

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN MARTINETTE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48885

FILED

SEP 18 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On October 20, 2005, the district court convicted appellant, pursuant to a guilty plea, of first degree murder of a victim 60 years of age or older. The district court sentenced appellant to serve two consecutive terms of life without the possibility of parole in the Nevada State Prison. No direct appeal was taken.

On October 12, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On January 17, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that his counsel's performance was deficient in that it

07-20620

fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability of a different outcome in the proceedings.¹ To demonstrate prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner must demonstrate that he would not have pleaded guilty and would have insisted on going to trial.² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³

First, appellant claimed that his counsel was ineffective for failing to investigate prior to advising him to plead guilty. Specifically, appellant asserted that an adequate investigation would have revealed that he had (1) never offended against anyone 60 years of age or older prior to the instant offense; (2) no prior knowledge of the victim's age; (3) perceived that the victim appeared young for his age; and (4) no expectation that a man of such advanced age would be working so late. Appellant did not show that his counsel's performance was deficient or that he was prejudiced by his counsel's failure to investigate. "An attorney must make reasonable investigations or a reasonable decision that particular investigations are unnecessary."⁴ A petitioner asserting a claim that his counsel did not conduct a sufficient investigation bears the burden

¹Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

²Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

³Strickland, 466 U.S. at 697.

⁴State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006) (citing Strickland, 466 U.S. at 691).

of showing that he would have benefited from a more thorough investigation.⁵ NRS 193.167 imposes an equal and consecutive term of imprisonment for a defendant who murders a victim over the age of 60.⁶ The statute does not require that the defendant know the victim's age in order to impose the penalty.⁷ As appellant's knowledge of the victim's age was irrelevant, appellant did not show that his counsel's decision not to investigate facts related to that knowledge was unreasonable or prejudiced him. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to adequately investigate whether appellant intended to commit a murder when he entered the establishment in which he killed the victim. Appellant did not identify the possible source of information that would have revealed what his intent was when he entered the establishment.⁸ Further, appellant did not show that the information regarding what his intent was when he entered the establishment would have precluded the possibility that he could have later formed the requisite intent to murder the victim. Thus, appellant did not show that his counsel was deficient for failing to adequately investigate this issue or that he was prejudiced. Therefore, the district court did not err in denying this issue.

⁵Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

⁶NRS 193.167(1)(a).

⁷See NRS 193.167(1); Carter v. State, 98 Nev. 331, 335, 647 P.2d 374, 377 (1982).

⁸Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that "bare" or "naked" claims, which are unsupported by specific facts, are insufficient to grant relief).

Third, appellant claimed that his counsel was ineffective for failing to investigate his conduct at the detention center, which included both exemplary behavior and a suicide attempt. Appellant failed to demonstrate that his trial counsel's performance was deficient, or that he was prejudiced. Appellant did not explain why he would not have pleaded guilty and would have insisted on going to trial if his counsel was aware of his conduct at the detention center.⁹ Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for repeatedly advising him to plead guilty as the only way to avoid the death penalty. A grand jury indicted appellant for first degree murder and the State filed its notice to seek the death penalty. Appellant conceded in his petition that he had confessed to the murder. Moreover, evidence showed that appellant had possessed the victim's car shortly after the murder, and was in possession of the victim's identification and items stolen from the bar where the victim was a bartender at the time of his arrest. As appellant faced a conviction for murder, he did not show that his counsel's advice to plead guilty and avoid the death penalty, as opposed to proceed to trial and face a possible sentence of death, was unreasonable, or that he was prejudiced. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his counsel never inquired about possible defenses or developed a theory of defending appellant, but only stated that appellant's proffered defenses could not be raised. Specifically,

⁹Id.

appellant claimed that his counsel should have investigated his sanity based on (1) appellant's explanation that he killed the victim to end the victim's suffering; (2) appellant's past mental health history, including his institutionalization and history of drug abuse; and (3) appellant's serious illness at the time of the crime. He asserted that the evidence would have shown that his decision making ability was impaired and he was acting on an irresistible impulse without malice aforethought during the crime. Appellant claimed that he had a history of numerous psychological ailments, substance abuse, and was very ill at the time of the crime with an infection in his arm.

Appellant failed to demonstrate that his counsel was ineffective for not investigating a possible insanity defense prior to advising appellant to plead guilty. To establish a valid insanity defense a defendant must show that he was "in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act."¹⁰ Nevada courts apply the test for legal insanity set forth in M'Naghten's Case,¹¹ not the irresistible impulse test.¹² Further, the technical defense of diminished capacity is not recognized in Nevada.¹³

¹⁰Finger v. State, 117 Nev. 548, 576, 27 P.3d 66, 84-85 (2001); NRS 174.035(4).

¹¹8 Eng. Rep. 718, 10 Cl. & Fin. 200, 209 (1843).

¹²See Finger, 117 Nev. at 562, 27 P.3d at 76 (citations omitted).

¹³Crawford v. State, 121 Nev. 744, 757, 121 P.3d 582, 591 (2005) (citing Finger, 117 Nev. at 576, 27 P.3d at 84-85; Miller v. State, 112 Nev. 168, 911 P.2d 1183 (1996)).

Appellant's claim that his ailments resulted in a legal excuse for his crime in that he did not understand the nature of his act or appreciate its wrongfulness is contradicted by appellant's claim that he killed the victim after he had struck and injured the victim in order to end the victim's suffering. Thus, the record reveals that appellant understood the nature of his act of killing the victim. Moreover, appellant did not explain what impulse or delusion led to his initial assault of the victim, which caused the suffering he intended to relieve with the murder. Appellant did not plead sufficient facts to show that he was not aware of the wrongfulness of his acts when killing the victim and thus did not establish any reasonable probability that a jury would find him not guilty by reason of insanity. Therefore, as an insanity defense was unlikely to succeed, he did not show that he would not have pleaded guilty and would have insisted upon going to trial had his counsel pursued the defense. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his counsel was ineffective for advising him to plead guilty because it was impossible to select an unbiased jury containing African-American and Hispanic jurors. Regardless of whether appellant's counsel's advice was accurate, appellant did not show that he was prejudiced by the advice. Appellant confessed to the murder of a man who was over the age of 60. Thus, he did not show that he would not have pleaded guilty and would have insisted upon going to trial but for counsel's advice. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his counsel was ineffective for failing to investigate possible negative pre-trial publicity. Specifically, appellant asserted that his arrest appeared on an episode of "COPS."

Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced by his counsel's failure to investigate. Appellant did not demonstrate that pre-trial publicity rose to the level from which prejudice would be presumed.¹⁴ Further, appellant pleaded guilty prior to the start of his trial so no juror indicated he or she could not be impartial during voir dire.¹⁵ Appellant did not show that his counsel failed to uncover negative pre-trial publicity. Thus, appellant failed to show that, in light of the evidence against him, he would have insisted upon going to trial if his counsel had investigated pre-trial publicity in his case. Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that his counsel was ineffective for failing to file more pretrial motions. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant did not identify the motions that his counsel should have filed.¹⁶ Therefore, we conclude that the district court did not err in denying this claim.

Ninth, appellant claimed that his counsel "pleaded him guilty" to the older victim enhancement. Appellant failed to show that his counsel's performance was deficient or that he was prejudiced by his counsel's actions. In the plea agreement, which was signed by appellant,

¹⁴See, e.g., Sonner v. State, 112 Nev. 1328, 1336-37, 930 P.2d 707, 712-13 (1996) (concluding pre-trial publicity in a high-profile capital murder case involving the murder of a police officer did not rise to the level of publicity for which prejudice would be presumed).

¹⁵See NRS 174.455.

¹⁶Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

he stated that he was pleading guilty to the first degree murder of a victim over the age of 60. During the plea canvass, the district court personally addressed appellant and asked him if he was pleading guilty to the murder and to the age enhancement. He replied affirmatively. As appellant personally pleaded guilty to the murder and acknowledged the age enhancement, he did not show that he was prejudiced by his counsel's purported actions. Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that his counsel was ineffective for failing to share the results of his investigations with him. Appellant failed to show that his counsel's performance was deficient or that he was prejudiced by his counsel's actions. Appellant did not allege what information his counsel discovered during his investigation that would have prompted appellant to insist on going to trial.¹⁷ Therefore, the district court did not err in denying this claim.

Eleventh, appellant claimed that his counsel was ineffective for failing to investigate and present mitigating evidence at his sentencing hearing. Specifically, he claimed (1) his counsel failed to investigate appellant's whereabouts on the day of the victim's 70th birthday party; (2) his counsel failed to submit appellant to a polygraph examination; and (3) counsel failed to present evidence of appellant's history of gainful employment, work ethic, and community service. Appellant did not show that his counsel's performance was deficient or that he was prejudiced. Prior to his sentencing, appellant had pleaded guilty to the murder and

¹⁷Id.

acknowledged the age enhancement. Further, whether he was aware of the victim's age was irrelevant to whether he could receive the enhancement.¹⁸ Thus, appellant did not show that his counsel's decision not to investigate whether he knew the victim's age was an unreasonable decision or that the decision prejudiced him. Regarding appellant's employment history and community service, he did not establish that the evidence, if introduced, was so favorable that the district court would have imposed a lesser sentence. Therefore, the district court did not err in denying this claim.

Twelfth, appellant claimed that his counsel was ineffective for advising him not to testify at his sentencing concerning the age enhancement. As discussed above, appellant's knowledge of the victim's age was irrelevant to the applicability of the age enhancement.¹⁹ Moreover, appellant pleaded guilty to both the underlying murder and the age enhancement. Thus, he did not establish that he was prejudiced by his counsel advising him not to testify at the sentencing hearing regarding the age enhancement. Therefore, the district court did not err in denying this claim.

Thirteenth, appellant claimed that his counsel was ineffective for failing to present expert witnesses to testify concerning appellant's future dangerousness, history of mental health issues, and diminished capacity during the crime itself. Although appellant did not precisely state what testimony he hoped to elicit, it could be presumed from his

¹⁸See 193.167(1); Carter, 98 Nev. at 335, 647 P.2d at 377.

¹⁹See id.

petition that the testimony would show that he did not bear a significant risk of future dangerousness and his history of mental health issues and drug abuse contributed to a diminished capacity during the crime. However, this claim is speculative and appellant did not identify possible or potential experts who would have offered the testimony.²⁰ Therefore, we conclude that the district court did not err in dismissing this claim.

Fourteenth, appellant claimed that his counsel was ineffective for failing to cross-examine the State's witness at his sentencing hearing. The victim's daughter testified at the sentencing hearing that appellant was present at the victim's 70th birthday party. She also testified about the impact of her father's murder on her family. As appellant's knowledge of the victim's age was irrelevant to the applicability of the enhancement,²¹ appellant failed to establish that he was prejudiced by his counsel's failure to cross-examine the victim's daughter on that point. Appellant also failed to explain how further examination of the victim's daughter concerning the sudden loss of her father would have resulted in a different sentence. Thus, he did not show that he was prejudiced by his counsel's failure to cross-examine on that point. Therefore, the district court did not err in denying this claim.

Fifteenth, appellant claimed that his counsel was ineffective for failing to interview the victim's family prior to his sentencing hearing. Appellant did not identify the information about which he asserted that

²⁰Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

²¹See Carter, 98 Nev. at 335, 647 P.2d at 377.

his counsel should have interviewed the family members.²² To the extent that appellant claimed that his counsel should have interviewed the family members concerning whether he attended the victim's 70th birthday party, appellant's knowledge of the victim's age was irrelevant to the applicability of the age enhancement.²³ Moreover, appellant pleaded guilty to both the underlying murder and the age enhancement. Thus, he did not establish that he was prejudiced by his counsel's failure to question members of the victim's family prior to the sentencing hearing. Therefore, we conclude that the district court did not err in denying this claim.

Sixteenth, appellant claimed that his counsel was ineffective for asking that appellant's family not testify at his sentencing hearing. Appellant failed to show that he was prejudiced by his counsel's failure to call his family to testify. Presumably, appellant's family would have testified concerning his history of mental illness and drug abuse. Appellant failed to show that he was prejudiced by his counsel's failure to introduce this testimony. While appellant received the most severe sentence short of death, he also received the sentence for which he bargained. Moreover, appellant asserted that he did not want his family put through the ordeal of testifying on his behalf. Thus, he did not show that his counsel's decision was unreasonable or that he was prejudiced by his counsel's performance. Therefore, the district court did not err in denying this claim.

²²Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

²³See Carter, 98 Nev. at 335, 647 P.2d at 377.

Seventeenth, appellant claimed that his counsel was ineffective for failing to inform him of his right to appeal and failing to file a notice of appeal. In particular, he asserted that he could have appealed his sentence asserting that (1) it was an illegal sentence and (2) his counsel was ineffective for failing to present mitigating evidence. "[A]n attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction."²⁴ However, "there is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal."²⁵ Counsel is only required to advise a defendant who has pleaded guilty if the defendant inquires about his right to appeal or "the situation indicates that the defendant may benefit from receiving the advice."²⁶ Appellant did not allege that he requested an appeal. Further, appellant did not assert sufficient claims that would likely have succeeded on appeal. His sentence was not illegal as it was within the range prescribed by statute,²⁷ and claims of ineffective assistance of counsel are not heard on appeal.²⁸ Moreover, during the plea canvass, appellant was informed of the charges against him, the factual basis upon

²⁴Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999) (quoting Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994)).

²⁵Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

²⁶Id.

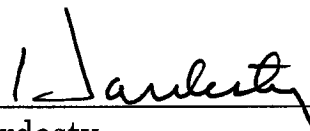
²⁷See NRS 200.030(4)(b)(1); NRS 193.167(1).

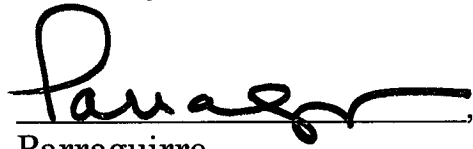
²⁸See Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995); Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001).


which the charges were based, and the possible sentences for those offenses.²⁹ Therefore, the district court did not err in denying relief on this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.³⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

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

²⁹See Little v. Warden, 117 Nev. 845, 849, 34 P.3d 540, 542-43 (2001) (holding that a district court must ensure that a defendant who pleads guilty understands both the nature of the charges against him and the direct consequences of his guilty plea).

³⁰See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).