

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFONSO MANUEL BLAKE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50552

FILED

FEB 18 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from the denial of a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Appellant Alfonso Blake shot to death two young women and attempted to kill another young woman by shooting her in the head. A jury convicted Blake of two counts of first-degree murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon. This court affirmed the judgment of conviction and death sentence. Blake v. State, 121 Nev. 779, 121 P.3d 567 (2005).

Blake timely filed the instant post-conviction petition for a writ of habeas corpus, which the district court denied without conducting an evidentiary hearing. Blake argues on appeal that the district court erred by summarily denying his claims of ineffective assistance of trial and appellate counsel. Blake was entitled to an evidentiary hearing only if he "assert[ed] claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). For the reasons discussed below, we conclude that Blake failed to adequately support or explain his

claims of ineffective assistance of trial and appellant counsel such that he was entitled to an evidentiary hearing and that his claims lack merit. Therefore, the district court did not err by summarily denying his post-conviction petition.

Claims of ineffective assistance of trial 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). “However, the district court's purely factual findings regarding a claim of ineffective assistance of counsel are entitled to deference on subsequent review by this court.” Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004). A claim that counsel provided constitutionally inadequate representation is subject to the two-part test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate that (1) counsel's performance was deficient and (2) prejudice, i.e., but for counsel's errors there is a reasonable probability that the result of the proceeding would have been different. Strickland, 466 U.S. at 694; Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996). “The defendant carries the affirmative burden of establishing prejudice.” Riley v. State, 110 Nev. 638, 646, 878 P.2d 272, 278 (1994). A court need not consider both prongs of the Strickland test if a defendant makes an insufficient showing on either prong. Strickland, 466 U.S. at 697.

Investigative claims

Blake first argues that the district court erred by summarily denying his claim that trial counsel were ineffective for inadequately investigating his case. This claim encompasses four specific alleged deficiencies by trial counsel.

First, Blake contends that trial counsel should have interviewed two of Blake's female companions, who were present during an altercation between Blake and the victims, to develop a self-defense theory. Blake, however, fails to identify what further investigation of his two female companions would have revealed to assist counsel in developing options for his defense. Rather, Blake presents a bare statement unsupported by any specific factual allegations. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). And the evidence adduced at trial renders a self-defense theory implausible: Blake ordered the victims to walk some distance into the desert, told them to get down on their hands and knees, donned a pair of gloves, and shot each of them in the head. After the shooting, Blake fled to Los Angeles, where he disposed of the murder weapon and crafted an alibi. Blake failed to provide any cogent argument supporting his claim that counsel were deficient for not investigating his proffered witnesses nor did he demonstrate prejudice.

Second, Blake contends that trial counsel were ineffective for not obtaining his school records, which he claims would have assisted the defense psychologist in properly assessing and diagnosing him. However, Blake does not explain how the records would have affected the psychologist's opinion or altered the outcome of the trial.

Third, Blake asserts that trial counsel were ineffective for failing to investigate assertions from Blake's family and friends that jurors were observed speaking to a victim's family in the courthouse hallway. However, Blake does not explain when the alleged conversation occurred or what the jurors and victim's family members purportedly discussed.

Fourth, Blake argues that trial counsel were ineffective for failing to investigate his assertions that he had been robbed a few months

prior to the murders, had been shot at when he was 18 years old, and had been shot at three times when he was in his 20s. Blake failed to explain for what purpose these matters should have been investigated or how any of these events, had they been revealed to the jury, would have altered the outcome of the proceeding.

Blake presented nothing more than bare allegations respecting the above claims of ineffective assistance of trial counsel. Because he failed to show that counsel were deficient on the grounds he asserts or prejudice, we conclude that the district court did not err by summarily denying these claims. See Strickland, 466 U.S. at 694; Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

Waiver of preliminary hearing

Blake next argues that the district court erred by summarily denying his claim that trial counsel were ineffective for allowing him to waive his right to a preliminary hearing without securing assurances from the State that the death penalty would not be pursued. Blake argues that he was prejudiced because he was prevented from securing a probable cause hearing respecting the aggravating circumstances alleged, which could have avoided “the possibility of a death determination,” and allowed him to approach his case differently or “explore other viable defenses to prevent the imposition of death.” Blake’s claims lack merit because he was not entitled to a preliminary hearing or probable cause determination respecting the aggravating circumstances. Floyd v. State, 118 Nev. 156, 166, 42 P.3d 249, 256 (2002), abrogated on other grounds by Grey v. State, 124 Nev. ___, 178 P.3d 154 (2008).

Even assuming counsel waived the hearing based on an erroneous belief that the State had decided not to seek the death penalty

because it had not filed a notice in the justice court, Blake cannot demonstrate that counsel's actions in this regard prejudiced him. The State's notice of intent to seek the death penalty comported with SCR 250(4)(c), and as this court concluded on direct appeal, there is more than sufficient evidence to support the aggravating circumstances. Blake v. State, 121 Nev. 779, 795, 800, 121 P.3d 567, 577, 581 (2005). He thus would have faced the death penalty even if counsel had proceeded through a preliminary hearing. Because Blake failed to demonstrate that counsel were deficient or prejudice, the district court did not err by summarily denying this claim. See Strickland, 466 U.S. at 694; Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

Insanity defense

Blake further contends that the district court erred by summarily denying his claim that trial counsel were ineffective for pursuing an insanity defense because the facts of his case did not support such a defense and insanity is an "extremely difficult [theory] to promote successfully to a jury." Blake suggests that counsel should have pursued theories of self-defense, diminished capacity, or an imperfect self-defense. This claim lacks merit for four reasons.

First and foremost, Blake presented nothing more than bare allegations. Therefore, on this basis alone, the district court did not err by summarily denying this claim. Hargrove, 100 Nev. at, 502-03, 686 P.2d at 225.

Second, pursuing an insanity defense was not unreasonable under the facts of this case. Blake has a heavy burden to demonstrate deficiency in this regard because trial counsel's strategic or tactical decisions are "virtually unchallengeable absent extraordinary circumstances." Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-

81 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000)). No “extraordinary circumstances” are present here. The circumstances of the shooting and Blake’s actions after the event show that defending this case was an extremely difficult undertaking. Any defense pursued would have been a daunting task. Blake now views pursuing an insanity defense as an unreasonable trial strategy. Although the jury rejected Blake’s insanity defense, the psychological evidence he presented persuaded the jury to find his emotional and mental state at the time of the shootings to be a mitigating circumstance during the penalty hearing.

Third, to the extent Blake contends that counsel failed to pursue other defenses, his claim is belied by the record. The jury was instructed on self-defense, defenses pursuant to NRS 194.010, second-degree murder, and voluntary manslaughter. And we noted in Blake’s direct appeal that counsel addressed each of these theories in closing argument. Blake v. State, 121 Nev. 779, 791, 121 P.3d 567, 575 (2005). Therefore, the jury was aware of the theories Blake now suggests should have been pursued and rejected them as evidenced by the jury’s verdict of first-degree murder and attempted murder.

Fourth, two of the defenses that Blake faults counsel for failing to present—imperfect self-defense and diminished capacity—have been rejected by this court. Hill v. State, 98 Nev. 295, 297, 647 P.2d 370, 371 (1982); Crawford v. State, 121 Nev. 744, 757, 121 P.3d 582, 591 (2005). Therefore, we conclude that Blake failed to demonstrate that counsel were ineffective for failing to pursue those defenses.

Based on the foregoing discussion, because Blake failed to show that counsel were deficient for pursuing an insanity defense or prejudice, we conclude that the district court did not err by summarily denying this claim. See Strickland, 466 U.S. at 694; Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

Preparation of defense expert

Blake next argues that the district court erred by summarily denying his claim that trial counsel were ineffective for failing to prepare Dr. Louis Mortillaro for trial by informing him of Blake's violent history. However, Dr. Mortillaro testified that his assessment of Blake's mental state was based in large part on representations of Blake's family members and one of the women who had been with Blake when he confronted the victims, who all advised Dr. Mortillaro that Blake was not a violent person. Therefore, the information upon which Dr. Mortillaro relied to conclude that Blake suffered from a psychotic disorder at the time of the shootings was supplied by Blake's own witnesses. Blake did not suggest that counsel should have known how the persons Dr. Mortillaro interviewed would characterize Blake's character. And even assuming counsel were deficient, Blake cannot demonstrate prejudice. Given the manner in which the shootings were accomplished and Blake's actions after the event, there is no reasonable probability of a different outcome had Dr. Mortillaro known about Blake's history of violence. Because Blake failed to demonstrate that counsel were ineffective in this regard, we conclude that the district court did not err by summarily denying this claim.

Preventing-a-lawful-arrest aggravating circumstance

Finally, Blake argues that the district court erred by summarily denying his claim that counsel were ineffective for failing to

challenge the preventing-a-lawful-arrest aggravating circumstance on the ground that the State advanced two conflicting theories respecting Blake's motive for killing two of the victims. However, even assuming Blake's premise is accurate and the State asserted conflicting theories of motive, he failed to provide any legal authority suggesting that the State is prohibited from advancing conflicting theories of motive for the crimes or that doing so provided any basis for counsel to challenge the preventing-a-lawful-arrest aggravating circumstance. Because Blake failed to demonstrate that counsel were deficient or prejudice, we conclude that the district court did not err by denying this claim. See Strickland, 466 U.S. at 694; Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

Claims of ineffective assistance of appellate counsel

Blake argues that the district erred by summarily denying three claims of ineffective assistance of counsel. The Strickland test applies to the review of claims of ineffective assistance of appellate counsel. To establish prejudice resulting from appellate counsel's deficiency, a defendant must establish that the omitted issue had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

Conflict of interest

First, Blake contends that the district court erred by summarily denying his claim that he received ineffective assistance of appellate counsel due to a conflict of interest.

The submissions before this court reveal that prior to trial, a representative from the Public Defender's Office advised the district court that the office could not represent Blake due to a conflict because the office had represented some of the witnesses in Blake's case. Subsequently, after Blake's trial and penalty hearing, the district court inquired whether

a conflict with the Public Defender's Office still existed. A Deputy Public Defender responded that after reviewing the list of witnesses, there did not appear to be a conflict. The district court then appointed the Public Defender's Office to represent Blake at sentencing on the attempted murder and on appeal. Blake failed to identify the witnesses who were apparently the source of the conflict, their relevance to the case, or why the Public Defender's Office's apparent association with them created a conflict of interest, particularly given the nature of the proceeding in which the office represented Blake. See RPC 1.7. Because Blake failed to adequately substantiate this claim to warrant an evidentiary hearing, we conclude that the district court did not err by denying this claim. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Preventing-a-lawful-arrest aggravating circumstance

Blake next argues that the district court erred by summarily denying his claim that appellate counsel were ineffective for failing to challenge the preventing-a-lawful-arrest aggravating circumstance because there was no evidence to support it. Blake's claim is devoid of any factual support explaining why appellate counsel was deficient or that a challenge to the aggravating circumstance on sufficiency grounds had any reasonable probability of success on appeal. See Kirksey, 112 Nev. at 998, 923 P.2d at, 1114. Moreover, as we observed in our review of Blake's direct appeal, "strong evidence" supported the preventing-a-lawful-arrest aggravating circumstance. Blake v. State, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005). Accordingly, we conclude that the district court did not err by summarily denying this claim.

Lethal injection protocol

Finally, Blake contends that the district court erred by summarily denying his claim that appellate counsel were ineffective for

failing to challenge the constitutionality of Nevada's lethal injection protocol. Such a challenge involves factual matters that could not have been addressed in the first instance on direct appeal. See McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). For this reason, counsel were not deficient for failing to challenge the protocol and such a challenge had no probability of success on direct appeal. Accordingly, we conclude that the district court did not err by summarily denying this claim.

Having considered Blake's arguments and concluded that the district court did not err by summarily denying his post-conviction petition, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, C.J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

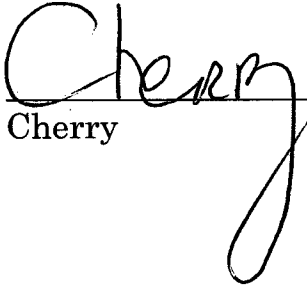
Saitta, J.
Saitta

Gibbons, J.
Gibbons

Pickering, J.
Pickering

CHERRY, J., dissenting:

I dissent. I conclude that the district court erred by denying the petition without conducting an evidentiary hearing.

 J.
Cherry

cc: Hon. Sally L. Loehrer, District Judge
Law Offices of Cynthia Dustin, LLC
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk