

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY PRENTICE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50338

FILED

JUL 22 2010

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Ineffective assistance of trial counsel

Appellant argues that the district court erred by denying his claims of ineffective assistance of counsel without conducting an evidentiary hearing. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). Both components of the inquiry must be shown. 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).

First, appellant argues that his trial counsel was ineffective for failing to object to the admission of prior bad act evidence, evidence of appellant's racist beliefs, and evidence of a fight that occurred while appellant was incarcerated. Appellant cannot demonstrate prejudice because the underlying claims were raised on direct appeal and this court rejected those claims. Prentice v. State, Docket No. 43178 (Order of Affirmance, June 15, 2005). Therefore, the district court did not err in denying these claims without conducting an evidentiary hearing.

Second, appellant argues that his trial counsel was ineffective for failing to seek to exclude any reference to his incarceration following his arrest for this crime. Given the strength of the evidence admitted at trial, appellant fails to demonstrate he was prejudiced by references to his incarceration. 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 investigate the veracity of a police claim that an apartment surveillance tape was not useable. Appellant fails to demonstrate his counsel's performance was deficient or that he was prejudiced. Appellant made only a bare and naked claim that the police's statement concerning the quality of the tape may not have been accurate. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Appellant fails to demonstrate a reasonable probability that the outcome of the proceedings would have been different had his counsel investigated the veracity of the police's claim. 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 investigate whether his codefendant was actually a follower.

Appellant fails to demonstrate that he was prejudiced. At trial, multiple witnesses testified that the codefendant was a follower. Appellant fails to demonstrate that further investigation into this area would have revealed different information. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fifth, appellant argues that his trial counsel was ineffective for failing to investigate C. Roncancio and other witnesses who could have testified about appellant's feelings toward homosexuals or that his codefendant was a homosexual. Appellant testified about his opinion of homosexuals and testified that his codefendant was a homosexual. Appellant fails to demonstrate what further investigation into this area would have revealed and fails to demonstrate a reasonable probability of a different outcome had further information of this type been presented at trial. Id. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Sixth, appellant argues that his trial counsel was ineffective for failing to investigate A. Ratelle's false allegations of sex abuse and whether she was a prostitute. Appellant cannot demonstrate that his trial counsel was deficient because his trial counsel was aware of these issues as counsel attempted to question Ratelle in these areas, but was precluded from doing so by the district court. Appellant cannot demonstrate prejudice because the underlying claim concerning prostitution was raised on direct appeal and this court rejected that claim. Prentice v. State, Docket No. 43178 (Order of Affirmance, June 15, 2005). In addition, appellant fails to demonstrate that Ratelle actually made any false allegations of sex abuse, and thus, fails to demonstrate a reasonable

probability of a different outcome had further investigation in this area been performed. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Seventh, appellant argues that his trial counsel was ineffective for failing to investigate the State's interference with A. Ratelle's testimony because her testimony changed after discussions with the prosecuting attorney. Appellant failed to demonstrate that he was prejudiced. Ratelle testified that she agreed to testify against appellant and in exchange would only be charged as a juvenile. Appellant fails to identify any further information that could have been uncovered and fails to demonstrate a reasonable probability of a different outcome had further investigation into this area taken place. Molina, 120 Nev. at 192, 87 P.3d at 538. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Eighth, appellant argues that his trial counsel was ineffective for failing to seek expert witnesses to testify on the use of swastikas in racist groups. Appellant fails to demonstrate that he was prejudiced. Appellant does not list any expert witnesses who could have testified about this issue and fails to demonstrate a reasonable probability of a different outcome had any further testimony in this area been presented. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Ninth, appellant argues that his trial counsel was ineffective for failing to suppress appellant's statements to the police because he was not read the warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. When appellant made the

challenged statements, he was not considered a suspect and had agreed to help the police with the investigation. In considering the circumstances in which appellant made the challenged statements, appellant fails to demonstrate he was undergoing a custodial interrogation and therefore, his statements were properly admitted at trial. Casteel v. State, 122 Nev. 356, 362, 131 P.3d 1, 4 (2006); Alward v. State, 112 Nev. 141, 155, 912 P.2d 243, 252 (1996), overruled on other grounds by Rosky v. State, 121 Nev. 184, 111 P.3d 690 (2005). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Tenth, appellant argues that his trial counsel was ineffective for failing to object to admission of the codefendant's statements as a violation of his right to confrontation as discussed in Bruton v. United States, 391 U.S. 123 (1968). Appellant cannot demonstrate prejudice because the statements of his codefendant that were admitted at trial did not facially or expressly implicate him. Rodriguez v. State, 117 Nev. 800, 809, 32 P.3d 773, 779 (2001); McRoy v. State, 92 Nev. 758, 759, 557 P.2d 1151, 1152 (1976). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Eleventh, appellant argues that his trial counsel was ineffective for failing to object to testimony that appellant and his codefendant were laughing together during a pretrial hearing. Appellant fails to demonstrate that he was prejudiced because he fails to demonstrate a reasonable probability of a different outcome at trial had counsel objected to this testimony. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Twelfth, appellant argues that his trial counsel was ineffective for failing to object to or offer any additional jury instructions, including a

specific instruction that appellant's racism could only be considered if the State offered proof beyond a reasonable doubt that the killing was racially motivated. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. During trial, counsel stated that he had read the State's proposed instructions and had no objections. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances," Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), and appellant fails to demonstrate any such circumstances here. In addition, appellant does not cite anything to support his position that a proposed jury instruction specifically addressing appellant's racism would have been appropriate. See Mazzan v. Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000) (stating that "[c]ontentions unsupported by specific argument or authority should be summarily rejected on appeal"). Appellant fails to demonstrate a reasonable probability that the outcome of the proceedings would have been different had his counsel sought additional instructions because the jury was properly instructed on the use of prior bad act evidence and instructed that it may only consider such evidence for the limited purpose of preparation, intent, motive, plan, knowledge, identity or the absence of mistake or accident. In addition, the State presented significant evidence that the murder was performed in furtherance of appellant's participation in racist skinhead organizations. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Thirteenth, appellant argues that his trial counsel was ineffective for failing to look at the State's case file, object to admission of evidence of the victim's habits, object to admission of appellant's statements where he used racial epithets, object to introduction of hearsay

statements, failing to investigate semen found on the victim, and failing to question the venire panel concerning appellant's racism or his beliefs about homosexuality. These claims were presented in list form and appellant fails to provide cogent argument as to how or why the district court erred in denying these claims. "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). Therefore, appellant fails to demonstrate that he is entitled to relief for these claims.

Ineffective assistance of appellate counsel

Next, appellant argues that the district court erred in denying his claims of ineffective assistance of appellate counsel without conducting an evidentiary hearing. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, appellant argues his appellate counsel was ineffective for failing to argue his statements should have been suppressed because he was not read his Miranda rights. As discussed previously, appellant cannot demonstrate his counsel's performance was deficient or prejudice because he was not undergoing a custodial interrogation, thus his

statements were properly admitted. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, appellant argues that his appellate counsel was ineffective for failing to look at the State's case file. Appellant fails to demonstrate a reasonable likelihood of success on appeal had his appellate counsel looked at the State's case file. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

State's proposed findings of fact and conclusions of law

Next, appellant argues that the district court erred in denying his petition because appellant was not allowed the opportunity to review and respond to the proposed draft order in violation of Byford v. State, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007), EDCR 7.21, and NCJC Canon 3B(7). To the extent the district court may not have strictly followed the mandates of EDCR Rule 7.21 and NCJC Canon 3B(7), we conclude any error was harmless and appellant failed to demonstrate prejudice. NRS 178.598 (stating that any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded). Appellant failed to identify any challenge to the factual findings of the district court. As such, appellant failed to demonstrate that any failure to be allowed to review the proposed factual findings adversely affected the outcome of the proceedings or his ability to seek full appellate review. Therefore, we conclude that appellant is not entitled to relief on this claim.¹


¹Further, Byford is distinguishable from this case. In Byford, the State's draft of the proposed order was premature because the district court had not conducted a hearing and had not made a ruling on a capital murder defendant's claims following a remand from this court to reconsider those claims. 123 Nev. at 69, 156 P.3d at 692.

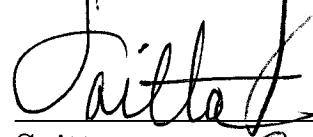
Investigator expenses in post-conviction proceedings


Next, appellant argues that the district court erred by refusing to grant expenses to pay for an investigator for the post-conviction proceedings. Appellant fails to demonstrate that the district court abused its discretion by declining to grant expenses for an investigator.

Having considered appellant's contentions and concluding they are without merit, we

ORDER the judgment of the district court AFFIRMED.²


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Valerie Adair, District Judge
Bailus Cook & Kelesis
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²Because appellant is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, this court shall take no action and shall not consider the proper person documents that appellant has submitted to this court in this matter.