

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID STEPHEN MIDDLETON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50457

FILED

JUN 16 2009

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

ORDER OF AFFIRMANCE

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. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant David Stephen Middleton kidnapped and murdered Katherine Powell and Thelma Davila. He also stole several items from Powell's residence and used her credit card to purchase stereo equipment. Middleton was convicted of two counts of first-degree murder, two counts of first-degree kidnapping, one count of grand larceny, one count of fraudulent use of a credit card, and two counts of ex-felon in possession of a firearm and sentenced him to death for both murders. On appeal this court affirmed the judgment of conviction. Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998).

In this appeal from a district court order denying his post-conviction petition for a writ of habeas corpus, Middleton argues that the district court erred by denying him relief pursuant to McConnell v. State,

120 Nev. 1043, 102 P.3d 606 (2004). In addition, Middleton argues that the district court erred by denying approximately 20 claims for relief that were the subject of an evidentiary hearing. He also contends that the district court erred by summarily dismissing his remaining claims.

As to Middleton's claim that the district court erred by denying him relief pursuant to McConnell, we conclude that although McConnell invalidated the felony aggravator found for each murder, Middleton failed to show prejudice resulting from the jury's consideration of the invalid aggravators. Regarding Middleton's claims for relief for which he received an evidentiary hearing, we conclude that he failed to demonstrate that trial and appellate counsel were ineffective on any of the grounds asserted. Further, we conclude that Middleton failed to demonstrate that he was entitled to an evidentiary hearing on his remaining claims. Consequently, the district court did not err by denying Middleton's petition.

Factual and procedural background

Katherine Powell's murder

At around 9:30 p.m. on February 11, 1995, Katherine Powell's body was found in a trash dumpster at a Reno apartment complex. She was last seen alive on February 3, 1995. Her body was contained in a sleeping bag and covered by plastic garbage bags. A large yellow plastic bag covered the sleeping bag. Her body was also loosely bound by rope and, aside from a black tank top and blue socks, she was nude. Powell's autopsy revealed bruises on her elbows and knees; most of the bruises were

incurred prior to death. She had likely been dead for at least two days. Microscopic analysis of sections of the left ventricle of her heart exhibited some fibrosis and acute cell death; the latter occurred a few days before death. Although forensic pathology investigation revealed the manner of death was homicide, the cause of death could not be conclusively determined.

Physical evidence obtained during the autopsy was later linked to Middleton. Bite marks were found on Powell's left breast and had been inflicted by Middleton before Powell died. A semen stain found on her right thigh was also matched to Middleton.

Investigation after Powell's body was found indicated that she was taken from her home and pointed toward the involvement of Middleton and his girlfriend, Evonne Haley. In particular, two of Powell's neighbors noticed a pickup truck, resembling Middleton's truck, parked in front of Powell's home early in the morning on Saturday, February 4, 1995. A third neighbor had noticed that a TCI Cable truck was parked in front of Powell's home a few days earlier on February 1. This neighbor later identified the occupants as Middleton and Haley. Police also determined that Middleton was the TCI Cable technician who had made a service call at Powell's home on January 28, 1995.

Additionally, after hearing of Powell's disappearance, a friend entered her home and noticed various items were missing, including a phone, a camera, a FAX machine, and a laptop computer and printer. In the kitchen, he found two condoms and a wad of duct tape.

On February 5, a person used Powell's credit card to purchase a \$1,900-piece of stereo equipment by telephone from the Good Guys store in Reno. The next afternoon, Haley arrived at the store to pick up the equipment. One employee's description of the truck she drove led the police to Middleton's pickup.

About one month later, an anonymous caller informed the police that Middleton and Haley had a storage unit, which the police searched pursuant to a warrant and recovered evidence linking Middleton to Powell's death. Police officers recovered the stereo equipment purchased from Good Guys and Powell's house and car keys, camera, computer, printer, and other personal property. The police also found a box of yellow plastic bags and a box of garbage bags. One of three yellow bags was missing from the first box, as were some garbage bags from the second. Police officers also discovered a refrigerator lying on its back and blue fibers, similar to fibers found on Powell's body, inside the refrigerator. The refrigerator's shelves had been removed, the floor of its freezer compartment had been cut and folded down to make one space, and two air holes had been drilled in it. The police also found a switchblade knife, a stun gun, a foam ball with apparent teeth marks, and rope similar to that used to bind Powell's body. Other incriminating evidence collected included the following: orange-handled tension clamps, hair and fiber from one of the clamps, black canvas belts with Velcro, black wire ties, handcuffs, condoms, partial rolls of duct tape, a large speaker box with a space behind the speaker about 14 inches deep, 30 inches wide, and 36

inches high, hairs and fibers from the speaker box, several blankets, and chains.

Thelma Davila's murder

On April 9, 1995, about one month after the search of Middleton's storage unit and two months after the discovery of Powell's body, a man walking with his dog in a secluded area near Verdi found a human skull and other remains. A matted hairpiece was found with rope in it; the rope was the same diameter as the rope found with Powell's body.

A medical examination of the remains did not disclose the cause of death, but the medical examiner could not rule out suffocation or other possible causes of death. A dental bridge in the skull led to the identification of the remains as those of Thelma Davila, who had disappeared eight months earlier, on August 8, 1994.

Davila's sister and a friend later identified a blanket, a black lacy top, and a red hair tie found in Middleton's storage unit as Davila's. Other evidence indicated that Davila, Haley, and Middleton may have had contact before her disappearance, including testimony that Davila was getting into a white or beige pickup truck on August 5, 1994, with a man and woman matching Haley's and Middleton's descriptions, that Middleton was seen using the pay phone at a dance club that Davila frequented, and that Davila had been seen with Haley at the restaurant where Davila was employed, a grocery store, and a medical complex.

Although TCI cable had been installed in Davila's apartment in June 1993 and serviced in July 1994, Middleton did not perform either

service. Nonetheless, one of Davila's neighbors saw Middleton walk part-way up the stairs leading to Davila's apartment and then come back down around 6:45 a.m. on August 8, 1994—the day that Davila was last seen alive. Middleton was not working that day.

Evidence relative to both murders

The timing of Middleton's leasing and usage of two storage units was consistent with the timing of the victims' disappearances. Middleton first leased a storage unit in Sparks just over a month before Davila disappeared, under the name of Hal Data Research. The unit was five feet by ten feet in size. On the afternoon of August 8, 1994—the day that Davila was last seen alive—Middleton leased a larger unit and moved out of the smaller one. Storage facility records revealed that on Friday, February 3, 1995—the last day that Powell was seen alive—Middleton entered the facility at 2:13 a.m. and 8:06 p.m. Middleton entered the facility numerous times between February 3 and February 11, the day that Powell's body was found.

Analysis of evidence located in the larger storage unit connected Middleton to the murders. With respect to Powell: (1) fibers found in the refrigerator in the storage unit were indistinguishable from those found on Powell's body; (2) two human head hairs found in the refrigerator and one found on a black restraint belt could not be excluded as belonging to Powell; and (3) DNA obtained from a foam ball found in the storage unit matched Powell's DNA, as did DNA extracted from two hairs found in a clamp and one hair found on a blanket. With respect to Davila: (1) hairs

found on a roll of duct tape and on two blankets in the storage unit were consistent with those found on Davila's hairbrush; and (2) DNA collected from one hair found on duct tape and one hair from another blanket matched Davila's DNA. Rope found with both bodies was the same type—common white, nylon, woven twelve-strand, one-quarter inch in diameter.

A medical examiner explained Powell's and Davila's autopsy results. In particular, he opined that despite mild perivascular fibrosis, Powell's heart was healthy and normal, countering Middleton's contention that Powell died from heart disease rather than a criminal agency. The circumstances of Powell's disappearance and the condition of her body when found signified that her death was a homicide and the lack of pathological findings indicated that she probably died of asphyxiation. Bruising on Powell's elbows and knees were consistent with struggles to free herself from a confined space, such as the refrigerator.¹ The medical examiner concluded that although the circumstances surrounding Davila's disappearance indicated that her death was a homicide, a cause of death could not be determined.

¹An expert witness explained that based on the volume of the refrigerator and the size of the two holes drilled in it, a person measuring 5' 7" tall and weighing 145 pounds enclosed in the refrigerator would have died from oxygen deprivation in about three and a half hours.

Verdict

The jury found Middleton guilty of two counts of first-degree murder, two counts of first-degree kidnapping, one count of grand larceny, and one count of fraudulent use of a credit card. A bench trial was held the following month, where the district court found Middleton guilty of two counts of being an ex-felon in possession of a firearm. After a penalty hearing, the jury found five circumstances aggravated Powell's murder—Middleton had two previous convictions for felonies involving the use or threat of violence (aggravated battery and false imprisonment), the murder was committed during the commission of a kidnapping, Middleton was convicted of more than one murder in the immediate proceeding, and the murder involved torture and/or depravity of mind. The jury found the same circumstances aggravated Davila's murder with the exception of the torture/depravity of mind aggravator. The jury found no mitigating circumstances sufficient to outweigh the aggravators and sentenced Middleton to death for both murders. Middleton was sentenced to two prison terms of life without the possibility of parole for the two counts of first-degree kidnapping and multiple, definite prison terms for the remaining offenses. This court affirmed Middleton's conviction and sentence on appeal. Middleton, 114 Nev. at 1094-1102, 968 P.2d at 300-06.

Post-conviction

Middleton filed a timely post-conviction petition for a writ of habeas corpus. The district court summarily dismissed a number of Middleton's claims, and after conducting an evidentiary hearing, it denied

Middleton's remaining claims in January 2003. Middleton appealed. However, due to appellate counsel's repeated violations of this court's orders and procedural deadlines, we removed counsel from representing Middleton, vacated the district court's order denying Middleton's post-conviction petition, and remanded the matter to the district court with instructions to appoint Middleton new post-conviction counsel. Middleton v. Warden, 120 Nev. 664, 98 P.3d 694 (2004). After the appointment of new counsel, Middleton filed a supplemental post-conviction petition on August 2, 2005, raising 71 claims for relief. The district court summarily denied approximately 50 of Middleton's claims and denied his remaining claims after conducting an evidentiary hearing. This appeal followed.

For the reasons discussed below, we conclude that Middleton failed to show that he was entitled to relief on any claim. Therefore, the district court did not err by denying his post-conviction petition.

Application of McConnell v. State

Middleton argues that the district court erred by denying his claim that the application of McConnell mandates reversal of his death sentence. He specifically contends that McConnell invalidated the felony aggravators found for each murder and that the jury's consideration of those aggravators was not harmless.² Because this claim is appropriate

²Middleton contends that the torture aggravator found in connection with Powell's murder is invalid under McConnell. However, in Hernandez v. State, 124 Nev. ___, 194 P.3d 1235 (2008), this court declined to extend

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for direct appeal, Middleton must demonstrate good cause for his failure to raise it previously and actual prejudice. NRS 34.810(1)(b)(2), (3). Although he demonstrated good cause because McConnell is retroactive, Bejarano v. State, 122 Nev. 1066, 1070, 1076, 146 P.3d 265, 268, 272 (2006), we conclude that he failed to demonstrate actual prejudice.

In McConnell, this court “deem[ed] it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated.” 120 Nev. at 1069, 102 P.3d at 624. Here, the State advanced two theories of first-degree murder including felony murder and relied on the same underlying felony (kidnapping) to support an aggravating circumstance as to each murder. Because the verdict is silent as to which theory or theories the jury relied on to find him guilty of the murders, the felony aggravators found for each murder must be stricken pursuant to McConnell. This court may nonetheless uphold the death sentences either by reweighing the aggravating and mitigating evidence or conducting a harmless-error review. See Clemons v. Mississippi, 494 U.S. 738, 741 (1990); see Browning v. State, 120 Nev. 347, 364-65, 91 P.3d 39, 51-52 (2004); Leslie v. Warden, 118 Nev. 773, 784, 59 P.3d 440, 448 (2002).

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the reasoning in McConnell to the torture aggravating circumstance. Therefore, we conclude that the district court did not err by denying this claim.

After invalidating the felony aggravator for each murder, four remain respecting Powell's murder—Middleton had two previous convictions for felonies involving the use or threat of violence (aggravated battery and false imprisonment), he was convicted of more than one murder in the immediate proceeding, and the murder involved torture and/or depravity of mind. The same aggravating circumstances remain for Davila's murder with the exception of the torture/depravity of mind aggravator, which was not sought for her murder.

To support the aggravating circumstances alleged, the State presented evidence that Middleton had been convicted in Florida of aggravated battery and false imprisonment in December 1991. And of course the verdicts reflect that Middleton was convicted of two murders in the immediate proceeding. As to Powell's murder, the State produced compelling evidence to support the torture aggravator, including evidence showing that she was bound and kept in a refrigerator or other small space for some period of time and was allowed to suffocate to death, Middleton inflicted a painful bite mark on her breast, and he used a stun gun on her. Further, Powell's hair was found on a tension clamp and duct tape and her DNA and tooth marks were found on a foam ball, all of which were found in Middleton's storage unit, suggesting that he treated her in cruel manner.

In mitigation, Middleton presented several family members and friends who testified that he was raised by a loving, close-knit family and was helpful to others. And a Washoe County Sheriff's Department Deputy

testified that Middleton functioned well in prison. Middleton made a statement in allocution stating that he had four children whom he loved. He explained his work history and that he had attended college. Although he did not accept responsibility for the murders, Middleton expressed his “empathy” to Powell’s and Davila’s families. Middleton also thanked the district court for its fairness and consideration of his case.

After reweighing the aggravating and mitigating evidence, we conclude that the jury would have found Middleton death eligible for each murder absent the invalid aggravators. The remaining aggravators in this case are compelling. Middleton’s two prior violent felony convictions reveal a history of violence, which escalated to the murder of two women in a six-month period. And as described above, Middleton’s torture of Powell was nothing less than sadistic. Although Middleton’s evidence in mitigation was credible, it is not compelling when weighed against the strength of the remaining aggravators. Therefore, we conclude that the jury would have found Middleton death eligible absent the invalid aggravators. Further, considering all of the evidence adduced during the penalty hearing, we conclude that the jury would have imposed death for each murder. Consequently, although Middleton demonstrated good cause for failing to raise this claim previously, he failed to establish actual prejudice. Therefore, the district court did not err by denying this claim.³

³To the extent that Middleton contends that the district court erred by denying his claim that appellate counsel was ineffective for failing to
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Claims of ineffective assistance of counsel subject to an evidentiary hearing

Middleton argues that the district court erred by denying numerous claims of ineffective assistance of trial and appellate counsel. “A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review,” Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001), but the district court's purely factual findings are entitled to deference. Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004). Under the two-part test established by the United States Supreme Court 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, but for counsel’s deficient performance, 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). “The defendant carries the affirmative burden of establishing prejudice.” Riley v. State, 110 Nev. 638, 646, 878 P.2d 272, 278 (1994).

Middleton contends that the district court erred by denying nine claims that trial counsel was ineffective for—(1) unreasonably

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challenge the dual use of the same predicate felony for felony murder and the felony aggravator, we conclude that the district court did not err by denying this claim.

dividing the responsibilities of representation, (2) failing to challenge his competency to stand trial, (3) failing to renew a motion to suppress evidence, (4) failing to file a motion to suppress evidence recovered pursuant to a defective warrant, (5) failing to file a motion to suppress statements made during two police interrogations, (6) failing to challenge the notice of intent to seek the death penalty on the ground that Middleton detrimentally relied on promises by police detectives and the district attorney, (7) providing erroneous advice respecting Middleton's right to counsel, (8) failing to adequately cross-examine a police investigator, and (9) failing to object to prosecutorial misconduct.⁴

Middleton also contended that the district court erred by denying two claims of ineffective assistance of appellate counsel: (1) appellate counsel labored under an actual conflict of interest, rendering his representation ineffective and (2) appellate counsel should have sought to disqualify the Washoe County District Attorney's Office because the prosecutor improperly participated in the selection of appellate counsel.

⁴As a corollary to this issue, Middleton contends that the district court's order disposing of this claim is deficient because it does not contain specific factual findings or conclusions of law. Although the district court did not detail each instance of misconduct alleged, the order is sufficient to enable this court to discern the bases for the district court's decision and review for error. See Nika v. State, 120 Nev. 600, 605, 97 P.3d 1140, 1144 (2004).

We have carefully considered all of these claims and conclude that the district court's detailed findings of fact are supported by substantial evidence. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (stating that district court's factual findings are entitled to deference on appeal so long as they are supported by substantial evidence and not clearly wrong). Because Middleton failed to demonstrate that trial and appellate counsel were ineffective for any of the reasons identified, we conclude that the district court did not err by denying these claims. Although we deny relief, three claims warrant detailed discussion.

Competency to stand trial

Middleton contends that the district court erred by denying his claim that trial counsel was ineffective for failing to challenge his competency. To support his claim, he produced four competency evaluations from three mental health doctors that he contends demonstrate his incompetence to stand trial. However, based on these evaluations and counsel's testimony at the evidentiary hearing, we conclude that Middleton failed to demonstrate that counsel was deficient or prejudicial.

Considering the evaluations together, which were completed between June 29, 1995, and November 30, 1995, the following assessments were adduced. Middleton suffered from depression and anxiety. He reported in each evaluation that he had experienced blackouts and auditory hallucinations, although as one evaluator noted, there was "no corroborative source regarding these blackouts." Middleton

was intelligent and “well-versed” in the criminal justice system. Despite his intellectual ability to assist counsel, three of the evaluations noted that Middleton’s memory deficits due to blackouts rendered him unable to assist counsel. The fourth evaluation noted Middleton’s concern regarding his competency, but the evaluator did not opine that Middleton was unable to assist counsel in his defense. One report explained that if treated for his anxiety and depression, Middleton would be able to assist his counsel.

The evaluations, however, were not the only evidence before the district court relative to Middleton’s claim. At the evidentiary hearing, trial counsel explained that he was aware of the four mental health evaluations but elected not to challenge Middleton’s competency because the evaluations were unpersuasive in that Middleton coherently related to the evaluators his actions relative to the Powell murder and Middleton’s anxiety and depression would be expected given that he was in jail facing the death penalty. Trial counsel also explained that Middleton had related to counsel his account of what happened the night Powell died and denied experiencing a blackout that evening. Trial counsel described Middleton as a very hands-on client, who was “intimately involved with everything going on in the case” and read the discovery materials provided by counsel. Based on his interactions with Middleton, counsel believed that Middleton was able to assist in his defense and therefore counsel did not request a competency hearing.

We conclude that the district court's findings of fact are supported by substantial evidence. Although language in the evaluations raises the specter of incompetency, a closer examination of those evaluations reveals that Middleton cooperated with the evaluators, appeared intelligent, understood the charges against him, and possessed at least average cognitive ability, which was consistent with counsel's interactions with and observations of Middleton during his representation. We conclude that the district court did not err by denying this claim because Middleton failed to show that counsel were deficient or prejudice.

Renewal of motion to suppress

Middleton argues that the district court erred by denying his claim that trial counsel was ineffective for not renewing a motion to suppress evidence. In particular, he contends that several search warrants secured by the police were based on suppressed statements he made during police interviews between March 1 and March 3, 1995; therefore counsel should have sought to suppress evidence obtained as a result of those statements.

Approximately a month before trial, counsel unsuccessfully sought to suppress all evidence recovered from Middleton's storage unit during three searches on the grounds that the search warrants were deficient for various reasons. During a hearing on pretrial motions shortly before trial, the State conceded that Middleton's statements from the March 1 and 2, 1995, interviews should be suppressed because they were made as part of a plea negotiation and therefore were involuntary. Trial

counsel did not renew the motion to suppress the physical evidence recovered from Middleton's storage unit based on the State's concession.

At the post-conviction evidentiary hearing, counsel explained that he did not renew the motion to suppress because the probable cause supporting the warrants was not based solely on Middleton's statements from the suppressed interviews and therefore a motion would not have been successful. The district court concluded that counsel testified credibly that he considered renewing the suppression motion but that based on his research, the warrant was supported by sufficient probable cause exclusive of Middleton's suppressed statements. Therefore, counsel's decision not to renew the motion was "not unreasonable under prevailing professional norms." The district court further concluded that the suppression motion would not have been granted had it been renewed because "the affidavit nevertheless recited a sufficient factual basis supporting probable cause without [the suppressed statements]."

It is axiomatic that searches must be based upon probable cause, which "requires that law enforcement officials have trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are: seizable and will be found in the place to be searched." Keese v. State, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994). It is also a cornerstone of constitutional law that evidence obtained through illegal official acts is excluded as fruit of the poisonous tree. Costello v. United States, 365 U.S. 265, 280 (1961); see generally Wong Sun v. United States,

371 U.S. 471 (1963). In Wong Sun, however, the United States Supreme Court observed that the exclusionary rule has no application if an "independent source" exists from which the state learned of the evidence. Id.; see United States v. Mearns, 443 F. Supp. 1244, 1254 (D. Del. 1978). Based on these constitutional principles, the question is whether, excluding Middleton's suppressed statements, probable cause supported the search warrants; if so, counsel had no basis for seeking suppression of the evidence recovered from Middleton's storage unit.

The record supports the district court's conclusion that the warrants were supported by probable cause independent of Middleton's suppressed statements. Several search warrants were executed respecting Middleton's storage unit and the resulting searches yielded the vast majority of evidence used to establish Middleton's guilt for both murders. Although Middleton's suppressed statements were incriminating and established a solid link between him and Powell, the evidence connecting Middleton to Powell's murder and her missing property, exclusive of those statements, provided probable cause to support the search warrants. Therefore, the search warrants were valid. Accordingly, even if counsel had renewed the motion to suppress, it would not have met with any success, and Middleton thus cannot demonstrate that counsel was ineffective in this regard. The district court therefore did not err by denying this claim.

Detrimental reliance

Middleton argues that the district court erred by denying his claim that trial counsel was ineffective for not challenging the notice of intent to seek the death penalty on the grounds that he detrimentally relied on promises made by the State and police detectives. In particular, he contends that the Washoe County District Attorney and a police detective promised him that the death penalty would not be sought if he cooperated in the investigation of Powell's death. Therefore, Middleton argues, trial counsel should have filed a motion to dismiss the notice of intent to seek the death penalty. We conclude that Middleton failed to demonstrate that trial counsel was ineffective on this basis.

Although Middleton, a former police officer, expressed concern about the death penalty several times during the March interviews, he cites to particular points during those interviews that he claims demonstrate that a detective promised not to seek the death penalty if he cooperated with the investigation. Essentially, Middleton points to statements by a detective expressing (1) his belief that Powell was not murdered; (2) his representations that Middleton's counsel at the time, the Washoe County Public Defender, did not believe that Powell was murdered; and (3) his statements that the death penalty may only be sought for first-degree murder and that he did not see how the death penalty could apply because he was unsure of whether Powell had been murdered. None of these statements made any promise respecting punishment. And other portions of the interview demonstrate that the

detective made no such promise. For example, the detective informed Middleton that he could only promise to “fairly and accurately record what you say and determine the truth.” And when Middleton expressed a desire to negotiate a deal, the detective advised Middleton that he would arrange a meeting with a prosecutor because the detective was “uncomfortable getting outside of my arena.” Considering the detective’s statements as a whole, we conclude that the record supports the district court’s conclusion that the police made no promises respecting the death penalty.

To the extent Middleton argues that the district attorney promised not to seek the death penalty, nothing in the district attorney’s statements to Middleton supports this contention. The district attorney told Middleton during the March 3, 1995, interview that if Middleton gave a truthful statement and the offenses involved property crimes, he would negotiate an agreement. However, the district attorney never promised Middleton that he would not seek the death penalty and, in fact, referred to Powell’s murder only fleetingly, essentially informing Middleton that if he provided a truthful statement, he would consider the evidence and then discuss with Middleton how to proceed based on the evidence. We conclude that the record supports the district court’s conclusion that the district attorney made no promise to Middleton to forgo the death penalty in exchange for Middleton’s cooperation in the investigation.

Because Middleton failed to show that a motion to dismiss the notice of intent would have met with any success, he failed to prove that

counsel was deficient or prejudice in this regard. The district court therefore did not err by denying this claim.

Claims of ineffective assistance of counsel summarily denied

Middleton argues that the district court erred by dismissing numerous claims without conducting an evidentiary hearing, including: (1) trial counsel were ineffective for failing to challenge Senate Bill 314, which abolished insanity as a complete defense to a criminal offense; (2) trial counsel were ineffective for failing to pursue an alibi defense; (3) trial counsel were ineffective for failing to investigate whether police officers tampered with or planted evidence; (4) trial counsel were ineffective for not seeking sequestration of the jury; (5) trial counsel were ineffective for failing to retain certain expert witnesses, including identification, bite mark, and mental health experts; (6) trial counsel were ineffective for not introducing evidence of positive prison adjustment; (7) appellate counsel were ineffective for failing to adequately address the State's alleged interference with appellant's right to counsel; (8) appellate counsel were ineffective for failing to challenge alleged prosecutorial misconduct; (9) appellate counsel were ineffective for failing to correct numerous alleged inaccuracies in the opening brief, including portions of Middleton's suppressed statements in the briefs, and failing to communicate with Middleton; (10) appellate counsel were ineffective for not presenting numerous claims as implicating federal constitutional concerns to avoid dismissal of a federal habeas petition due to unexhausted state remedies; and (11) appellate counsel were ineffective for not challenging his

conviction and sentence as unreliable because Nevada trial and appellate judges are popularly elected. Middleton was entitled to an evidentiary hearing on these claims only if they were “supported by specific factual allegations not belied by the record that, if true, would entitle him to relief.” Mann v. State, 118 Nev. 351, 353, 46 P.3d 1228, 1229 (2002); Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Our review of these claims reveals that none of them were sufficiently supported by factual allegations justifying an evidentiary hearing or relief. Because Middleton did not show that he was entitled to an evidentiary hearing on any of the claims identified above, we conclude that the district court did not err by summarily denying them.⁵

⁵Middleton also argues that that he was entitled to an evidentiary hearing on the following claims: (1) the trial court improperly considered financial costs in appointing the Washoe County Public Defender to represent him on appeal; (2) extensive and inflammatory publicity rendered his trial unfair; (3) his conviction and sentence were the result of purposeful discrimination; (4) the district court improperly instructed the jury on the “elements of the capital offense” and premeditation; and (5) Nevada’s death penalty scheme and lethal injection protocol are unconstitutional. However, these claims were appropriate for direct appeal and therefore an evidentiary hearing was not necessary to develop a factual record to resolve the claims. And as these claims were appropriate for direct appeal, they are procedurally barred absent a demonstration of good cause and prejudice. NRS 34.810(1)(b)(2). We conclude that Middleton failed to overcome the procedural default.

Miscellaneous claims

Middleton raises two claims related to the content and drafting of the district court's orders resolving his post-conviction petition.

First, Middleton argues that the district court's January 9, 2006, order summarily dismissing numerous claims is deficient under Nika v. State, 120 Nev. 600, 97 P.3d 1140 (2004), because it does not contain factual findings or legal conclusions. However, the order considered in Nika is distinguishable from the one challenged here. In the January 9, 2006, order, the district court explained, albeit briefly, its reasons for dismissing each of the approximately 50 claims without an evidentiary hearing. Therefore, we can determine the bases upon which the district court summarily dismissed the claims identified and review for error. Consequently, this claim lacks merit.

Second, Middleton argues that we should review with special scrutiny the district court's findings of fact and conclusions of law because they were drafted by the State, indicating that "the district court was either biased or not paying attention." However, Middleton points to no inaccuracies, omissions, or misrepresentations in either order disposing of his post-conviction claims. Nor does the circumstance that the State drafted the order alone suggest that the district court was biased against him. Accordingly, this claim lacks merit.

Having considered Middleton's arguments and concluded that the district court did not err by denying his post-conviction petition for a

writ of habeas corpus, we

ORDER the judgment of the district court AFFIRMED.⁶

Hardesty, C.J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

Pickering, J.
Pickering

⁶Middleton argues that the instruction on first-degree murder by torture was inaccurate and that torture by murder was not supported by the evidence. He concedes that he raises this issue for the first time on appeal but argues that refusing to consider it would result in a miscarriage of justice because the torture murder theory is invalid. "Generally, failure to raise an issue below bars consideration on appeal." State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998). We conclude that Middleton has not shown a miscarriage of justice warranting departure from that rule.

cc: Hon. Steven P. Elliott, District Judge
Nathalie Huynh
Law Office of Thomas L. Qualls, Ltd.
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk