

IN THE SUPREME COURT OF THE STATE OF NEVADA


SCOTT HENRY BEDARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47646

FILED

MAY 08 2008

ORDER OF AFFIRMANCE

TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant Scott Bedard's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On December 7, 2000, the district court convicted Bedard, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon, ten counts of burglary, one count of robbery with the use of a deadly weapon, and three counts of grand larceny. The district court sentenced Bedard to serve a prison term of life without the possibility of parole for the first-degree murder count with an equal and consecutive term for the deadly weapon enhancement; ten terms of 48 to 120 months for the burglary counts; a term of 72 to 180 months for the robbery count with an equal and consecutive term for the deadly weapon enhancement; one term of 48 to 120 months for one of the grand larceny counts; and two terms of 24 to 60 months for the remaining grand larceny counts. The district court ordered all terms to run consecutively. This

court affirmed Bedard's judgment of conviction on direct appeal.¹ The remittitur issued on July 9, 2002.

On May 22, 2003, Bedard filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. With the assistance of counsel, Bedard filed a supplemental petition. Pursuant to NRS 34.770, the district court declined to conduct an evidentiary hearing. On June 22, 2006, the district court denied the claims raised in the original petition. On January 17, 2008, the district court denied the claims contained in the supplemental petition. This appeal followed.

In his petition, Bedard claimed that trial counsel were ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsels' performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsels' 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, Bedard claimed that trial counsel were ineffective by moving for continuances without Bedard's consent, which resulted in a conflict of interest. Bedard also claimed that the district court's decision to continue the trial was the result of judicial bias. Bedard claimed that

¹Bedard v. State, 118 Nev. 410, 48 P.3d 46 (2002).

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.

counsel's conflict of interest, coupled with the judicial bias, resulted in the denial of his speedy trial rights.⁴ To determine whether a defendant was deprived of a speedy trial, it is necessary to consider the following factors: (1) the length of the delay; (2) the reason for delay; (3) the defendant's assertion of the right; and (4) prejudice to the defendant.⁵

Although the length of the delay is significant,⁶ other factors militate against a determination that Bedard was denied his right to a speedy trial. In particular, the delay does not appear to be the fault of the State or the district court. For example, significant delay resulted from the replacement of defense counsel following Bedard's numerous motions for alternative counsel and self-representation, and defense counsel requested continuances to obtain psychological evaluations of Bedard. Further, Bedard failed to demonstrate prejudice or lack of good cause for the delay of his trial. Bedard failed to demonstrate that his speedy trial rights were violated and failed to establish counsel were ineffective. Accordingly, we conclude the district court did not err in denying this claim.

Second, Bedard claimed that trial counsel were ineffective for failing to investigate and present witnesses. Specifically, Bedard claimed

⁴To the extent that Bedard raised this issue independently from his ineffective assistance of counsel claims, we conclude that it is waived; it should have been raised on direct appeal and Bedard did not demonstrate good cause for his failure to do so and actual prejudice. See NRS 34.810(1)(b).

⁵See Barker v. Wingo, 407 U.S. 514, 530 (1972).

⁶Bedard's trial commenced approximately three years after he was arraigned.

that, if his counsel had properly investigated, counsel would have discovered inconsistencies in the State's timeline and these inconsistencies would have created reasonable doubt that he committed the alleged crimes. However, Bedard failed to demonstrate that the alleged inconsistencies would have altered the outcome of the trial given the overwhelming evidence of guilt.⁷ Thus, the district court did not err in denying this claim.

Third, Bedard claimed that trial counsel were ineffective for failing to properly litigate his motion to suppress. This court previously held, in Bedard's direct appeal, that the underlying search was legal.⁸ Thus, Bedard failed to demonstrate that he was prejudiced by counsels' failure to "properly" litigate his motion to suppress. Accordingly, the district court did not err in denying this claim.

Fourth, Bedard claimed that trial counsel were ineffective for failing to properly cross-examine witnesses. Specifically, Bedard claimed that trial counsel should have further cross-examined witness Charles Williams regarding his statement to police officers and his past felony convictions because this information would have created reasonable doubt that Bedard committed the alleged crimes. Further, Bedard claimed that

⁷Bedard's fingerprints, footprints, and DNA were found at the scene of the crime. Further, Bedard made incriminating statements and possessed several items taken from the crime scene, including the murder weapon. Bedard attempted to hide these items in a friend's garage.

⁸Bedard, 118 Nev. at 415, n.10, 48 P.3d at 49 n.10. We note that Bedard is precluded from raising an ineffective assistance of counsel claim involving the period of time that he represented himself. Faretta v. California, 422 U.S. 806, 834 n.46 (1975).

trial counsel should have impeached Alex Merriam's testimony that Bedard told him that the victim had begged for his life. Bedard claimed that Elena Aresco would have testified that Merriam was coached by the prosecutor with respect to his grand jury testimony. Bedard failed to demonstrate that further cross-examination would have altered the outcome of the trial given the overwhelming evidence of guilt. Thus, the district court did not err in denying this claim.

Fifth, Bedard claimed that trial counsel were ineffective for failing to present a theory of defense. However, Bedard failed to identify a cogent defense theory that counsel could have presented that would have altered the outcome of the trial.⁹ Thus, the district court did not err in denying this claim.

Sixth, Bedard claimed that trial counsel were ineffective for failing to file a motion to dismiss based on the State's failure to collect and preserve exculpatory evidence. Specifically, Bedard claimed that the State failed to test all of the fingerprints found at the scene and conduct DNA testing on feces and blood found in the restroom. Bedard contended that the State's failure to collect and preserve this evidence should have resulted in dismissal of the charges. However, Bedard failed to demonstrate that DNA or fingerprint testing would have exonerated him or that the district court would have dismissed the case if a motion to dismiss had been filed.¹⁰ Thus, Bedard failed to demonstrate that counsel

⁹Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

¹⁰See Daniels v. State, 114 Nev. 261, 266-67, 956 P.2d 111, 115 (1998).

were ineffective for failing to move for a dismissal. Accordingly, the district court did not err in denying this claim.

Seventh, Bedard claimed that trial counsel were ineffective for failing to object to the reasonable doubt instruction. The reasonable doubt instruction given at trial was a correct statement of the law and is required to be given by NRS 175.211.¹¹ Thus, Bedard failed to demonstrate that counsel were deficient for failing to object. Accordingly, the district court did not err in denying this claim.

Eighth, Bedard claimed that trial counsel were ineffective for failing to object to the jury instruction on malice as vague and ambiguous and argue that the terms “abandoned and malignant heart” are archaic. Bedard failed to demonstrate that the jury instruction was erroneous¹² or that counsel were deficient for failing to object. Accordingly, the district court did not err in denying this claim.

Ninth, Bedard claimed that trial counsel were ineffective because they both conceded guilt during the closing argument. First, Bedard claimed that counsel conceded guilt by asking the jury to acquit him on the counts of robbery, burglary, and attempted burglary, but not the murder count. Bedard’s claim is not supported by the record. The closing argument was divided between counsel. The first defense counsel presented closing argument on the robbery, burglary, and attempted

¹¹NRS 175.211(2) states: “[n]o other definition of reasonable doubt [other than that defined in NRS 175.211(1)] may be given by the court to juries in criminal actions in this State.”

¹²See Leonard v. State, 117 Nev. 53, 79, 17 P.3d 397, 413 (2001) (rejecting the argument that implied malice is defined in impermissibly vague and archaic terms).

burglary counts, and asked the jury to acquit on those counts. The second defense counsel presented closing argument on the murder count and described how the evidence disputed the various degrees of murder. Thus, Bedard failed to demonstrate that defense counsel conceded guilt. Accordingly, the district court did not err in denying this claim.

Tenth, Bedard claimed that trial counsel were ineffective for failing to present an opening statement. Bedard failed to demonstrate that he was prejudiced. Overwhelming evidence supported Bedard's conviction, and Bedard failed to demonstrate that the outcome of the trial would have been different had counsel given an opening statement. Thus, the district court did not err in denying this claim.

Eleventh, Bedard claimed that trial counsel were ineffective for failing to present expert witnesses. Specifically, Bedard claimed that trial counsel should have retained experts in DNA analysis, fingerprint analysis, firearm ballistics, and liquid and fluid dynamics. Bedard failed to articulate with any specificity how the testimony of these experts would have resulted in a different outcome at trial.¹³ Accordingly, the district court did not err in denying this claim.

Twelfth, Bedard contended that trial counsel were ineffective for failing to file a motion for a change of venue. Bedard contended that pretrial publicity prejudiced his case because the victim came from a prominent Nevada family.

Bedard failed to demonstrate that there was inflammatory pretrial publicity such that a fair and impartial trial could not be had or that any members of the jury demonstrated unfair bias acquired by

¹³Hargrove, 100 Nev. 498, 686 P.2d 222.

pretrial publicity.¹⁴ Further, given the overwhelming evidence of guilt, Bedard failed to demonstrate that the result of the trial would have been different had a change of venue been granted. Thus, Bedard failed to demonstrate that counsel were ineffective for failing to request a change of venue. Accordingly, the district court did not err in denying this claim.

Thirteenth, Bedard claimed that trial counsel were ineffective for failing to present a theory of self-defense. Specifically, Bedard claimed that defense counsel should have presented evidence that the victim had a black belt in Karate. The record indicates that the evidence presented did not support a theory of self-defense. In particular, the victim was found in a kneeling position with his wallet open in his hands. Further, the record indicates that the evidence supported the fact that Bedard was the aggressor.¹⁵ Thus, Bedard failed to demonstrate that he was prejudiced because he failed to establish that the outcome would have been different had trial counsel presented a self-defense theory. Accordingly, the district court did not err in denying this claim.

Fourteenth, Bedard claimed that trial counsel were ineffective for failing to assert voluntary intoxication as a defense to the specific intent crimes, including first-degree murder. Bedard asserted that a witness's testimony indicating that he was "drunk" the morning after the murder supported a voluntary intoxication defense. "In order for a defendant to obtain an instruction on voluntary intoxication as negating specific intent, the evidence must show not only the defendant's

¹⁴See NRS 174.455.

¹⁵See NRS 200.200(2).

consumption of intoxicants, but also the intoxicating effect of the substances imbibed and the resultant effect on the mental state pertinent to the proceedings.”¹⁶ Bedard provided little support for this claim, as no other person encountering Bedard on the morning following the murder testified that he was intoxicated. Further, a surveillance videotape portraying images of Bedard shortly after the murder did not support Bedard’s contention that he was impaired. Thus, Bedard failed to demonstrate that he was prejudiced by trial counsels’ failure to present a theory of voluntary intoxication in that the outcome of the proceedings would have been different. Accordingly, the district court did not err in denying this claim.

Fifteenth, Bedard claimed that trial counsel were ineffective for failing to object to numerous instances of prosecutorial misconduct. Specifically, Bedard claimed that trial counsel should have objected to the prosecutor’s (1) impermissible use of redirect to inflame the jury, (2) reference to facts not in evidence, (3) description of Bedard as a “career criminal,” (4) argument vouching for Williams’ veracity, (5) argument improperly placing the prestige of the office of the prosecutor behind the case, (6) misstatement of the robbery elements, and (7) argument inciting the passions of the jury with testimony that the victim begged for his life.

“To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor’s statements so infected the proceedings with unfairness as to make the results a denial of due

¹⁶Nevius v. State, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985).

process.”¹⁷ “[W]here evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error.”¹⁸

Based on our review of the record, Bedard failed to demonstrate that trial counsel were ineffective for failing to object to prosecutorial misconduct. Even assuming that the prosecutor’s statements were improper, Bedard failed to demonstrate that the prosecutor’s statements infected the proceedings with unfairness given the overwhelming evidence of guilt.¹⁹ Accordingly, the district court did not err in denying these claims.

Sixteenth, Bedard claimed that trial counsel were ineffective for failing to make a proper record of witness Williams’ convictions. Specifically, although trial counsel questioned Williams regarding his past drug, robbery, and assault convictions, the district court ordered defense counsel not to further question Williams regarding his fraud conviction. Bedard contended that trial counsel should have made an offer of proof and requested that the district court state its reasons for sustaining the objection. Bedard failed to demonstrate that evidence of Williams’ fraud conviction would have further undermined Williams’ credibility to the extent that it would have altered the outcome of the trial. Thus, he failed

¹⁷Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004) (citing Darden v. Wainwright, 477 U.S. 168, 181 (1986)).

¹⁸King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (citing Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 64 (1997)).

¹⁹King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (“where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error”).

to demonstrate that he was prejudiced. Accordingly, the district court did not err in denying this claim.

Bedard additionally claimed that appellate counsel was ineffective. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.²⁰ Appellate counsel is not required to raise every non-frivolous issue on appeal.²¹ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.²²

Bedard specifically claimed that his appellate counsel was ineffective for failing to argue that his speedy trial rights were violated, that the prosecutor committed misconduct, and that the jury was incorrectly instructed on reasonable doubt and malice. For the reasons discussed above, Bedard failed to demonstrate that these issues had a reasonable probability of success on appeal. Therefore, he failed to demonstrate that appellate counsel was ineffective in this regard. Accordingly, the district court did not err in denying these claims.

Bedard further contended that appellate counsel was ineffective for failing to argue that the district court erred by not

²⁰Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996) (citing Strickland, 466 U.S. 668).

²¹Jones v. Barnes, 463 U.S. 745, 751 (1983).

²²Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

appointing alternate counsel to represent Bedard on his motion to dismiss counsel.

The right to choose one's own counsel is not absolute, and a defendant is not entitled to reject his court-appointed counsel and request alternate counsel at public expense without demonstrating adequate cause.²³ The district court retains the discretion to determine "whether friction between counsel and client justifies appointment of new counsel," and that decision will not be reversed absent an abuse of discretion.²⁴ Bedard failed to demonstrate that the district court abused its discretion in finding that there was not adequate cause for appointing new counsel, and therefore failed to demonstrate that this issue had a reasonable likelihood of success on appeal. Bedard failed to demonstrate appellate counsel was ineffective. Accordingly, the district court did not err in denying this claim.

Finally, Bedard contended that an accumulation of errors resulting from ineffective assistance of trial and appellate counsel deprived him of a fair trial and due process of law. "The cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."²⁵ However, none of Bedard's claims have merit. Therefore, we conclude that the district court did not err in denying this claim.


²³Thomas v. State, 94 Nev. 605, 607, 584 P.2d 674, 676 (1978).


²⁴Id. at 607-08, 584 P.2d at 676.

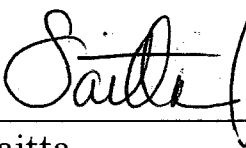
²⁵Evans v. State, 117 Nev. 609, 647, 28 P.3d 498, 524 (2001).

Having reviewed the record on appeal and for the reasons set forth above, we conclude that Bedard is not entitled to relief and that briefing and oral argument are unwarranted.²⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²⁷


_____, J.
Maupin


_____, J.
Cherry


_____, J.
Saitta

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

²⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²⁷We have reviewed all documents that Bedard has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Bedard 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.