

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID MICHAEL STEINHAUER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48799

FILED

MAR 06 2008

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

ORDER OF AFFIRMANCE AND REMANDING FOR NEW
SENTENCING HEARING

This is an appeal from a district court order dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Appellant David Steinhauer was convicted, pursuant to a jury verdict, of first-degree kidnapping and sexual assault. The district court adjudicated Steinhauer as a habitual felon pursuant to NRS 207.012 and sentenced him to serve a term of life in prison without the possibility of parole. This court affirmed the judgment of conviction and sentence on direct appeal.¹ The remittitur issued on July 1, 2003.

Steinhauer filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. Subsequently, counsel filed a supplemental petition, and the State filed an answer. The

¹Steinhauer v. State, Docket No. 40024 (Order of Affirmance, June 5, 2003).

district court dismissed the petition without conducting an evidentiary hearing. This appeal followed.

The sole issue raised on appeal is whether the district court erred by dismissing Steinhauer's claims without first conducting an evidentiary hearing. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief.²

In his petition, Steinhauer sought a new trial based on newly discovered DNA evidence. Steinhauer presented evidence that he was not the father of the child the victim delivered two months before trial. The district court dismissed this claim on the basis that Steinhauer failed to meet the standard for obtaining a new trial based on newly discovered evidence as set forth in Callier v. Warden.³ Specifically, the district court found that the paternal status of the victim's child was not material to Steinhauer's defense that the sexual encounter between him and the victim was consensual, the DNA information did not indicate that a different result would be probable on retrial, and the evidence would be offered merely to discredit a former witness.

Assuming the DNA evidence regarding the paternity of the victim's child was true, Steinhauer failed to demonstrate that a new trial was warranted under the standards set forth in Collier. Thus, he failed to

²Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

³111 Nev. 976, 988, 901 P.2d 619, 626 (1995) (setting forth seven factors that must be met in order to grant a motion for a new trial based on newly discovered evidence).

demonstrate that he would have been entitled to relief. Therefore, we conclude that the district court did not abuse its discretion in dismissing this claim without conducting an evidentiary hearing.

In his petition, Steinhauer also claimed he received ineffective assistance of trial and appellate counsel. The question of whether a defendant received ineffective assistance of counsel is a mixed question of law and fact and is subject to independent review.⁴ A petitioner alleging ineffective assistance of counsel “must establish the factual allegations which form the basis for his claim of ineffective assistance by a preponderance of the evidence.”⁵

First, Steinhauer claimed that trial counsel was ineffective for failing to present evidence of the victim’s bisexuality or evidence pertaining to the identity of the biological father of the child the victim delivered two months before trial. The district court dismissed this claim on the basis that the claim was insufficiently pled. The district court specifically found that Steinhauer failed to provide the evidentiary or factual support necessary to grant an evidentiary hearing on this claim. We conclude that the district court correctly determined that this claim was not sufficiently pled, and therefore, the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Second, Steinhauer claimed that trial counsel was ineffective because counsel lost a card with the victim’s phone number on it. He

⁴Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁵Means v. State, 120 Nev. 1001, 1013, 103 P.3d 25, 33 (2004).

asserted that this piece of evidence would have contradicted the victim's testimony that she was not acquainted with Steinhauer. The district court dismissed this claim finding that it could not find any improper conduct by his counsel because Steinhauer was unable to identify the party responsible for the loss of the card⁶ and that Steinhauer failed to demonstrate that but for the loss of the card the outcome of his trial would have been different. The record reveals that overwhelming evidence supported Steinhauer's convictions. Thus, even if counsel lost the card with the victim's phone number, Steinhauer would not have been entitled to relief because the loss of the card would not have altered the outcome of the trial.⁷ Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Third, Steinhauer claimed appellate counsel was ineffective for failing to argue that he was denied his right to conflict free counsel.⁸

⁶Steinhauer was represented by different counsel at the preliminary hearing and at trial, and he could not identify which attorney allegedly lost the card.

⁷See Strickland v. Washington, 466 U.S. 668, 690, 693 (1984) (holding that to establish ineffective assistance of counsel a petitioner must demonstrate that his counsel's performance was deficient and he was prejudiced, such that the reliability of the verdict was undermined as a result of counsel's errors); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland).

⁸To the extent that Steinhauer raised this claim outside the context of his ineffective assistance of appellate counsel claim, we conclude that the district court did not err in dismissing the claim. The claim was appropriate for direct appeal and was thus waived absent a showing of good cause for failing to raise the claim earlier and actual prejudice. See

continued on next page . . .

He asserted that the district court erred by denying trial counsel's motion to withdraw because an actual conflict existed between him and his counsel. The district court dismissed this claim on the basis that Steinhauer failed to demonstrate that an actual conflict of interest existed.

The existence of an actual conflict of interest must be established on the specific facts of each case, but "[i]n general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties."⁹ Our review of the record reveals that the district court did not err by denying the motion to withdraw because an actual conflict of interest did not exist between Steinhauer and counsel. Because this claim lacked merit, Steinhauer failed to demonstrate that appellate counsel was ineffective,¹⁰ and he was not entitled to any relief. Therefore, we conclude that the district court did not err by dismissing this claim without conducting an evidentiary hearing.

... continued

NRS 34.810(1)(b), (3). Steinhauer failed to demonstrate good cause or actual prejudice.

⁹Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

¹⁰See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (holding that to demonstrate ineffective assistance of appellate counsel a petitioner must show that his counsel's performance was objectively unreasonable and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal).

Finally, Steinhauer claimed that the cumulative effect of counsels' errors rendered his conviction invalid. The district court dismissed this claim finding that Steinhauer failed to demonstrate that either trial or appellate counsel were ineffective. We conclude that the district court correctly determined that Steinhauer failed to demonstrate that counsel were ineffective. Thus, Steinhauer could not demonstrate that he was entitled to relief on this claim. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

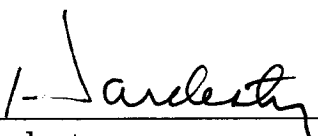
Our review of the record reveals that the district court erred at sentencing. Specifically, the sentence set forth in the judgment of conviction provides for only one definite term: life without the possibility of parole. Steinhauer, however, was convicted of two offenses. Therefore, it appears that Steinhauer was not sentenced to definite terms on each conviction.¹¹ The district court's failure to specify a sentence for each of Steinhauer's convictions must be corrected. Because Steinhauer was charged as a habitual felon, the district court must impose the enhanced sentence on each count, however, the district court is not required to enhance each sentence identically.¹² Therefore, on remand, the district court shall specify the count it originally intended to enhance with the

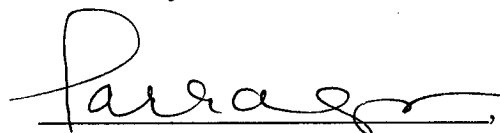
¹¹See NRS 176.033(1)(b); NRS 176.035; Powell v. State, 113 Nev. 258, 264 n.9, 934 P.2d 224, 228 n.9 (1997).

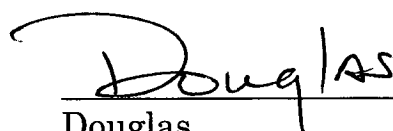
¹²See NRS 207.012(1)(b).

sentence of life without the possibility of parole and determine the appropriate enhancement for the remaining count. Accordingly, we

ORDER the judgment of the district court AFFIRMED AND REMAND this matter to the district court for proceedings consistent with this order.¹³


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Steven R. Kosach, District Judge
Scott W. Edwards
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹³This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

Although Steinhauer has not been granted permission to file documents in this appeal in proper person, we have received and considered the proper person documents he has submitted. See NRAP 46(b). We conclude that the relief requested is not warranted.