IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL MESSICK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49257

FILED

OCT 0 8 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; Jennifer Togliatti, Judge.

Appellant Michael Messick was convicted, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon in the death of Hisayo Miller and second-degree murder in the death of Anne Suazo. The district court sentenced Messick to serve terms totaling life in prison without the possibility of parole. This court affirmed the judgment of conviction and sentence on direct appeal.[1]

Messick filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel to assist Messick, but

[1]Messick v. State, Docket No. 41824 (Order of Affirmance, February 3, 2005).

07-22081

declined to conduct an evidentiary hearing.[2] On June 29, 2007, the district court denied Messick's petition. This appeal followed.

Messick contended that he received ineffective assistance of trial and appellate counsel. 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 him.[3] Petitioner must demonstrate prejudice by showing a reasonable probability that but for counsel's errors the result of the proceeding would have been different.[4] We conclude that the district court did not err in denying Messick's claims of ineffective assistance of counsel.

Messick argued that trial counsel was ineffective for failing to investigate whether Suazo ran away, committed suicide, or was killed by someone else. Messick raised no specific factual allegations in support of these claims,[5] and he failed to explain how such investigation would have changed the outcome of his trial.

Messick next argued that trial counsel was ineffective for failing to object to improper police opinion testimony, particularly to a

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[2]See NRS 34.750; NRS 34.770.

[3]See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[4]See Thomas v. State, 120 Nev. 37, 43-44, 83 P.3d 818, 823 (2004); Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[5]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that a petitioner is not entitled to an evidentiary hearing on claims that are not supported by specific factual allegations).

crime scene analyst's testimony that when a killer cleans up a crime scene, the killer usually lives at the scene or is a member of the victim's family. Messick failed to provide cogent argument for why this testimony was improper.[6] Even assuming such an objection had been sustained, we are not persuaded that it would have altered the outcome of Messick's trial given the other evidence adduced.

Messick also argued that trial counsel was ineffective for failing to object to prosecutorial misconduct in closing argument. Our review of the three comments Messick complained of in his petition reveals that the prosecutor properly argued that Messick's actions showed premeditation and deliberation. The prosecution has a right to comment on the evidence and ask the jury to draw inferences from that evidence,[7] and his comments were not so inflammatory that they constituted misconduct.[8] Messick further argued that the prosecutor injected his personal belief into the proceedings by calling a defense witness a liar.[9] Our review of the record indicates the prosecutor did not accuse the defense witness of lying; rather, the prosecutor properly commented on the witness's motives for giving damaging testimony about a State witness.[10]

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[6]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987); see generally NRS 50.275; NRS 50.285.

[7]See State v. Green, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965).

[8]See Morales v. State, 122 Nev. ___, ___, 143 P.3d 463, 467 (2006).

[9]See Pascua v. State, 122 Nev. ___, ___, 145 P.3d 1031, 1035 (2006).

[10]See Ross v. State, 106 Nev. 924, 927-28, 803 P.2d 1104, 1106 (1990).

Messick also argued that trial counsel was ineffective for failing to properly notice expert witnesses.[11] Even assuming counsel erred in this regard, Messick did not allege that any of these witnesses were unable to testify as a result or that he was otherwise prejudiced as a result of counsel's actions in this regard.

Messick next argued that trial counsel was ineffective for failing to move to suppress evidence seized from his home, which he shared with Miller. He argued that warrantless entry into his home by the first police officer on the scene violated his Fourth Amendment right to be free from unreasonable searches and seizures. We disagree. Entry into the home without a warrant was reasonable under the circumstances, which indicated that Miller may have been injured or in need of medical assistance.[12] The day before her body was found, Miller had called her work to say she was not coming in that day; she sounded unusual to the coworker she spoke to. She failed to report for work the next day and did not call her work. She did not respond to telephone calls or knocks on the door during those two days, even though her car was parked in front of the home. Her friends and colleagues reported that this behavior was unusual for her. Once the officer found Miller's body, he left the apartment, secured it, and called his superiors, who obtained a telephonic search warrant before entering the home again.

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[11]See NRS 174.234.

[12]See generally Mincey v. Arizona, 437 U.S. 385, 392 (1978); Brigham City, Utah v. Stuart, ___ U.S. ___, ___, 126 S.Ct. 1943, 1947 (2006); Alward v. State, 112 Nev. 141, 152, 912 P.2d 243, 250 (1996).

As to Messick's vehicle, which revealed the presence of Miller's and Suazo's blood, trial testimony indicated that Messick was a suspect in Miller's death before he arrived at Miller's home at 8:40 p.m. and found police there investigating Miller's death. Testimony also established that the telephonic search warrant included Messick's car. Even had a motion to suppress been successful, we are not persuaded that it would have made a difference in the outcome of Messick's trial given the other evidence adduced.

Messick also argued that trial counsel was ineffective for failing to object based on a lack of foundation to an audiotape of Suazo's voice mail messages played at trial by witness Bethany Rodriguez. Rodriguez testified that the messages she listened to on Suazo's voice mail were the same as those on the tape, that she listened to the tape that morning, and that she had the tape in her possession from the time she listened to it until she produced it at trial. This was sufficient foundation for the tape's admission.[13]

Next, Messick argued that trial counsel was ineffective for failing to challenge prospective juror Fulton on the grounds that the trial judge's husband appointed Fulton to a position as a court-appointed special advocate. Messick's argument that this potential juror was biased against him is mere speculation and is not supported by the record. Our review of the record reveals no indication that prospective juror Fulton was biased against Messick or could not be fair and impartial.[14]

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[13]See Franko v. State, 94 Nev. 610, 613, 584 P.2d 678, 679 (1978).

[14]See NRS 16.050(1).

Messick also argued that trial counsel was ineffective for failing to hire an expert to measure his footprint and an expert in "blood evidence." He failed to explain how having his footprint measured by a trained expert rather than a defense investigator would have altered the outcome of the trial. There is no indication in the record that the footprint taken by the investigator was inaccurate, nor is there any evidence in the record that shows how the footprint was comparable to a footprint left in bleach in Miller's apartment.

As to blood evidence, Messick failed to specify what a blood expert would have testified to that would have altered the outcome of his trial. In a seemingly related claim, Messick contended that appellate counsel was ineffective for failing to argue that the State untimely turned over an expert report regarding blood spatter analysis. Messick argued that the report's conclusions were different than those stated by the blood spatter expert at the preliminary hearing, and that the untimely disclosure of the report limited his ability to impeach the expert at trial. Counsel's supplemental petition argued that the report for the first time analyzed blood on a pair of jeans that were found in Miller's apartment. We conclude there was no reasonable probability that we would have decided Messick's direct appeal differently had appellate counsel raised this argument. The blood spatter evidence, particularly as it pertained to the jeans, was relatively insignificant, and any error in admitting the report and allowing the expert to testify to its contents was harmless.[15]

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[15]See Mortensen v. State, 115 Nev. 273, 281-82, 986 P.2d 1105, 1111 (1999).

Messick also argued that trial counsel was ineffective for failing to object to the prosecutor and witnesses referring to Anne Suazo in the past tense during examination. Given the evidence adduced at trial, we are not persuaded that any such objections would have had a reasonable possibility of changing the trial's outcome.

Messick next argued that trial counsel was ineffective for stipulating to Suazo's family members' in-court identifications of him. He failed to allege how such stipulations prejudiced him. He was personally known to each of the family members. His claim that the stipulations resulted in an admonishment in front of the jury is belied by the record, which reveals that the prosecutor objected to the stipulations but was overruled by the district court.[16]

Messick also argued that trial counsel was ineffective for failing to obtain his consent to argue in closing that, if anything, Messick was guilty of being an accessory after the fact to Miller's murder. Messick appeared to contend that counsel's argument encouraged the jury to find him guilty. Given the evidence tying Messick to the murder, we are not persuaded that counsel's argument was prejudicial.

Messick next argued that trial counsel was ineffective for failing to object to evidence of a DNA profile obtained for Anne Suazo from her water bottle, toothbrush, and other items. Messick contended counsel should have argued that Bethany Rodriguez, who lived with Suazo, could have tampered with these items. This claim is pure speculation.[17]

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[16]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

[17]See id.

Messick failed to establish that the profile was not reliable. We note that the profile was also based on DNA samples taken from Suazo's blood relatives.

Messick also argued that trial counsel was ineffective for causing the district court to reconsider whether to allow the State to call Suazo's son Adam Cheney as a trial witness. Defense counsel had established from other family members that Suazo owned a gun that was now missing. The State indicated outside the jury's presence that it had learned during the trial that Adam Cheney, without telling Suazo or anyone else, had sold the gun some time before Suazo's disappearance. When the State indicated it wanted to call Cheney, the district court said Cheney's testimony seemed irrelevant. Defense counsel said he would refer to the gun in closing argument, and the district court allowed Cheney to be called. Defense counsel did not mention the gun in closing argument. Messick failed to explain how Cheney's testimony was prejudicial. Given the evidence adduced at trial, we are not persuaded that exclusion of Cheney's testimony would have had a reasonable possibility of changing the trial's outcome.

Messick argued that trial counsel was ineffective for contradicting his opening argument in his closing argument, first referring to Messick as someone who would "march to his own drum" and then referring to him in closing as someone who followed along. Our review of the record indicates that counsel's arguments were not contradictory. In closing argument, defense counsel continued to argue that Messick was an unusual person; this was consistent with his opening argument. Nor are we persuaded that counsel's comments prejudiced Messick in light of the evidence adduced at trial.

Messick next argued that trial counsel was ineffective for failing to voir dire the jury panel on racial prejudice against persons of Asian descent, as Messick claimed he is. This claim is merely speculative.[18] Messick does not argue that any of the jurors empanelled had a racial bias or that the failure to question them about racial bias prejudiced him.

Messick also argued that trial counsel was ineffective for failing to advise him not to hide his face during trial and at sentencing. Messick contends that counsel's failure allowed the prosecutor to argue at sentencing that Messick "had good reason to hide his true self." Given Messick's crimes, we are not persuaded that there was a reasonable probability of a different outcome at sentencing had Messick's counsel so advised him.

Messick next argued that trial counsel was ineffective for failing to move for a change of venue due to pretrial publicity. "A defendant seeking to change venue must not only present evidence of inflammatory pretrial publicity but must demonstrate actual bias on the part of the jury empaneled."[19] Our review of the record indicates that during voir dire, only one of the panel members indicated she had been exposed to pretrial publicity. That panel member was later excused because she felt she would have difficulty finding someone guilty of a

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[18]See id.

[19]Floyd v. State, 118 Nev. 156, 165, 42 P.3d 249, 255 (2002); see also NRS 174.455(1).

crime that could result in a life sentence. Messick failed to allege that any of the empanelled jurors were actually biased against him.[20]

Messick further argued that trial counsel was ineffective for failing to request the jury be sequestered during trial to prevent exposure to media coverage of the trial. Messick failed to establish that any publicity during trial required the jury be sequestered.[21] Messick cited only one newspaper article, which was published approximately two weeks before voir dire of the jury panel began. Any harm caused by this article would not have been cured by subsequent sequestration.[22]

Messick also argued that trial counsel was ineffective for making "insensitive" comments during his closing argument, in particular, "[The State has evidence] that Mr. Messick [cleaned] up [the crime scene], well folks, so what? He was cleaning up. He's guilty of helping somebody after the fact clean up." Even if, as Messick contended, this comment implied counsel's lack of sorrow for the victims' families, we are not persuaded that counsel was deficient for making it or that it prejudiced Messick.

Messick next contended that appellate counsel was ineffective for failing to argue that the district court erroneously denied his pre-trial petition for a writ of habeas corpus. The petition argued that the grand jury considering indicting him for Suazo's murder heard improper

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[20]See Floyd, 118 Nev. at 165, 42 P.3d at 255.

[21]See generally Crew v. State, 100 Nev. 38, 42-43, 675 P.2d 986, 988-89 (1984).

[22]See id. at 42, 675 P.2d at 989.

character evidence without a Petrocelli[23] hearing and the prosecutor improperly told the grand jury that Messick was also under arrest for killing Miller. Messick cited no authority, and we are aware of none, supporting the proposition that a Petrocelli hearing is required before such evidence may be admitted at a grand jury proceeding. Even assuming admission of such evidence was error, there was ample evidence to support the grand jury indictment of Messick for Suazo's murder.[24]

Messick also contended that appellate counsel was ineffective for failing to argue a violation of his right to a speedy trial. Messick appeared to claim that the State had the Public Defender removed due to a conflict, the State knew replacement counsel would have to request a continuance, and the State engineered these events so it could attempt to consolidate the Miller and Suazo cases. Messick did not allege that the Public Defender did not have a conflict or that replacement counsel should not have requested a continuance. He also failed to explain how the delay in trial in the first trial prejudiced him other than by allegedly leading to joinder of the two trials, which we decided was proper in his direct appeal.[25]

Messick next contended that his initial counsel was ineffective for withdrawing after the preliminary hearing and not turning over his files to Messick. Messick's contention that he was unable to secure other

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[23]101 Nev. 46, 692 P.2d 503 (1985).

[24]See State v. Boueri, 99 Nev. 790, 795, 672 P.2d 33, 36 (1983).

[25]See generally Windham v. State, 118 Nev. 226, 232, 43 P.3d 993, 997-98 (2002) (discussing analysis of speedy trial violation claims).

counsel is belied by the record, which shows that Messick was subsequently appointed counsel to represent him.[26] Messick pointed to no specific prejudice from this change in representation. He argued that retained counsel's failure to turn over documents to him prejudiced his ability to challenge counsel in this proceeding, but he raised no specific allegation that retained counsel was ineffective save for his withdrawing after the preliminary hearing.

Messick also raised allegations of prosecutorial and judicial misconduct and/or bias. These claims were waived by Messick's failure to argue them on direct appeal.[27] Messick raised only three of his claims of judicial bias as ineffective-assistance-of-counsel claims, asserting that counsel should have objected. However, we are not persuaded that Messick's examples of alleged misconduct demonstrate the district court was biased against him or had a preconceived notion that he was guilty.[28] Our review of the examples Messick provided indicate that the district court was attempting to make correct rulings in a properly expeditious manner.

Messick next argued that there was insufficient evidence to support his conviction of second-degree murder. This claim was also waived by Messick's failure to argue it on direct appeal.[29]

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[26]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[27]See NRS 34.810(1)(b).

[28]See NRS 1.230.

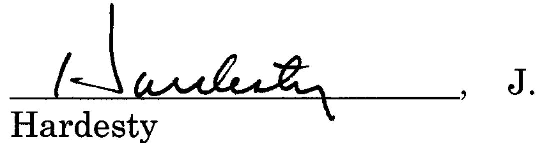
[29]See NRS 34.810(1)(b).

Messick also argued that he was unfairly prejudiced by joinder of the charges. This court concluded in Messick's direct appeal that joinder was proper. This ruling is now the law of the case, and we decline to reconsider it.[30]

Finally, Messick argued that he was entitled to a new trial based on cumulative error. Having found no prejudicial error, we disagree.

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.[31] Accordingly, we

ORDER the judgment of the district court AFFIRMED.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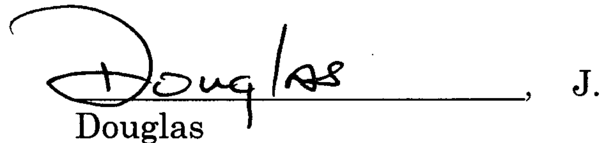
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cc: Hon. Jennifer Togliatti, District Judge
Michael Messick
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[30]See Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001).

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