

IN THE SUPREME COURT OF THE STATE OF NEVADA

BROOKEY LEE WEST,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

BROOKEY LEE WEST,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46874

FILED

NOV 07 2006

No. 47341

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

ORDER OF AFFIRMANCE

These are proper person appeals from orders of the district court denying appellant's post-conviction petition for a writ of habeas corpus and appellant's second amended post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On September 25, 2001, the district court convicted appellant, pursuant to a jury verdict, of first-degree murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison without the possibility of parole. This court affirmed the judgment of conviction and sentence on direct appeal.¹ The remittitur issued on November 18, 2003.

¹West v. State, 119 Nev. 410, 75 P.3d 808 (2003).

Docket No. 47341

On September 3, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant thereafter filed two amended petitions. The State opposed the petition and the amended petitions. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. The district court denied appellant's petition on August 22, 2005, after conducting an evidentiary hearing. This appeal followed.

In her petition, appellant raised multiple claims of ineffective assistance of counsel. 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 "[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."⁴ Factual findings of the district court that are supported by substantial

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.

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

evidence and are not clearly wrong are entitled to deference when reviewed on appeal.⁵

First, appellant claimed that her counsel was ineffective for failing to have the victim's medical records from California subpoenaed, reviewed, and explained to the jury at trial. Appellant asserted that this information would have bolstered her defense of death by natural causes by demonstrating that the victim was very ill prior to her death and contradicting the nurse practitioner's trial testimony.

Appellant failed to demonstrate that her counsel was ineffective. At the evidentiary hearing, counsel testified that although his team followed some leads and attempted to obtain the California medical records, they were unable to obtain the records prior to trial. The record indicates that appellant's recent medical records from Nevada were introduced and admitted as exhibits at trial. Counsel had a medical expert testify on appellant's behalf at trial, and that expert testified that his review of the Nevada medical records indicated that the victim was very ill and suffered from severe lung disease prior to her death. This testimony contradicted the nurse practitioner's testimony that was presented earlier in the trial. The defense's expert also testified that, although very rare, death was a possible side effect of one of the medications the victim was taking for her asthma. The district court found that appellant's counsel "rigorously cross-examined the State's witnesses regarding the victim's medical history," and the "introduction of the more recent medical records from Nevada significantly diminished the

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

relevance of any older medical records from California." The district court also found that appellant's counsel was not ineffective. We conclude that the district court's determination was supported by substantial evidence and was not clearly wrong. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed that her counsel was ineffective for failing to request a competency hearing for her. Appellant asserted that she was denied her right to testify because she was rendered incompetent by having her mental illness medication withheld from her.

Appellant failed to demonstrate that her counsel was ineffective. At the evidentiary hearing, counsel testified that he was aware that the jail was not giving appellant the medication that had been prescribed for her and appellant had informed him that she did not feel she could handle the stress of testifying. However, counsel also testified that "there was never a question about competency." According to counsel, appellant suffered from a nervous disorder that caused her to act odd, but in his opinion she was never incompetent to testify. Counsel also acknowledged that there was a concern regarding what appellant would be cross-examined about if she testified. Further, at the evidentiary hearing, appellant acknowledged that the district court admonished her of her right to testify and she never informed the court that she did not feel she could testify due to her lack of medication. We conclude that the district court did not err in denying this claim.

Third, appellant claimed that her counsel was ineffective for failing to subpoena court and state documents that would refute the State's accusations of witchcraft. Appellant asserted that at the sentencing hearing the State argued that she used witchcraft and threats

to intimidate the father of her child, Mr. Veramontes, to relinquish his parental rights. Appellant claimed that court and state documents from Arizona and California would have contradicted the State's argument and demonstrated that the State of Arizona terminated Mr. Veramontes' rights and she did not need to threaten him. Appellant argued that had the court been aware of this information the court would have sentenced her to life with the possibility of parole rather than life without the possibility of parole.

Appellant failed to demonstrate that her counsel was ineffective. The record on appeal indicates that the district court imposed a sentence of life without the possibility of parole due to the heinous nature of appellant's crime. Further, at the evidentiary hearing, the district court stated that appellant was "not sentenced by virtue of some mistreatment that [she] foisted upon Mr. Veramontes" and the judge "felt the evidence was overwhelming as to [her] guilt." We conclude that the district court did not err in denying the claim.

In the petition, appellant also claimed: (1) the prosecution engaged in misconduct by failing to provide notice to the defense that it intended to argue "all theories possible" relating to a religious or ritualistic death; (2) her appellate counsel was ineffective for failing to raise the preceding claim on direct appeal; and (3) trial counsel was ineffective for failing to request an evidentiary hearing to determine if the State had enough evidence to support a conviction for murder based on "manner or means unknown." Appellant voluntarily withdrew these claims at the evidentiary hearing. Accordingly, we conclude that the district court did not err in denying these claims.

Docket No. 46874

On December 9, 2005, appellant filed a second amended post-conviction petition for a writ of habeas corpus in the district court.⁶ The State moved to dismiss the petition on the grounds that it was procedurally barred. 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 April 26, 2006, the district court denied the petition. This appeal followed.

Appellant filed her petition more than two years after this court issued the remittitur from her direct appeal. Thus, appellant's petition was untimely filed.⁷ Moreover, appellant's petition was successive because she had previously filed a post-conviction petition for a writ of habeas corpus.⁸ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁹

⁶The record on appeal indicates that the petition filed on December 9, 2005, was a duplicate copy of the second amended post-conviction petition for a writ of habeas corpus that was filed with the district court on May 31, 2005. The district court denied the May 31, 2005, second amended petition on August 22, 2005. It appears that appellant resubmitted the petition while attempting to have the appeal in Docket No. 47341 transmitted to this court.

⁷See NRS 34.726(1).

⁸See NRS 34.810(1)(b)(2); NRS 34.810(2).

⁹See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

Appellant made no attempt to excuse her procedural defects. Accordingly, we conclude that the district court did not err in denying this petition.

Conclusion

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.¹⁰ Accordingly, we

ORDER the judgments of the district court AFFIRMED.¹¹

Becker _____, J.
Becker

Hardesty _____, J.
Hardesty

Parraguirre _____, J.
Parraguirre

¹⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹¹We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in these matters, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Donald M. Mosley, District Judge
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Brookey Lee West
Clark County Clerk