

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAGDALENO GALLEGOS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49633

FILED

JUL 31 2009

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

On July 20, 2003, the district court convicted appellant, pursuant to a jury verdict, of two counts of lewdness with a child under the age of 14 and two counts of sexual assault on a child under the age of 14. On the first two counts, appellant was sentenced to two concurrent terms of life in the Nevada State Prison with the possibility of parole after 10 years. On the third and fourth counts, appellant was sentenced to two terms of life with the possibility of parole after 20 years, to be served concurrently to one another but consecutively to the terms imposed on the first two counts. On appeal, this court affirmed the judgment of conviction. Gallegos v. State, Docket No. 41872 (Order of Affirmance, June 14, 2004). The remittitur issued on July 9, 2004.

On May 17, 2005, appellant filed a proper person petition for a writ of habeas corpus in the district court. The district court appointed post-conviction counsel, and counsel filed a notice that a supplemental petition would not be filed. Pursuant to NRS 34.770, the district court

declined to conduct an evidentiary hearing. On May 16, 2007, the district court denied the petition. This appeal follows.

Appellant argues that the district court erred in denying his ineffective assistance of counsel claims without conducting an evidentiary hearing. 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 there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different. See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test set forth in Strickland). The court need not consider both prongs if the petitioner makes an insufficient showing on either prong. Strickland, 466 U.S. at 697. 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. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Defense Strategy

First, appellant argues that he received ineffective assistance of counsel because the defense strategy changed after new counsel was appointed to replace the Public Defender's Office.¹ Appellant claims that,

¹The Public Defender's Office was initially appointed to represent appellant, but withdrew from representation of appellant because the office had previously represented the victim's mother and there was some indication the defense wanted to challenge the credibility of the victim's mother. Jenny Hubach was appointed, but also withdrew. John Kadlic was eventually appointed and represented appellant at trial.

while it was apparent that the Public Defender's Office intended to challenge the victim's mother's story, trial counsel John Kadlic did not vigorously cross-examine her at trial and failed to oppose the State's motion to preclude reference to her criminal record and work as a confidential informant for the State. Appellant further claims that Carlos Salas was the person who actually committed the sexual assault and that the Public Defender's Office investigated Salas, but that trial counsel John Kadlic failed to call Salas to testify.

Appellant fails to demonstrate that he was prejudiced. Appellant provides no argument as to why the district court should have denied the State's motion to preclude reference to the mother's criminal record and work as a confidential informant. Thus, appellant fails to demonstrate that an opposition to the State's motion had a reasonable likelihood of success. Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996). Further, appellant provides no factual basis for his claim that Carlos Salas committed the sexual abuse and provides no information as to what the nature of Salas' testimony would have been. Hargrove, 100 Nev. at 502, 686 P.2d at 225. In addition, there was substantial evidence of appellant's guilt given the testimony of the victim, the physical evidence indicating a sexual assault, and that the nine-year-old victim contracted chlamydia during the time period that appellant exhibited symptoms of the disease. Therefore, appellant failed to demonstrate that this claim had a reasonable probability of altering the outcome of trial.

To the extent that appellant argues that his trial counsel was ineffective for failing to question the victim's mother concerning her criminal record and her work as a confidential informant, appellant failed to demonstrate that his trial counsel's performance was deficient as the

district court precluded questioning of that nature. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Issues Arising From Trial

Second, appellant argues that his trial counsel was ineffective for failing to make an opening statement and for failing to make a complete closing argument. Appellant fails to demonstrate that he was prejudiced. As there was substantial evidence of appellant's guilt given the testimony of the victim, the physical evidence, and that the nine-year-old victim contracted chlamydia during the time period that appellant exhibited symptoms of the disease, appellant fails to demonstrate that this claim had a reasonable probability of altering the outcome of trial. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Third, appellant argues that his trial counsel was ineffective for failing to call witnesses on his behalf. Appellant argues that his trial counsel should have called Diana Favino, Joseph Dominguez, Frank Dominguez, Rick Gallegos, Margaret Segobiano, and Johnny Espinosa to testify. Appellant fails to demonstrate that he was prejudiced. Appellant fails to indicate the nature of the testimony of any of these witnesses or what questions should have been asked of these witnesses. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fourth, appellant argues that his trial counsel was ineffective for failing to call appellant to testify. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. "The accused has the ultimate authority to make certain fundamental

decisions regarding the case, such as whether to plead guilty, waive a jury, testify on one's own behalf, or take an appeal." Raquepaw v. State, 108 Nev. 1020, 1022, 843 P.2d 364, 366 (1992), overruled on other grounds by DeRosa v. Dist. Ct., 115 Nev. 225, 985 P.2d 157 (1999), overruled on other grounds by City of Las Vegas v. Walsh, 121 Nev. 899, 124 P.3d 203 (2005). During trial, the district court canvassed appellant concerning his right to testify and asked appellant if he needed more time to discuss it with counsel. Appellant responded that he did not need any additional time and informed the court that he was not going to testify. Thus, the district court informed appellant of his right to testify and appellant waived that right. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fifth, appellant argues that he received ineffective assistance of counsel because there were irreconcilable differences between him and his trial counsel. Appellant argues trial counsel did not introduce evidence he wished and did not fully discuss with appellant his right to testify. Appellant argues that this demonstrates that the attorney-client relationship had collapsed. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. "[I]f the complete collapse of the attorney-client relationship is evident, a refusal to substitute counsel violates a defendant's Sixth Amendment rights." Young v. State, 120 Nev. 963, 969, 102 P.3d 572, 576 (2004) (citing U.S. v Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)).

Here, we conclude that appellant fails to demonstrate a complete collapse of the attorney-client relationship occurred. Following the district court's inquiry concerning the adequacy of the discussion appellant had with counsel over his right to testify, appellant responded

that he had discussed his right to testify with counsel, but was not sure if their discussion was adequate. Appellant then told the district court that he was not being given the opportunity to bring in evidence that he felt was necessary and that he wanted counsel to work more with him on this matter. Appellant's trial counsel informed the district court that he had made a tactical decision as to what evidence to introduce, that he and appellant had discussed his right to testify in depth, and that he did not know any other way to explain testifying to appellant. The district court asked appellant if he needed more time to discuss his right to testify with counsel and appellant stated that he did not. The above discussion was the only incident appellant cites to demonstrate that there was a breakdown in the attorney-client relationship and that incident does not demonstrate a complete breakdown of that relationship. Notably, appellant did not make a motion to dismiss or request substitute counsel during trial or otherwise complain that he needed a different counsel during trial. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

In his petition below, appellant also raised the following claims of ineffective assistance of counsel alleging that trial counsel: (1) failed to investigate and retrieve tapes of police interviews with potential witnesses; (2) failed to investigate and retrieve results of a lie detector test taken by appellant; (3) failed to investigate theories of innocence; (4) only discussed plea negotiations; (5) failed to hire an investigator; (6) failed to retrieve and review the public defender's case file; (7) failed to communicate with appellant; (8) failed to investigate other sexual partners of the victim; (9) failed to investigate the victim's knowledge of sexual activity; (10) failed to investigate the victim's mother's instructing

the victim to fabricate testimony; (11) failed to investigate the victim's prior false allegations of sexual abuse and her mother's role in those allegations; (12) failed to impeach the victim and her mother with inconsistent statements; (13) failed to investigate a recorded statement the victim gave to police officers; (14) failed to investigate reasons the victim's mother would encourage the victim to fabricate her testimony; (15) failed to impeach the examining nurse over the fact that the sexual assault examination was not conducted within a reasonable period of time after the incidents; (16) failed to move to suppress the results of the physical examination; (17) failed to demonstrate that appellant never had chlamydia; (18) failed to the impeach victim's mother over the fact that appellant was involved in an industrial accident which caused his eyes to be red; (19) failed to call an expert to demonstrate that chlamydia can be passed in ways other than penetration and that testing procedures for the disease are unreliable; (20) failed to call an expert witness to impeach the State's evidence from the sexual assault examination; (21) failed to seek psychological examination of the victim; (22) failed to communicate with appellant regarding proposed expert witnesses; (23) failed to investigate the victim's mother's criminal history; (24) failed to poll the jury members individually after the verdict was read; (25) failed to present mitigation evidence; and (26) failed to object to imposition of lifetime supervision.

On appeal, appellant lists the claims, but fails to provide any cogent argument as to how or why the district court erred in denying these claims without conducting an evidentiary hearing. "It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Thus we need not address these

claims. Therefore, appellant fails to demonstrate that the district court erred in denying the above claims without conducting an evidentiary hearing.

In addition, appellant claimed that, due to cumulative errors of trial counsel, he received ineffective assistance of counsel. Appellant failed to demonstrate that he was prejudiced. As appellant failed to demonstrate he was prejudiced by any of the claims above, he failed to demonstrate cumulative error amounting to ineffective assistance of counsel. Therefore, the district court did not err in denying this claim.

Next, appellant argues the district court erred in failing to appoint different post-conviction counsel when counsel below did not file a supplemental petition.² Appellant also argues that post-conviction counsel should have investigated appellant's claims further and should have requested a court-appointed investigator. Appellant failed to demonstrate that the district court erred in failing to appoint substitute post-conviction counsel. There is no right to effective assistance of counsel in post-conviction proceedings. McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). Notably, appellant did not file a motion for substitute counsel or otherwise request that different post-conviction counsel be appointed in the proceedings before the district court.³ Thus, we conclude


²Scott Edwards represented appellant in the post-conviction proceedings in the district court. Mary Lou Wilson represents appellant in the instant appeal.

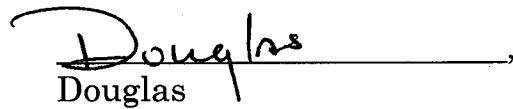
³Following the district court's denial of the petition, appellant filed a motion in the district court stating that counsel's services were no longer required. Appellant requested that counsel withdraw and send appellant all documentation generated for this matter.


that he was not entitled to substitute counsel and the district court did not err in failing to appoint substitute counsel.

Accordingly, having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Robert H. Perry, District Judge
Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk