

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL J. MCINERNEY A/K/A
MICHAEL JOSEPH MCINERNEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47369

FILED

NOV 09 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

On April 8, 2004, appellant Michael J. McInerney was convicted, pursuant to a jury verdict, of one count each of robbery of a victim 65 years of age or older and attempted murder with the use of a deadly weapon. The district court sentenced McInerney to serve a prison term of 35 to 156 months for the robbery count and a consecutive prison term of 96 to 240 months for the attempted murder count, with an equal and consecutive prison term for the use of a deadly weapon. McInerney filed a direct appeal, and this court affirmed the judgment of conviction.¹

On April 15, 2005, McInerney filed a proper person post-conviction petition for a writ of habeas corpus. The State filed an opposition to the petition. The district court appointed counsel to represent McInerney, and counsel filed a supplement to the petition. The

¹McInerney v. State, Docket No. 43251 (Order of Affirmance, December 2, 2004).

State filed an opposition to the supplemental petition, and McInerney filed a reply to the opposition. After hearing argument from counsel, the district court found that counsel was ineffective for failing to challenge an erroneous jury instruction and overturned the conviction for attempted murder. The district court denied McInerney's remaining claims.

McInerney contends that the district court erred by denying his petition in part without conducting an evidentiary hearing. McInerney argues that defense counsel was ineffective under the standard set forth in Strickland v. Washington.² We disagree.

First, McInerney argues that trial counsel was ineffective for failing to investigate whether McInerney was competent at the time of trial. While acknowledging that he was previously deemed competent to stand trial, McInerney argues that subsequent changes in the dosages and types of his prescription medications "rendered the previous findings of competency unreliable and meaningless." The district court found that an investigation into McInerney's mental health status was not warranted because there was no reason to believe that he was incompetent at the time his trial commenced. The district court's finding is supported by substantial evidence.

There is no evidence in the record that would raise a reasonable doubt as to McInerney's competency at the time of trial.³

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

³Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (court must order a formal competency hearing if there is substantial evidence raising a reasonable doubt about the defendant's competency to stand trial); accord Miles v. Stainer, 108 F.3d 1109, 1112 (9th Cir. 1997).

Approximately two months before trial, McInerney had been deemed legally competent. Additionally, the district court noted that McInerney appeared fully cognizant during trial, and the record of the trial indicates that he was able to appropriately respond to the trial judge's questions. Finally, McInerney's written request to prison officials dated December 1, 2003, approximately one week before trial, and the medical notes from a prison doctor dated November 5, 2003, approximately one month before trial, indicate that McInerney was coherent and oriented as to person, time, and place.⁴ Accordingly, trial counsel was not deficient for failing to investigate McInerney's competency before commencement of the trial.

Second, McInerney argues that trial counsel was ineffective for failing to challenge the admission of the victim's preliminary hearing testimony at trial. Citing to Stevenson v. Superior Court,⁵ he argues that the victim's preliminary hearing testimony was inadmissible under the former testimony exception to the hearsay rule because McInerney was incompetent at the preliminary hearing. McInerney alleges that had he

⁴Melchor-Gloria, 99 Nev. at 179-180, 660 P.2d at 113 (discussing the standard for competency--whether the defendant is able to consult with counsel with a reasonable degree of rational understanding and has a rational and factual understanding of the proceedings) (quoting Dusky v. United States, 362 U.S. 402 (1960)).

⁵154 Cal. Rptr. 476 (Cal. Ct. App. 1979). Although Stevenson supports McInerney's position, we note that its holding has been called into to doubt by another California appellate court. See People v. Jones, 78 Cal. Rptr. 2d 265, 270 (Cal. Ct. App. 1998) ("In light of Mancusi [a Supreme Court case discussed infra]), we question the Stevenson court's conclusion that the [incompetent] defendant did not have to demonstrate precisely how his assistance would have improved the cross-examination").

been competent to assist counsel at the preliminary hearing he could have elicited information helpful to his defense such as the facts that: he did not threaten to kill the victim or take his wallet or jewelry; "the two men did not know each other; there was no altercation or other action between them that might explain his bizarre behavior; and McInerney's appearance and behavior during the episode were very strange." The district court did not err by rejecting McInerney's claim.

To determine whether former testimony is admissible at a subsequent proceeding under the evidence code and the Confrontation Clause, it is not enough to show that the defendant received ineffective assistance of counsel at the prior proceeding.⁶ Rather, the defendant must show that the former testimony was unreliable because the unavailable witness was not adequately cross-examined and the trier of fact had no "satisfactory basis for evaluating the truth of the prior statement."⁷

In this case, McInerney has failed to show that the cross-examination of the unavailable victim witness was inadequate. At the preliminary hearing, McInerney was represented by counsel and defense counsel cross-examined the victim. Although the cross-examination was limited, McInerney has failed to show that further cross-examination of the victim would have demonstrated that the victim's testimony was in some way unreliable or untruthful. Moreover, McInerney was not

⁶Mancusi v. Stubbs, 408 U.S. 204, 214-216 (1972) (holding that former testimony from the first trial was admissible even though defendant's conviction arising from that trial had been overturned due to ineffective assistance of counsel).

⁷Id. at 216 (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)).

prejudiced by any deficiency in the cross-examination of the victim because the information that he alleges should have been elicited was either undisputed by the State or elicited through other trial testimony. Accordingly, trial counsel was not ineffective for failing to challenge the admission of the victim's former testimony.

Third, McInerney argues that trial counsel was ineffective for failing to investigate McInerney's mental health history. Specifically, he argues that "[t]rial counsel could not make a reasonable tactical decision as to whether to pursue an insanity defense without having first conducted a reasonable investigation." The district court rejected McInerney's claim, finding that the defense theory of methamphetamine-induced psychosis was reasonable and substantiated by McInerney's medical records. We conclude the district court's finding is supported by substantial evidence.


In particular, we note that McInerney's medical records do not show that he has ever been formerly diagnosed with schizophrenia and instead indicated a long term history of depression and drug addiction. Moreover, McInerney did not demonstrate that, during the commission of the crime, he was "in a delusional state such that he [could not] know or understand the nature and capacity of his act, or his delusion [was] such that he [could not] appreciate the wrongfulness of his act."⁸ To the contrary, trial testimony indicated that McInerney lied to police officers about the source of the blood on his leg and changed clothes and showered

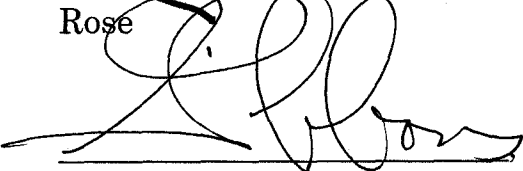
⁸See Finger v. State, 117 Nev. 548, 576, 27 P.3d 66, 84-85 (2001) (discussing the M'Naghten standard for legal insanity).


purportedly to destroy the blood evidence. Accordingly, trial counsel was not deficient for failing to present an insanity defense.

Having considered McInerney's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____, C. J.
Rose


_____, J.
Gibbons


_____, J.
Maupin

cc: Hon. Douglas W. Herndon, District Judge
JoNell Thomas
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk