

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENSHAWN JAMES MAXEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48461

FILED

SEP 25 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Kenshawn Maxey's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. Maxey's convictions stem from an armed robbery of the O'Aces Bar and Grill in Las Vegas in which Maxey shot and killed the bartender, Salvatore Zendano, Jr., as well as his fellow robber, Lawshawn Levi.

Maxey was convicted, pursuant to a jury verdict, of burglary while in possession of a firearm, conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, first-degree murder with the use of a deadly weapon, second-degree murder with the use of a deadly weapon, second-degree kidnapping with the use of a deadly weapon, and battery with use of a deadly weapon. After a sentencing hearing, Maxey was sentenced to a term of life without the possibility of parole for first-degree murder, two terms of life with the possibility of parole after ten years for second-degree murder with the use of a deadly weapon, and nine definite terms in prison for the remaining offenses. The district court ordered all the sentences to run consecutively. This court affirmed Maxey's conviction on appeal, but remanded for the correction of errors in

his sentence.¹ Pursuant to the remand, the district court modified Maxey's sentence on October 22, 2002, vacating one term of 40 to 120 months and one term of 16 to 72 months and adding a consecutive term of life without the possibility of parole for the deadly weapon enhancement related to first-degree murder.

Maxey filed a timely petition for a writ of habeas corpus. After several years and a number of hearings, the district court denied the petition. This appeal followed.

Ineffective assistance of counsel

In this appeal, Maxey raises several claims of ineffective assistance of counsel.² 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 counsel's deficient performance prejudiced the defense.³ To establish prejudice, a defendant must show that but for

¹Maxey v. State, Docket No. 36253 (Order Affirming in Part, Reversing in Part, and Remanding, September 9, 2002).

²Maxey argues that his constitutional rights were violated by various errors at trial, including (1) the State violated its duty to protect its ward and sought the death penalty against him, (2) the jury was not adequately instructed on the elements of first degree murder, (3) the jury was given an erroneous burglary instruction, and (4) the trial court failed to ensure that a record was made of all bench conferences. These claims were appropriate for direct appeal, and Maxey did not demonstrate good cause for his failure to raise them earlier or prejudice. NRS 34.810(1)(b). In addition, Maxey raised claims in the district court that were not raised on appeal. We conclude that Maxey abandoned these claims, and we do not consider them here.

³Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

counsel's errors, there is a reasonable probability that the result of the proceeding would have been different.⁴ The court may dispose of a claim if the petitioner makes an insufficient showing on either prong.⁵

Maxey first claims that his trial counsel was ineffective for failing to argue that because he was a ward of the State at the time of trial, the State violated its duty to protect him and created a conflict of interest when it sought the death penalty. Maxey was not sentenced to death, and his claim is therefore moot. However, he argues that despite the fact that he was not sentenced to death, he is entitled to relief because allowing the State to seek the death penalty resulted in a "death qualified" jury panel that was not impartial, but was more prone to conviction and to imposing harsher sentences. We have previously held that a "death qualified" jury meets constitutional standards.⁶ In addition, the United States Supreme Court has considered such arguments and concluded that such a view of jury impartiality is "is both illogical and hopelessly impractical."⁷ We conclude that the district court did not err in summarily denying Maxey's claim.⁸

⁴Id. at 694.

⁵Id. at 697.

⁶Leonard v. State, 114 Nev. 1196, 1205, 969 P.2d 288, 294 (1998).

⁷Lockhart v. McCree, 476 U.S. 162, 178 (1986).

⁸In addition, following Maxey's trial and appeal and the filing of his petition, the United States Supreme Court determined that juveniles are ineligible for the death penalty. Roper v. Simmons, 543 U.S. 551 (2005). Accordingly, under the current state of the law, a person in Maxey's
continued on next page . . .

Second, Maxey argues that his trial counsel was ineffective for failing to cite to federal authority in a motion to set aside the verdict and thus inadequately preserved the issue for federal review. Maxey failed to demonstrate that trial counsel's performance was deficient. Maxey's motion was based on the fact that the district court gave the Kazalyn⁹ instruction on deliberation and premeditation. On direct appeal, we affirmed Maxey's conviction and held that the use of the Kazalyn instruction did not provide grounds for relief.¹⁰ Maxey has failed to demonstrate that the motion to set aside the verdict would have been granted by the district court had his trial counsel cited to federal authority or that he would have received relief upon federal review. Accordingly, we conclude that no relief was warranted and the district court did not err in summarily denying Maxey's claim.

Third, Maxey argues that his trial counsel was ineffective for failing to object to jury instruction 12. Instruction 12 was intended to inform the jury that a person can be convicted both for a burglary and for any subsequent felonies committed after the entry that constituted the burglary. The instruction read:

... continued

position would not be eligible for the death penalty, and this issue is unlikely to arise in the future.

⁹Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), receded from by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

¹⁰Maxey v. State, Docket No. 36253 (Order Affirming in Part, Reversing in Part, and Remanding, September 9, 2002).

You are instructed that the offense of Burglary is complete if you find that the defendant entered a building with the intent to commit a felony therein. If you find that the defendant committed a felony subsequent to entering the building as stated above you may find that the defendant has committed two separate offenses and convict on both the Burglary and the Murder.

Maxey contends that because the instruction included the word “murder,” it was erroneous and confusing. Maxey has failed to demonstrate any reasonable probability that had counsel raised the issue at trial, the district court would have altered the instruction. Here, the evidence was overwhelming that Maxey committed a number of crimes, including two murders, after entering the O’Aces Bar and Grill. Accordingly, while it would have been preferable to use the term “subsequent felony” rather than the word “murder,” under the facts of this case the instruction was, as a matter of law, correct.

Further, we are not persuaded that the instruction led the jury to convict Maxey of murder without finding all of the elements of that crime beyond a reasonable doubt. The jury was clearly instructed on the elements of murder and the State’s burden of proof. Furthermore, we noted in this court’s order resolving Maxey’s direct appeal that there was overwhelming evidence of Maxey’s guilt. Therefore, we conclude that any error in giving instruction 12 was harmless.¹¹ Because there is no reasonable probability that the result of the proceeding would have been different had counsel raised this issue, the district court did not err in summarily denying Maxey’s claim.

¹¹Nay v. State, 123 Nev. ___, ___, 167 P.3d 430, 435 (2007).

Finally, Maxey asserts that the district court's failure to record all bench conferences violated SCR 250(5)(a)¹² and that his trial counsel was ineffective for failing to raise the issue. A capital defendant does not have an absolute right to have trial proceedings recorded.¹³ Further, "[t]he mere failure to make a record of a portion of the proceedings . . . is not grounds for reversal."¹⁴ Rather, a defendant "must show that the subject matter of the omitted portions of the record was so significant that this court cannot meaningfully review his claims of error."¹⁵

The record reveals that there were unrecorded bench conferences, but several of them were later placed on the record. Maxey made no specific factual allegations regarding the content of the remaining conferences, and he failed to adequately explain how he was prejudiced or how failure to record these conferences precluded adequate

¹²SCR 250(5)(a) reads in part: "[t]he court shall ensure that all proceedings in a capital case are reported and transcribed, but with the consent of each party's counsel the court may conduct proceedings outside the presence of the jury or the court reporter. If any objection is made or any issue is resolved in an unreported proceeding, the court shall ensure that the objection and resolution are made part of the record at the next reported proceeding."

¹³Archanian v. State, 122 Nev. 1019, 1033, 145 P.3d 1008, 1018-19 (2006), cert. denied, ___ U.S. ___, 127 S. Ct. 3005 (2007).

¹⁴Id. at 1033, 145 P.3d at 1019 (quoting Daniel v. State, 119 Nev. 498, 508, 78 P.3d 890, 897 (2003)) (alteration in original).

¹⁵Id.

appellate review. Therefore, we conclude that the district court did not err in summarily denying this claim.

Ineffective assistance of appellate counsel

Maxey also raises claims that his appellate counsel was ineffective. Such claims are reviewed under the test set forth in Strickland v. Washington.¹⁶ “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.”¹⁷

First, Maxey claims that appellate counsel was ineffective for failing to raise the issue that the State breached its duty in seeking the death penalty against him because he was a ward of the State. Maxey failed to demonstrate that appellate counsel’s performance was deficient. Maxey was not sentenced to death and therefore the issue was moot. Accordingly, there was no reasonable probability of success on appeal. We conclude that the district court did not err in summarily denying this claim.

Second, Maxey contends that appellate counsel was ineffective for failing to “federalize” his claim on direct appeal that his rights were violated when the district court gave the Kazalyn¹⁸ instruction. Maxey failed to demonstrate that appellate counsel’s performance was deficient. He failed to provide sufficient specific factual allegations demonstrating that the results of his direct appeal might have been different if counsel

¹⁶Lara v. State, 120 Nev. 177, 183-84, 87 P.3d 528, 532 (2004).

¹⁷Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

¹⁸Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

had “federalized” the issues. We decline to opine as to what claims the federal courts may or may not review. Accordingly, the district court did not err in summarily denying this claim.

Next, Maxey argues that appellate counsel was ineffective for failing to challenge jury instruction 12, arguing that it allowed him to be convicted of murder without the jury finding each element of that crime beyond a reasonable doubt. However, as explained above, we conclude that even if appellate counsel had raised the matter on appeal, a different result was not reasonably probable. Accordingly, we conclude that the district court did not err in summarily denying this claim.

Maxey further contends that his appellate counsel was ineffective for failing to raise the issue of the district court’s failure to record all bench conferences on direct appeal. As explained above, we conclude that even if appellate counsel had raised the issue on direct appeal, a different result was not reasonably probable. Accordingly, we conclude that the district court did not err in summarily denying this claim.

Other claims of error

In addition to his claims of ineffective assistance of counsel, Maxey claims that he was denied due process when the district court failed to hold an evidentiary hearing regarding each of the issues raised in his petition. “[A]n evidentiary hearing is required in regard to any claims that are supported by specific factual allegations unrepelled by the record and that would warrant relief if true.”¹⁹ However, an evidentiary hearing

¹⁹Byford v. State, 123 Nev. 67, 70, 156 P.3d 691, 693 (2007).

is not required when the factual allegations are belied by the record or when there is no factual dispute and the petitioner has raised a purely legal issue.²⁰ We conclude that Maxey failed to provide sufficient factual allegations for any of the claims discussed above that entitled him to an evidentiary hearing. Therefore, we conclude that the district court did not err in this regard.

Maxey further argues that he was denied due process because the district court did not allow full argument and the district court's order failed to make specific findings regarding each of his claims. Accordingly, Maxey contends, the district court's order is not entitled to deference. "Any order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court."²¹

Maxey relies on our decision in Byford v. State, in which we vacated a district court order denying a petition for a writ of habeas corpus because, following remand from this court for a hearing, the order was entered by the district court without a hearing, was drafted by the State without any direction from the district court, and the petitioner was not permitted an opportunity to review the proposed order submitted by the State.²² Maxey contends that he received similar treatment because he was denied a hearing, the district court's order was defective and failed to

²⁰See Johnson v. State, 117 Nev. 153, 161, 17 P.3d 1008, 1013 (2001).

²¹NRS 34.830(1).

²²123 Nev. 67, 70-71, 156 P.3d 691, 692-93 (2007).

make specific reference to each of the claims in his petition, and because he was not given a copy of the final draft of the order before it was submitted by the State and filed by the district court.

We conclude that Maxey's claim lacks merit. Due to a number of discovery issues, the parties had numerous hearings before the district court, including an evidentiary hearing on September 14, 2006, related to one of the issues in the petition. At that hearing, Maxey was granted the opportunity to argue the remaining issues in his petition. Maxey stated his intention to "primarily rely on the briefs," but did present argument on several issues. After hearing argument, the district court stated that the petition was denied in its entirety and directed the State to prepare the order.

Maxey was provided with a copy of the prepared order prior to filing. However, he complains that he was presented with a draft version and did not receive a final version before it was filed. Maxey does not state in what way the draft that he received differed from the version that was ultimately filed.²³ The order entered by the district court included 13 findings of fact and 18 conclusions of law, restated the appropriate standard under Strickland²⁴ for finding ineffective assistance of counsel, and held that Maxey's counsel was not ineffective. To the extent that the district court's order does not specifically reference Maxey's claims of ineffective assistance of appellate counsel, he fails to explain what


²³Neither party submitted a copy of the draft version of the order in the documentation before this court, and thus we are unable to determine what differences, if any, there are between the two documents.


²⁴Strickland v. Washington, 466 U.S. 668 (1984).


additional findings of fact were necessary to resolve these claims, which involve primarily matters of law. Other claims raised in the petition were determined to be procedurally barred because they were not raised on direct appeal. We conclude that Maxey has failed to demonstrate that he was prejudiced by the manner in which the district court considered and denied his petition.

Having considered all of Maxey's claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.


Cherry, J.


Maupin, J.


Saitta, J.

cc: Hon. Michelle Leavitt, District Judge
Susan D. Burke
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk