

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID LEE SIEWERT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46890

FILED

NOV 29 2006

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Fifth Judicial District Court, Mineral County; John P. Davis, Judge.

On May 28, 2002, the district court convicted appellant, pursuant to a jury verdict, of lewdness with a child under the age of fourteen. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after ten years. This court affirmed the judgment of conviction and sentence on direct appeal.¹ The remittitur issued on March 16, 2004.

On January 11, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed and moved to dismiss the petition. Appellant filed a reply

¹Siewert v. State, Docket No. 40019 (Order of Affirmance, February 18, 2004).

and opposition to the State's motion to dismiss. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On December 2, 2005, and December 8, 2005, the district court entered orders dismissing appellant's petition. This appeal followed.

In his petition, appellant claimed that his trial counsel was ineffective. 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

First, appellant claimed that his trial counsel was ineffective for failing to investigate and call two witnesses who would have discredited his wife's testimony. Appellant failed to support this claim with specific factual allegations.⁴ Specifically, appellant failed to identify

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.

⁴See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that a petitioner is not entitled to an evidentiary hearing on bare or naked claims for relief that are unsupported by specific factual allegations).

the witnesses trial counsel should have investigated and failed to describe the witnesses' intended testimony. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to answer appellant's calls and provide appellant with requested paperwork. Appellant failed to identify what paperwork he was seeking, and failed to demonstrate how receipt of such paperwork and additional conversation with his counsel would have altered the outcome of his trial. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective because his counsel allowed a biased juror to be seated on the jury. Specifically, appellant claimed that one of the jurors worked for child protective services and must have heard about his case at her office. Appellant failed to demonstrate that any of the jurors were biased, and therefore, failed to demonstrate that his counsel was ineffective. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to obtain psychological testimony relative to his mental status prior to trial and present such information to the jury. Specifically, appellant claimed that the doctor who conducted a psychosexual examination on him prior to sentencing concluded that appellant was not a pedophile. Appellant argued that his counsel should have had the

psychosexual examination conducted prior to trial and had the findings presented to the jury.

Appellant failed to demonstrate that his counsel was deficient. A psychosexual examination is not conducted until after a defendant has been convicted of a sexual offense, and must be made before the imposition of sentence.⁵ Further, appellant failed to demonstrate that presentation of the psychosexual examination findings would have resulted in a different outcome at trial. Although the psychosexual examination report stated the evaluator's opinion that appellant was not a pedophile, the report also stated the evaluator's opinion that appellant was a threat to the health, safety and morals of the community. Accordingly, we conclude the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to move for a competency evaluation for appellant. Appellant asserted that he had been a patient in a psychiatric hospital for eighteen months, and therefore his counsel should have challenged his competency to stand trial. Appellant failed to demonstrate that his counsel was deficient. At the arraignment, the district court specifically inquired into appellant's prior treatment for mental disorders. Counsel stated that the treatment was associated with troubles appellant experienced as a teenager and did not involve any adult violations. Counsel further stated that he did not currently have any concerns about possible problems

⁵See 1999 Nev. Stat., ch. 310, § 3, at 1285-86 (NRS 176.135).

concerning any prior mental disorders. Additionally, the record on appeal indicates that appellant was competent because appellant was able to consult with his counsel with a reasonable degree of rational understanding and he had a factual and rational understanding of the proceedings against him.⁶ Accordingly, we conclude the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to investigate or properly cross-examine appellant's wife. Specifically, appellant claimed that his counsel should have obtained copies of his wife's daily journal. Appellant further claimed that his counsel should have cross-examined his wife about journal entries indicating that she wanted to get rid of appellant, and about his wife's treatment for bi-polar disorder, her use of psychotropic medications, and her being delusional and suicidal. Appellant asserted that such investigation and cross-examination would have undermined the credibility of his wife's testimony.

Appellant failed to demonstrate that his counsel was deficient. The record indicates that appellant's counsel rigorously cross-examined appellant's wife. Further, appellant failed to demonstrate that additional investigation or cross-examination of appellant's wife would have altered the outcome of the trial. It was appellant's daughter, not his wife, who was the victim and accused appellant. Appellant's daughter testified at

⁶See Tanksley v. State, 113 Nev. 844, 847, 944 P.2d 240, 242 (1997).

trial as to the sexual acts and touching her father engaged in with her. Appellant failed to demonstrate that additional investigation or cross-examination of appellant's wife would have diminished the credibility of the victim's testimony. Accordingly, we conclude the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for failing to raise substantive issues in his motion for a new trial. Specifically, appellant appears to have argued that because the children's testimony at the hearing on the motion for a new trial was "tainted," his counsel should have argued that the children's testimony at the trial was also "tainted," rendering the verdict unreliable.

Appellant failed to demonstrate that his counsel was ineffective. The record indicates that there were some discrepancies between the statements the children gave at different times. Appellant's counsel pointed out the discrepancies at the hearing on the motion for a new trial. The district court determined that the children's testimony was more credible than the evidence presented in support of the motion for a new trial. Appellant failed to demonstrate that any additional argument regarding the credibility of the children's testimony would have altered the outcome of appellant's motion for a new trial. Accordingly, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for failing to file a motion to dismiss the charge against him after the preliminary hearing based on the victim's inconsistent statements. Appellant failed to demonstrate that his counsel was ineffective because

he failed to demonstrate that such a motion would have been successful. At the preliminary hearing, the victim testified that appellant performed cunnilingus upon her. This testimony was sufficient to establish probable cause to bind appellant over on the charge of sexual assault of a victim under the age of fourteen years.⁷ Accordingly, we conclude that the district court did not err in denying this claim.

In his petition, appellant also claimed that his appellate counsel was ineffective for failing to raise "all meritorious issues on appeal." Appellant failed to specifically identify any additional claims his appellate counsel should have raised on direct appeal.⁸ To the extent that appellant claimed that his appellate counsel should have raised claims of ineffective assistance of trial counsel on direct appeal, this claim lacks merit. An appellant may not raise claims of ineffective assistance of counsel on direct appeal unless there has been an evidentiary hearing on those claims.⁹ Because the district court had not held an evidentiary hearing on any ineffective assistance of trial counsel claims, appellate counsel could not have raised any such claims on direct appeal.

⁷See Sheriff v. Milton, 109 Nev. 412, 414, 851 P.2d 417, 418 (1993) (holding that probable cause supporting a criminal charge may be based on slight or marginal evidence and the State must only "present enough evidence to support a reasonable inference that the accused committed the offense").

⁸See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

⁹Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

Accordingly, we conclude that the district court did not err in denying this claim.

Appellant also claimed: (1) his rights were violated because he was not arraigned until twelve days after he was arrested; (2) his rights were violated because his preliminary hearing was held three months after his arraignment; (3) the court engaged in judicial misconduct by failing to take any action regarding the preliminary hearing and arraignment violations; (4) the court engaged in judicial misconduct by failing to grant his motion to discharge counsel; (5) the court engaged in judicial misconduct and the prosecution engaged in misconduct by failing to require a psychosexual examination prior to trial; (6) the court engaged in judicial misconduct by denying his motion for a new trial; and (7) the district court was willfully negligent for failing to address his preliminary hearing and arraignment violations and for failing to order a psychological examination. All of these claims could have been raised in a pre-trial petition for a writ of habeas corpus or on direct appeal. Appellant waived these claims by failing to raise these claims earlier and by failing to demonstrate both cause for the failure to raise these claims and actual prejudice.¹⁰ Accordingly, we conclude the district court did not err in denying these claims.

¹⁰See NRS 34.810(1)(b).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker J.
Becker

Hardesty J.
Hardesty

Parraguirre J.
Parraguirre

cc: Hon. John P. Davis, District Judge
David Lee Siewert
Attorney General George Chanos/Carson City
Mineral County District Attorney
Mineral County Clerk

¹¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).