IN THE SUPREME COURT OF THE STATE OF NEVADA

BARBARA A. PINKSTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47500

FILED

JUN 27 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
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; Lee A. Gates, Judge.

Appellant Barbara Pinkston was convicted, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. She was sentenced to serve two consecutive terms of life in prison with the possibility of parole after 10 years. This court dismissed the direct appeal of her conviction and sentence.[1] The remittitur issued on April 3, 2000.

Pinkston filed a postconviction petition for a writ of habeas corpus on July 7, 2003. The State filed a motion to dismiss the petition, arguing it was untimely pursuant to NRS 34.726(1). The district court denied the State's motion, conducted an evidentiary hearing, and denied Pinkston's petition. This appeal followed.

[1]Pinkston v. State, Docket No. 31508 (Order Dismissing Appeal, March 2, 2000).

07-14016

In its brief to this court, the State argues that the district court should not have heard the petition on the merits; rather, the State claims the district court should have dismissed the petition as untimely. This court will not disturb the district court's determination regarding the existence of good cause except for clear cases of abuse of discretion.[2] Under the circumstances of this case, we conclude the district court did not abuse its discretion.

Here, after this court issued the remittitur from her direct appeal, Pinkston successfully moved the district court to have the Public Defender removed as her counsel of record. She then sought appointment of new counsel to represent her in seeking postconviction relief. The district court granted her motion and appointed Gary Gowen to represent Pinkston on November 11, 2000.

Gowen and the State appeared before the district court on December 5, 2000. The district court set a briefing schedule, with the opening brief due in March 2001 and argument scheduled for June 2001. To comply with NRS 34.726(1), Pinkston's petition had to be filed on or before April 3, 2001. Thus, had Gowen complied with the briefing schedule established by the district court at the hearing of December 5, 2000, her petition would have been timely filed.

Between May 2001 and October 2002, however, Gowen sought, and the district court granted, five extensions of time within which to file

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[2]Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

and brief the petition. The State did not object to any of these requests. On February 26, 2003, the district court removed Gowen as counsel and appointed Lori Teicher to represent Pinkston. Two months later, in April 2003, Teicher moved to withdraw because she was accepting a new job. The district court appointed Susan Burke to represent Pinkston. Burke filed Pinkston's petition on July 7, 2003, more than two years after it was due.

Thus, the delay in filing the petition was attributable primarily to Gowen's repeated unopposed requests for extensions of time, which the district court granted. The delay was also due to subsequent counsel Teicher's motion to withdraw before filing the petition, a motion that the district court also granted.[3]

Under these circumstances, the district court did not abuse its discretion in finding that Pinkston established good cause for filing an untimely petition. On balance, the actions of Pinkston's former counsel, coupled with the rulings of the district court granting the unopposed requests for extensions of time, combine to constitute an impediment external to Pinkston's defense, providing good cause for the untimely filing of the petition.[4] As discussed below, however, we also conclude that the

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[3]See id.

[4]See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (holding that an impediment external to the defense sufficient to establish good cause for failure to file a timely petition "might be demonstrated by a

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district court did not err by ruling that Pinkston was not entitled to relief on the merits of her claims.

Pinkston contended she received ineffective assistance of trial and appellate counsel. To establish a claim of ineffective assistance of counsel, a petitioner must show two things:[5] first, that counsel's performance was deficient, falling below an objective standard of reasonableness,[6] and second, that counsel's performance prejudiced her. Prejudice by trial counsel requires petitioner to demonstrate a reasonable probability that the result of the proceedings would have been different but for counsel's errors.[7] Prejudice by appellate counsel requires petitioner to demonstrate that an omitted issue had a reasonable probability of success on appeal.[8]

Pinkston argues her trial counsel were ineffective for calling deputy district attorney Bill Berrett as a defense witness to testify. Specifically, Pinkston argues that Berrett's testimony was damaging

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. . . continued

showing . . . that some interference by officials made compliance [with the procedural rule] impracticable.") (internal quotations omitted).

[5]See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

[6]See Strickland, 466 U.S. at 687.

[7]Id. at 694.

[8]Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

because he did not believe prior allegations made by Pinkston that the victim, Greg Payne, had been stalking her, and Berrett testified that the investigation of the stalking ended with Payne's "murder." Berrett also testified that the State has a duty to dismiss cases where prosecution is not justified.

Even assuming counsel were deficient for calling Berrett, we are not convinced, in light of the substantial evidence supporting the conviction, that there was a reasonable probability of a different outcome had counsel not called Berrett. In particular, we note that the jury heard testimony that Pinkston stayed in touch with Payne after obtaining protective orders against him and that Pinkston shot Payne in the back as he was trying to leave and shot him in the head seconds later. Further, Pinkston admitted she knew what she was doing when she fired the second shot. The jury also heard testimony that Payne was not acting in a threatening manner before Pinkston shot him.

Pinkston also argues her trial counsel were ineffective for failing to make sure she was present at a critical stage of the trial, namely an in-chambers meeting between counsel, the State, the district court, and a State's witness, Mary Groesbeck, an attorney who represented Payne in some of his family court proceedings against Pinkston.

Pinkston, whose counsel told her she could not be present for the hearing, claims she had seen a news story the night before the in-chambers meeting that contradicted some of Groesbeck's testimony on direct examination. In her brief, Pinkston says she informed her counsel about the story, and counsel were therefore aware of the substance of the

potential issue. Pinkston failed to explain how her absence thwarted a just and fair hearing or how the outcome of her trial would have been different had she been present for the in-chambers meeting,[9] and the district court did not therefore err by rejecting this claim.

Pinkston further claims her trial counsel were ineffective for failing to fully object to the testimony of her ex-husband, Danny Whitaker, who testified that Pinkston was manipulative, violent, and a liar. Whitaker also testified about several specific instances when Pinkston lied to him and assaulted him during their brief marriage 16 years before the trial. Pinkston also claims counsel were ineffective for failing to put on the record the substance of a bench conference during Whitaker's testimony.

We agree with Pinkston that some of this testimony was improper. Because Pinkston had testified, Whitaker could properly state his opinion that she was untruthful.[10] However, he could not testify on direct examination as to specific acts of untruthfulness.[11] Pinkston did not, by claiming self-defense or otherwise, place the violence of her own

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[9]See U.S. v. Gagnon, 470 U.S. 522, 526 (1985) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934) (holding that a defendant has a due process right to be present at a proceeding if the defendant's absence would thwart a fair and just hearing).

[10]See NRS 50.085(1)(a).

[11]See NRS 50.085(3).

character at issue; Whitaker could not therefore testify about that character trait or specific instances of Pinkston being violent.[12]

However, we conclude that admission of the evidence was harmless error. There was substantial evidence supporting the first-degree murder conviction without Whitaker's testimony, as detailed above. There is no indication that including the substance of the conference in the record might have altered the outcome of the appeal. We further conclude that appellate counsel was not ineffective for failing to argue these claims on direct appeal.

Pinkston also claims trial counsel were ineffective for failing to fully object to the district court's ruling on an issue of attorney-client privilege. To rebut Groesbeck's testimony about the family court proceedings, Pinkston attempted to call her own family court attorney, Doug Clark, to correct alleged misrepresentations by Groesbeck about the proceedings. Pinkston was willing to waive the attorney-client privilege as to this attorney and this matter, but the district court ruled that if she waived the privilege as to one attorney and one matter, she would waive the privilege entirely as to Clark and her other family court attorneys. This ruling was erroneous, however, because waiver of attorney-client privilege by allowing the attorney to disclose confidential communications only waives the privilege as to the subject matter of those

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[12]See NRS 48.045.

communications.[13] Thus, even assuming a waiver as to one attorney could transfer to a previous attorney, a prospect of which we are not convinced under the circumstances present here, any statement by Clark about his communications with Pinkston would only have allowed the State to question other attorneys about their communications with Pinkston on that same subject matter.

However, Pinkston has failed to demonstrate that the outcome of her trial might have been different had Clark testified. We are also not convinced that appellate counsel was ineffective for failing to raise this claim.

Pinkston also argues that her appellate counsel was ineffective at oral argument for failing to adequately argue the propriety of the premeditation and deliberation instructions, for failing to seek rehearing after this court announced its decision regarding those instructions in Byford v. State[14] and for failing to "federalize" this claim in the direct appeal briefs. Byford was briefed and argued en banc while Pinkston's appeal was pending before this court; thus, the court was fully aware of the issues involved. As it was in Byford, whose case prompted us to offer new instructions but who did not himself get relief on the issue, the evidence supporting Pinkston's first-degree murder charge was

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[13]See Manley v. State, 115 Nev. 114, 120, 979 P.2d 703, 707 (1999) (internal quotations omitted).

[14]116 Nev. 215, 994 P.2d 700 (2000).

significant, as described above. Pinkston's trial counsel adequately argued that the evidence did not indicate premeditation and deliberation. Pinkston failed to show a reasonable probability that we might have decided this issue differently had counsel argued it the way she now claims he should have.

We are also not persuaded that Pinkston's appellate counsel was ineffective at oral argument for failing to correct a factual misrepresentation by the State. Pinkston argued in her direct appeal brief that the district court erred by allowing the jury to view videotape exhibits during deliberations that were not played at trial. Those videotapes were of four family court proceedings between Pinkston and the victim. This court queried on direct appeal whether the State or Pinkston had introduced the tapes; Pinkston's counsel said he did not know and deferred to the State. The State claimed that the tapes were introduced by the State in its rebuttal case.

Although the videotapes were in fact not introduced until the State's rebuttal, Payne's family court attorney Mary Groesbeck testified regarding the proceedings depicted on the videotape during the State's case in chief. Pinkston therefore argues that the State's representation at oral argument that the tapes were admitted in rebuttal was misleading because the substance of the tapes was actually admitted during the State's case in chief.

Although the State's assertion may have been misleading, Pinkston failed to show that this court might have resolved this issue differently had her appellate counsel corrected the State. Pinkston cited

no cogent authority for the proposition that the trial court erred by allowing the jury to view the tapes. Pinkston also argues that her appellate counsel was ineffective for failing to "federalize" this claim as a violation of her rights under the Confrontation Clause. She cites Turner v. Marshall[15] and U.S. v. Cunningham[16] for this proposition. In Turner, the Ninth Circuit Court of Appeals concluded that a readback of testimony in the jury room without the defendant or his counsel was improper where counsel and the defendant had not waived the opportunity to be present.[17] The Ninth Circuit remanded the matter for a hearing on whether the error was harmless.[18] Cunningham addressed the inadvertent admission of unredacted 911-call recordings.[19] Here, the admission of the tapes was not inadvertent, counsel objected to only one of the three tapes, and there is no indication that the tapes should have been redacted. Pinkston and her counsel arguably waived the opportunity to be present when the tapes were played by failing to request they be played before the State rested and by counsel's argument in closing about what the tapes would show if

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[15]63 F.3d 807 (9th Cir. 1995), overruled by Talbert v. Page, 183 F.3d 677 (9th Cir. 1999).

[16]145 F.3d 1385 (D.C. Cir. 1998).

[17]Turner, 63 F.3d at 814-15.

[18]Id. at 815.

[19]Cunningham, 145 F.3d at 1385.

the jury took the time to watch them. Even if there was error, Pinkston fails to explain how the jury's access to the tapes prejudiced her.

Pinkston claims her appellate counsel was ineffective for failing to "federalize" three claims, as follows.

First, Pinkston unsuccessfully argued on direct appeal that the district court erred by refusing to let her cross-examine Groesbeck on a pending bar investigation into Groesbeck's alleged failure to communicate with her clients while she was representing Payne. Pinkston now argues that appellate counsel should have raised this issue as a violation of her Sixth Amendment rights. The Sixth Amendment allows the trial court broad discretion to allow cross-examination on the issue of bias; the trial court may properly exclude testimony that is only marginally relevant to the issue of bias.[20] Improper restriction on the scope of such cross-examination is subject to harmless-error analysis.[21] Pinkston fails to explain how we may have resolved this issue differently had appellate counsel argued this claim under the Sixth Amendment.

Second, Pinkston unsuccessfully argued in her direct appeal that the district court erred by allowing the State to impeach her on rebuttal with testimony from Ann Rickey that Pinkston planned to flee the country before trial. On direct appeal, we concluded that Pinkston's plan was relevant as consciousness of guilt. Pinkston now argues that

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[20]Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

[21]Id. at 680.

appellate counsel should have argued that this testimony violated her rights to due process, the right to a fair trial, and the right to present a defense. However, Pinkston fails to explain how this court may have decided her direct appeal differently had counsel argued violations of due process, the right to a fair trial, and the right to present a defense. Under the only relevant case Pinkston cites, evidence admitted in violation of a state rule of evidence only violates due process when there are "no permissible inferences the jury may draw from the evidence" and the evidence is "'of such quality as necessarily prevents a fair trial.'"[22] Pinkston fails to articulate how this evidence prevented her from getting a fair trial.

Third, Pinkston unsuccessfully argued on direct appeal that the district court erred by failing to instruct the jury that malice was an element of first-degree murder.[23] Pinkston cites several cases for the general proposition that the jury must be instructed on all the elements of

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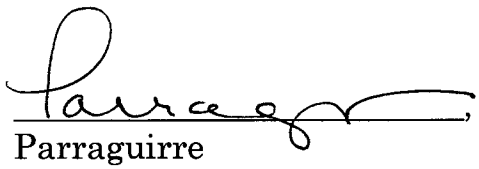
[22]Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991) (internal citation omitted).

[23]Instruction number seven told the jury that "Murder of the first degree is murder which is perpetrated by any kind of wilful (sic), deliberate and premeditated killing of another human being." Instruction number 10 informed the jury that second-degree murder was "all other kinds of murder which are not murder of the first degree. It is the unlawful killing of a human being with malice aforethought, but the evidence is insufficient to establish premeditation and deliberation."

a crime, but she fails to explain how appellate counsel's citation to these cases or to due process might have changed the outcome of her appeal.

Having concluded that the district court did not err by considering and denying Pinkston's petition on the merits, we

ORDER the judgment of the district court AFFIRMED.



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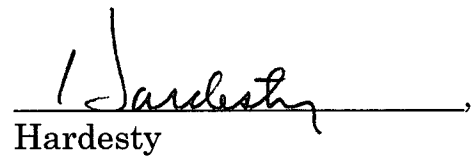

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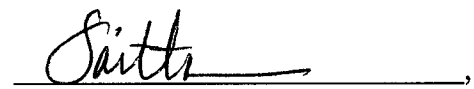

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cc: Hon. Lee A. Gates, District Judge
JoNell Thomas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk