

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
CLARENCE H. ELLIOT,
Respondent.

No. 49245

FILED

MAR 06 2008

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

ORDER OF REVERSAL

This is an appeal from a district court order granting a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

The district court convicted respondent Clarence H. Elliot, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and sentenced him to serve two consecutive terms of life in prison with the possibility of parole. This court affirmed Elliot's judgment of conviction.¹ Elliot filed a timely post-conviction petition for a writ of habeas corpus, which the district court granted after conducting an evidentiary hearing. This appeal followed.

The State argues that Elliot received effective assistance of counsel and that the district court abused its discretion in concluding otherwise. To establish ineffective assistance of counsel, a defendant must

¹Elliot v. State, Docket No. 33630 (Order of Affirmance, February 8, 2002).

show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced him.² To establish prejudice, a defendant must show that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different.³ "Judicial review of a lawyer's representation is highly deferential, and a claimant must overcome the presumption that a challenged action might be considered sound strategy."⁴ A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to this court's independent review.⁵ However, a district court's factual findings are entitled to deference on appeal if they are supported by substantial evidence and are not clearly wrong.⁶

In granting Elliot's habeas petition, the district court focused on two aspects of counsel's representation. First, the district court concluded that counsel was ineffective for not investigating Elliot's alibi witnesses. Evidence adduced at trial revealed that Elliot's wife Barbara, the murder victim, left work on February 19, 1996, at approximately 4:30 p.m., picked up a few groceries and a prescription, and then was not seen

²Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

³Id. at 694.

⁴Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004).

⁵See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

⁶Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

again until her body was found a few months later. At the post-conviction evidentiary hearing, Elliot testified that he provided counsel the names of three teenage boys who could have testified that Elliot was home at 5:00 p.m., approximately the time when Barbara picked up her prescription, and that Barbara had not returned home by 8:00 p.m., when Elliot called Barbara's best friend inquiring into Barbara's whereabouts. Elliot conceded during cross-examination that he did not know precisely what the potential alibi witnesses would have testified to at trial because he did not have statements or affidavits from them. Elliot further testified that he never discussed specific defenses with counsel but provided information respecting potential alibi witnesses to counsel's secretary.

Counsel testified that an attorney has an obligation to investigate a valid alibi defense; however, he did not recall Elliot advising him of any potential alibi witnesses. Counsel further stated that he did not deem an alibi defense plausible because the time of Barbara's death was not exact and covered too broad a range of time. Counsel further testified that he did not believe engaging an investigator would have revealed any evidence helpful to the defense.

Second, the district court concluded that counsel was ineffective for failing to call any witnesses on Elliot's behalf, noting that Elliot was an honorably retired military veteran and that the State's case was based solely on circumstantial evidence. Elliot testified that he provided counsel with a list of character witnesses he believed would have shown that he had no motive to kill Barbara. Elliot acknowledged during cross-examination that other witnesses could testify that he was a jealous

and possessive man. Counsel did not testify specifically about his consideration of any character witnesses.

Counsel's strategic or tactical decisions "are virtually unchallengeable absent extraordinary circumstances,"⁷ and we will not second guess trial strategy decisions that rest within counsel's discretion.⁸ Here, counsel explained his basis for rejecting an alibi defense. Further, it is unclear to what extent, if any, counsel was aware of Elliot's alibi defense as Elliot did not directly discuss with counsel this defense or witnesses who could support it. Other than the potential alibi witnesses, nothing in the record before us indicates what additional evidence or witnesses further investigation would have revealed.

Respecting counsel's failure to call character witnesses, doing so would have opened the door to testimony that Elliot was jealous and possessive, perhaps providing a motive for Barbara's murder. Elliot's murder conviction is based solely on circumstantial evidence, and not overwhelmingly strong circumstantial evidence at that. Challenging the wholly circumstantial nature of the State's case was a reasonable trial defense strategy. We conclude that Elliot failed to demonstrate that counsel was ineffective for the reasons the district court cites.

As the evidence adduced at the post-conviction evidentiary hearing does not support the district court's conclusion that counsel was

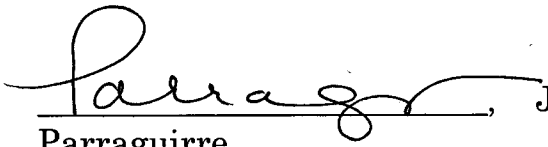
⁷Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

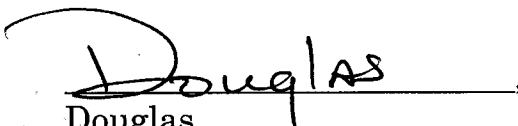
⁸Foster v. State, 121 Nev. 165, 173, 111 P.3d 1083, 1089 (2005).

ineffective, we conclude that the district court erred in granting Elliot's post-conviction petition for a writ of habeas corpus. Accordingly, we

ORDER the judgment of the district court REVERSED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

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