

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN JAMES NASBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47130

FILED

JUN 18 2007

JANETTE M. BLOOM
CLERK OF THE SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

Appellant Brendan James Nasby was convicted, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and conspiracy to commit murder. The district court sentenced him to serve two consecutive terms of life in prison with the possibility of parole for murder with the use of a deadly weapon and a consecutive term of 48 to 120 months for conspiracy. This court affirmed the judgment of conviction and sentence on direct appeal.¹

¹Nasby v. State, Docket No. 35319 (Order of Affirmance, February 7, 2001).

Nasby filed a timely postconviction petition for a writ of habeas corpus. After conducting an evidentiary hearing, the district court denied the petition. This appeal followed.

Nasby argues that the district court erred in finding that his trial and appellate counsel were not 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 fell below an objective standard of reasonableness and that but for counsel's errors the result of the proceeding would have been different.² "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."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 factual findings regarding ineffective assistance of counsel are entitled to deference upon review.⁵

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

³Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

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

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

Nasby claimed that trial counsel, Joseph Sciscento and Frederick Santacroce, were ineffective for failing to call three witnesses whom Nasby claimed would have given him an alibi.⁶ At the evidentiary hearing, counsel testified that they were prepared to call these witnesses at trial, but before trial they were given a letter Nasby had written from jail that suggested Nasby was concocting his alibi. Counsel testified that they suspected the witnesses might give false testimony if called, and they could not ethically call them. Nasby also claimed counsel were ineffective for failing to re-interview these witnesses to investigate whether he in fact concocted the alibi. Nasby failed to demonstrate that counsel's re-interview of the alibi witnesses, whom Mr. Sciscento testified he had previously interviewed, would have negated counsel's concerns. We conclude the district court did not err in denying this claim.

Next, Nasby claimed that trial counsel were ineffective for not obtaining an earlier ruling on the admissibility of the letter referenced above. Nasby argued that failing to obtain a ruling allowed the State to reference the letter in opening argument and accuse Nasby of concocting an alibi. Nasby also claimed counsel were ineffective for failing to move to strike the State's reference to the letter after the district court ruled the letter inadmissible. Even assuming counsel were deficient in this regard,

⁶We note that an affidavit submitted by one of the witnesses, Colleen Warner, indicates that she was present on the first day of trial and told counsel she would not testify on Nasby's behalf.

Nasby failed to demonstrate prejudice. We concluded in his direct appeal that the State's reference to the letter was not unfairly prejudicial. We therefore conclude the district court did not err in denying this claim.

Nasby also claimed that trial counsel were ineffective for failing to call Porsche Nichols to contradict Brittny Adams' testimony. Adams testified that Nasby wanted her to kill Tanesha Banks, who apparently was blaming Nasby for the murder. Our review of the record, including a transcript of a police interview of Nichols, reveals that Nichols' statement, while not as thorough as Adams' testimony, did not contradict it. Nasby also claimed counsel should have located and called Madison Jones and Michelle McKinrion to testify that they saw Charles Von Lewis threaten the victim with a gun. Nasby's defense was that Von Lewis, not Nasby, was the killer. Nasby's assertion that these witnesses were available to trial counsel and would have so testified has no factual support in the record.⁷ We conclude the district court did not err in rejecting these claims.

Nasby also claimed that trial counsel Joseph Sciscento was ineffective for representing him despite an alleged conflict of interest. Specifically, Nasby argued that a conflict arose when Sciscento accepted a position with the Special Public Defender, who represented one of Nasby's

⁷See Sparks v. State, 96 Nev. 26, 29, 604 P.2d 802, 804 (1980) (noting that facts stated in a party's brief will not compensate for a deficiency in the record).

alleged coconspirators. Evidentiary hearing testimony established that Mr. Sciscento's agreement with the Special Public Defender allowed him to finish his existing cases. Mr. Sciscento testified that his files on this matter were kept in his private office, not at the Special Public Defender's office, that he performed his work on this case in his private office, and that he did not discuss this case with anyone at the Special Public Defender's office. The district court concluded that Mr. Sciscento did not have a conflict of interest. We conclude the district court did not err in rejecting this claim.

Nasby next claimed that trial counsel were ineffective for failing to show the jury a videotape of Charles Von Lewis threatening the victim with a gun. At the evidentiary hearing, counsel testified that the videotape also contained images damaging to Nasby, including Nasby waving a gun around and "making comments." The record makes clear that counsel made a tactical decision not to show the videotape in order to avoid potential prejudice to their client. Counsel's tactical decisions are "virtually unchallengeable absent extraordinary circumstances,"⁸ which are not present here. We conclude the district court did not err in rejecting this claim.

⁸Doleman 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)).

Nasby further claimed that trial counsel were ineffective for not advising the district court that the prosecutor had shown Colleen Warner, one of his alibi witnesses, a letter from Nasby to Crystal Sobrian, in which Nasby disparaged and threatened Warner. Nasby claimed the prosecutor showed Warner the letter in an effort to convince her not to testify on Nasby's behalf. Nasby's claim that the State's action was in violation of a district court order is not supported by the record; the record reveals that before trial the prosecutor suggested he might use the letter in his case in chief. The court said that if he did so, Nasby's comments about Warner should be redacted. The prosecutor said he wanted to present "that information to [Warner] and see how she feels about him at this point," to which the district court responded, "I don't know about that." There was no order from the district court that the information not be disclosed outside the jury's presence. We conclude the district court did not err in rejecting this claim.

Nasby next claimed that trial counsel were ineffective for failing to request an accomplice-testimony instruction and failing to object to the district court's failure to give such an instruction. He failed to support this claim with any citation to the record or relevant legal authority. "It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by

this court."⁹ Even if counsel were deficient in this regard, Nasby failed to demonstrate prejudice in light of the fact that two witnesses testified that Nasby confessed to killing the victim and the murder weapon was found in his bedroom. We conclude the district court did not err in rejecting this claim.

Nasby also claimed that trial counsel were ineffective for refusing to allow him to testify. He fails to cite anything in the record indicating he wanted to testify and counsel prevented him from doing so.¹⁰ We conclude the district court did not err in rejecting this claim.

Next, Nasby claimed that trial counsel were ineffective for failing to object to the prosecution's vouching for witnesses and misinforming the jury on the law of conspiracy, accomplice liability, and/or accessory. Nasby provided no citations to the record or legal authority to support these allegations. "It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."¹¹ We note that the jury was properly instructed on the definition of conspiracy. We conclude the district court did not err in rejecting this claim.

⁹Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

¹⁰See Sparks, 96 Nev. at 29, 604 P.2d at 804.

¹¹Maresca, 103 Nev. at 673, 748 P.2d at 6.

Nasby also made a general claim that appellate counsel was ineffective "for Failure to raise all the meritorious issues contained in this memorandum of law" (emphasis in original). Nasby failed to cite to the record or provide cogent argument or legal authority for how appellate counsel's performance was deficient and prejudiced him.¹²

Nasby also cited numerous instances of alleged prosecutorial misconduct and trial court error. The district court determined that these claims were waived by Nasby's failure to raise them on direct appeal.¹³ In an attempt to show good cause for his failure sufficient to overcome this procedural bar,¹⁴ Nasby claimed his trial and appellate counsel were ineffective. "To establish good cause to excuse a procedural default, a defendant must demonstrate that some impediment external to the defense prevented him from complying with the procedural rule that has been violated."¹⁵ Nasby failed to demonstrate that an impediment external to the defense caused his failure to raise these claims earlier. We therefore conclude the district court did not err in rejecting these claims. Nasby's claim that a fundamental miscarriage of justice will result if this

¹²Id.

¹³See NRS 34.810(1)(b).

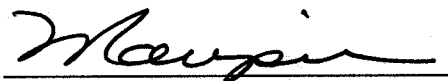
¹⁴See NRS 34.810(3).

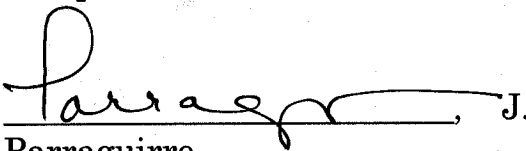
¹⁵Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

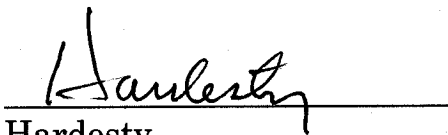
court does not hear these claims is unsupported by any cogent argument and is insufficient to raise a colorable showing that he is actually innocent.¹⁶

Having reviewed Nasby's contentions and concluded they are without merit or procedurally barred, we

ORDER the judgment of the district court AFFIRMED.

 C.J.
Maupin

 J.
Parraguirre

 J.
Hardesty

cc: Eighth Judicial District Court Dept. 18, District Judge
Patti, Sgro & Lewis
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹⁶Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).