IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK CHARLES MCKENNA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49498

FILED

OCT 06 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

AMENDED ORDER OF AFFIRMANCE[1]

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

Appellant Patrick Charles McKenna killed a fellow inmate while both men were incarcerated in the Clark County Detention Center. A jury convicted McKenna of first-degree murder and sentenced him to death. McKenna secured relief through federal and state appeals. See McKenna v. McDaniel, 65 F.3d 1483 (9th Cir. 1995); McKenna v. State, 101 Nev. 338, 705 P.2d 614 (1985); McKenna v. State, 98 Nev. 38, 639 P.2d 557 (1982). Ultimately, however, after receiving a third penalty hearing, a jury sentenced him to death, and this court affirmed the sentence. McKenna v. State, 114 Nev. 1044, 968 P.2d 739 (1998).

In this appeal from a district court order denying a post-conviction petition for a writ of habeas corpus, McKenna argues that (1) the district court erred by denying his claims that trial and appellate

[1]We issue this amended decision in place of the Order of Affirmance issued on April 20, 2010.

counsel were ineffective on issues related to the notice of intent to seek the death penalty, voir dire, investigation of a potential defense witness, and a clemency instruction; (2) the district court erred by denying claims related to juror misconduct, which were the subject of a limited evidentiary hearing; (3) the district court erred by denying as procedurally barred his claim challenging the use of physical restraints; and (4) the district court erroneously precluded him from introducing an evidentiary hearing witness's recorded interview with a post-conviction defense investigator. We conclude that the district court did not err by denying any of McKenna's claims and affirm the district court's judgment.

Ineffective assistance of counsel claims

McKenna argues that the district court erred by denying four claims of ineffective assistance of trial and appellate counsel without an evidentiary hearing. Under the two-part test established in Strickland v. Washington, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) prejudice in that there is a reasonable probability of a different outcome. 466 U.S. 668, 687-88, 694 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 998, 923 P.2d 1102, 1107, 1114 (1996). McKenna was entitled to an evidentiary hearing only if he "assert[ed] specific factual allegations that [were] not belied or repelled by the record and that, if true, would entitle him to relief. See Nika v. State, 124 Nev. ___, ___, 198 P.3d 839, 858 (2008), cert. denied, ___ U.S. ___, 130 S. Ct. 414 (2009).

Notice of intent to seek the death penalty

McKenna argues that trial counsel should have challenged the notice of intent to seek the death penalty because the State was judicially estopped from asserting the prior-violent-felony convictions as separate aggravators when the original 1980 notice of intent presented these

convictions in one aggravator. However, regardless of judicial estoppel principles, McKenna's underlying legal premise lacks merit. Under Riley v. State, 107 Nev. 205, 216-17, 808 P.2d 551, 558 (1991), the State properly alleged each of McKenna's prior violent felonies as a separate aggravator in its September 1996 amended notice of intent. Because trial and appellate counsel had no reason to challenge the notice of intent on this basis, the district court properly summarily denied this claim.

Voir dire

McKenna contends that trial counsel should have questioned jurors more thoroughly to uncover bias against the defense's mitigating evidence and jurors who would impose the death penalty on the basis of his prior convictions. During voir dire, jurors were questioned extensively about their views on the death penalty and the role of aggravating and mitigating evidence. Nothing in the record suggests that any empanelled juror was biased against McKenna relative to mitigation. Merely because some jurors reacted negatively to the mitigation presented does not in itself illustrate jury bias. As for the challenge to a juror's vote for death based on McKenna's prior-violent-felony convictions, those crimes were alleged as aggravating circumstances and were appropriate considerations upon which to impose death. See NRS 200.033(2). Because McKenna failed to demonstrate that trial and appellate counsel were ineffective, the district court properly summarily denied this claim.

Investigation of a defense witness

McKenna argues that trial counsel were ineffective for not adequately investigating a potential defense witness before deciding not to call him to testify. The witness was present in the cell when McKenna strangled the victim and testified at trial that McKenna killed him. McKenna v. State, 101 Nev. 338, 341, 705 P.2d 614, 616 (1985). McKenna

asserts that the witness later recanted his testimony in a handwritten statement. As a result of his interaction with the witness, counsel was concerned about the witness's competency and did not call him during the third penalty hearing. McKenna argues that trial counsel's conclusion that the witness was incompetent based solely on a brief phone call was unreasonable and that counsel should have presented the witness at the third penalty hearing.

We conclude that McKenna's ineffective-assistance claim lacks merit because (1) the witness's handwritten statement lacked sufficient detail as to what aspects of his police statement were false, the circumstances of the recantation, and his ability or willingness to testify and (2) evidence suggesting that McKenna did not commit the murder was inappropriate in the penalty hearing as he had been convicted of first-degree murder in a previous proceeding. Because McKenna failed to show that trial counsel were ineffective in this regard, we conclude that the district court properly summarily denied this claim.[2]

Clemency instruction

McKenna complains that trial and appellate counsel should have challenged the clemency instruction under Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996).[3] In Geary, this court held that a clemency

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[2]McKenna's challenge against appellate counsel in this matter is unclear. To the extent he argues that appellate counsel should have challenged trial counsel's action in this matter, claims of ineffective assistance are generally inappropriate for direct appeal. Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001). Therefore, we conclude that the district court did not err by denying this claim.

[3]The challenged instruction provided: "Although under certain circumstances and conditions the State Board of Pardons Commissioners

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instruction identical to the one given here was unconstitutional because the instruction, coupled with arguments at the penalty hearing, may have caused the jury to speculate that death was the only way to prevent Geary's release from prison. Id. at 1440-42, 930 P.2d at 723-24. Nevertheless, we have rejected claims that the failure to object to the clemency instruction pursuant to Geary constituted ineffective assistance of trial counsel because Geary announced a new rule that trial counsel could not have anticipated. See, e.g., Nika v. State, 124 Nev. at ___, 198 P.3d at 854; Leonard v. State, 114 Nev. 639, 659-60, 958 P.2d 1220, 1235 (1998), modified on other grounds by Collman v. State, 116 Nev. 687, 717 n.13, 7 P.3d 426, 445 n.13 (2000). Because Geary was decided approximately three months after McKenna's penalty hearing, trial counsel cannot be held accountable for failing to anticipate that decision. Therefore, the district court properly denied this challenge.

Appellate counsel, however, should have challenged the instruction because Geary had been decided at the time of McKenna's direct appeal. Nevertheless, considering the clemency instruction and the circumstances presented here through the lens of Geary, we conclude that even if appellate counsel had challenged the instruction, the claim would not have enjoyed a reasonable probability of success. Cf. Leonard v. State, 117 Nev. 53, 80, 17 P.3d 397, 414 (2001); Sonner v. State, 114 Nev. 321, 325-26, 955 P.2d 673, 676 (1998). Accordingly, the district court properly summarily denied this claim.

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has the power to modify sentences, you may not speculate as to whether the sentence you impose may be changed at a later date."

Juror misconduct

McKenna argues that the district court erred by denying his claims related to juror misconduct, pointing to four instances in which he contends that the jury was exposed to prejudicial extrinsic evidence—(1) the bailiff's statement to a juror that McKenna was wearing a stun belt, (2) the bailiff's statement to a juror that he would protect her if something happened, (3) two jurors' observation of McKenna in leg restraints, and (4) a juror's recounting during deliberations that her uncle had shot a number of people to death after being released from an institution. Based on this alleged misconduct, McKenna contends that he is entitled to a new penalty hearing.

In the context of motions for a new trial based on juror misconduct, the defendant must establish that (1) misconduct occurred and (2) prejudice. Meyer v. State, 119 Nev. 554, 563, 80 P.3d 447, 455 (2003). We review a district court's decision on jury misconduct for an abuse of discretion, and "[a]bsent clear error, the district court's findings of fact will not be disturbed." Id. at 561, 80 P.3d at 453. Where the misconduct involves exposure to extrinsic evidence, we review a district court's conclusions de novo. Id. at 561-62, 80 P.3d at 453.

Here, the bailiff's statement about protecting a juror and two jurors' observations of McKenna in leg restraints involved exposure to extrinsic influences, and McKenna established that the misconduct occurred.[4] See NRS 50.065(2)(a); Meyer, 119 Nev. at 562, 80 P.3d at 454;

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[4]The district court found that "the defense failed to establish that any jury [member] was told by a bailiff about the stun belt during the penalty hearing." This finding is not clearly erroneous and therefore is entitled to deference. See Riley v. State, 110 Nev. 638, 878 P.2d 272

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Barker v. State, 95 Nev. 309, 312, 594 P.2d 719, 720 (1979). The bailiff's conduct in particular was clearly improper and most troubling to this court. Nevertheless, McKenna failed to establish prejudice. See Zana v. State, 125 Nev. ___, ___, 216 P.3d 244, 248-49 (2009); Meyer, 119 Nev. at 566, 80 P.3d at 456 (outlining relevant factors in determining whether reasonable probability exists that juror misconduct affected verdict). Specifically, (1) there is no suggestion in the record that the other jurors were exposed to extraneous information; (2) the information was cumulative considering the aggravating factors based on McKenna's criminal record and his propensity for violence and efforts to escape; and (3) the information concerned a material matter—McKenna's dangerousness—and was inadmissible. In balancing these factors, however, we conclude that the misconduct did not affect the jury's sentencing decision. See id. ("[A] court must consider the extrinsic influence in light of the trial as a whole and the weight of the evidence."); see also Zana, 125 Nev. at ___, 216 P.3d at 248-49. And the district court instructed the jury on what it could consider in deciding the case. Accordingly, the district court did not err by denying this claim.

McKenna's claim related to the juror's recounting of her uncle's killing spree warrants no relief. Although McKenna established that the misconduct occurred, he failed to demonstrate prejudice considering the Meyer factors, 119 Nev. at 566, 80 P.3d at 456, evidence introduced in the penalty hearing revealing his penchant for violence and repeated attempts to escape incarceration, and the district court's

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(1994). Accordingly, McKenna did not establish that this alleged misconduct occurred.

instruction regarding matters appropriate for the jury's consideration. Accordingly, we conclude that the district court properly denied this claim.

Use of physical restraints and sleep deprivation

McKenna contends that the district court erred by denying his claim that the use of restraints and sleep deprivation caused by the detention center's security measures rendered his penalty hearing unfair. Because this claim should have been raised on direct appeal, it was procedurally barred absent a demonstration of good cause for his delay and prejudice. NRS 34.810(1)(b)(2).

As good cause for his delay, McKenna contends that he discovered during the instant post-conviction proceedings that jurors were aware that he was wearing leg restraints and a stun belt. McKenna's good-cause argument lacks merit for two reasons. First, he was certainly aware of the restraints used at trial and could have investigated any juror's knowledge of those restraints immediately after trial. Second, his argument does not explain his delay in challenging the restraints and raising his sleep deprivation claim, as those issues were unrelated to the jury. We conclude that McKenna failed to demonstrate good cause.

Even assuming McKenna established good cause, he failed to demonstrate prejudice. First, while specific findings respecting the bases for the trial court's decision to use them is preferable, considering the record as a whole, the district court's decision to restrain McKenna was sufficiently supported. See Browning v. State, 124 Nev. ___, ___, 188 P.3d 60, 73 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 1625 (2009). Second, any juror's observation of the restraints was not sufficiently prejudicial to overcome the procedural default, considering the evidence revealing his penchant for violence and repeated escape attempts. Finally, he fails to identify any contribution he was precluded from making to his defense as a result of the restraints or alleged sleep deprivation. See Hargrove v.

State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (providing that habeas claims must consist of more than bare allegations).

Because McKenna failed to demonstrate good cause and prejudice, we conclude that the district court did not err by denying these claims as procedurally barred.[5]

Introduction of witness's recorded interview

McKenna argues that the district court erred by not allowing him to supplement the post-conviction record with an evidentiary hearing witness's recorded interview with a defense investigator. We disagree.

Because he failed to include a transcript of the audio recording, we are unable to discern its significance. See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980). Nor can we determine whether the juror's recorded statements were any more definitive on the subject than her evidentiary hearing testimony. Even assuming the recording contains the statements McKenna attributes to the juror, we conclude that the omission of the recording as substantive evidence did not deprive him of a fair consideration of his jury-misconduct claim.

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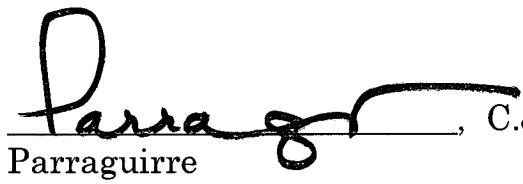
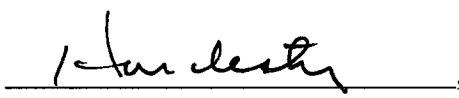
[5]To the extent McKenna challenged the presence of law enforcement personnel in the courtroom, we conclude that he failed to demonstrate good cause and prejudice to overcome the procedural bars, see NRS 34.810(1)(b)(2), and therefore the district court did not err by denying this claim.

Having considered McKenna's claims and concluded that they lack merit, we

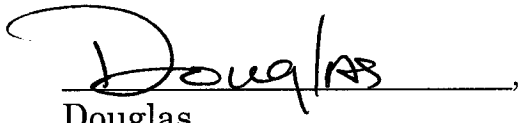
ORDER the judgment of the district court AFFIRMED.[6]



Parraguirre, C.J.



Hardesty, J.



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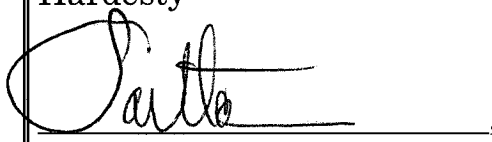

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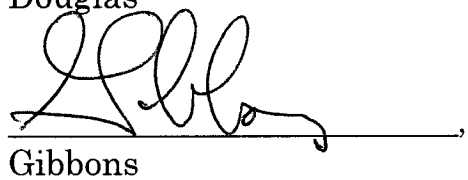

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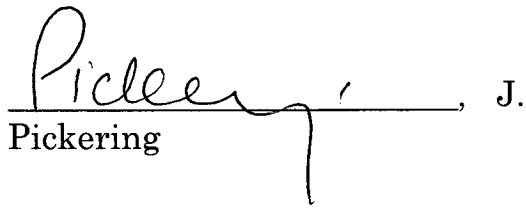

Pickering, J.

cc: Eighth Judicial District Court Dept. 8, District Judge
Law Office of Patricia M. Erickson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[6]The Honorable Michael Cherry, Justice, voluntarily recused himself from participation in the decision in this matter.