tried for the charged crimes and that Bennett had been acquitted.

At the evidentiary hearing, Picotte's trial counsel testified that she did not specifically remember why she did not object, but that she may have concluded the information was actually helpful to Picotte because it may have led the jurors to believe that Picotte had also been previously acquitted, that the State's case must therefore be weak, and that they should acquit him again. She also testified that because the information may also have been prejudicial, she may have decided not to highlight it before the jury by objecting. During argument on pretrial motions, Picotte's trial counsel had explained to the court that she wanted the prior trial to be discussed because she would use testimony from that trial to impeach witnesses in the second trial. She also said she wanted the jurors to know that other people had already been convicted for the crimes so they would not be tempted to convict Picotte just so someone would be held responsible. Counsel's decisions not to object to the admission of evidence revealing a prior trial or to Bennett's testimony were tactical, and tactical decisions are "virtually unchallengeable absent extraordinary circumstances."⁵ Picotte fails to demonstrate that extraordinary circumstances are present in this case.

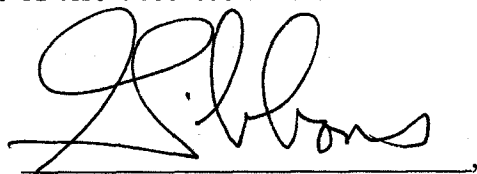
At the evidentiary hearing, Picotte's post-conviction counsel also questioned direct appeal counsel on his failure to argue that the

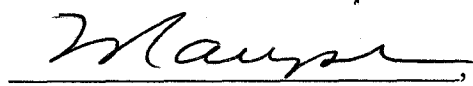
⁵See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)).

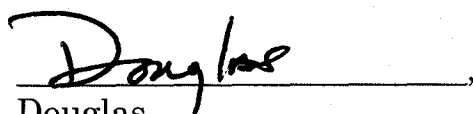
district court erred during the penalty hearing by advising the jurors, in response to their question, that Picotte had already been convicted of first-degree kidnapping and sentenced to life without the possibility of parole. Appellate counsel testified that trial counsel had failed to object to the district court answering the question, as well as to any evidence about Picotte's prior trial. He further testified that he did not think admission of the evidence amounted to plain error sufficient to overcome trial counsel's failure to object, and that such an argument would therefore not succeed.⁶ We agree with the district court that this was not unreasonable, nor has Picotte demonstrated any resulting prejudice.

Having reviewed Picotte's contentions and concluded they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Maupin


_____, J.
Douglas

⁶See NRS 178.602.

cc: Hon. Steven R. Kosach, District Judge
Mary Lou Wilson
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk