

IN THE SUPREME COURT OF THE STATE OF NEVADA

SIAOSI VANISI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50607

FILED

APR 20 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 appellant Siasosi Vanisi's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Vanisi killed University of Nevada, Reno Police Sergeant George Sullivan in 1998. A jury convicted him of first-degree murder and several related crimes and sentenced him to death. This court affirmed his convictions and sentence on direct appeal. Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001).

In 2002, Vanisi filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent him and counsel filed a supplemental petition. Following an evidentiary hearing, the district court denied the petition.

On appeal, Vanisi claims that the district court erred by concluding that he was competent to participate in post-conviction proceedings, denying a motion for a protective order, and denying each of the 22 claims in his petition. For the reasons stated below, we conclude

that Vanisi's claims lack merit and affirm the judgment of the district court.

Competency determination

Vanisi claims that the district court erred when it determined that he was competent to proceed with litigation of his post-conviction petition.¹ After his appointment, post-conviction counsel filed a motion to stay the proceedings in light of Rohan ex rel. Gates v. Woodford, 334 F.3d 803, 813-15 (9th Cir. 2003), in which the Ninth Circuit Court of Appeals concluded that where a capital defendant has a statutory right to the effective assistance of post-conviction counsel, he also has the right to be competent to assist counsel and, if incompetent, to a stay until he becomes competent. As a result, the district court ordered that Vanisi be evaluated by two mental health experts and held an evidentiary hearing.

At the hearing, psychiatrist Dr. Thomas Bittker opined that Vanisi was being incompletely treated for his mental problems and had "residual evidence of psychosis" to the extent that, while he was able to assist his counsel, he was irrationally resistant to doing so. On the other hand, psychologist Dr. Alfredo Amezaga testified that Vanisi was competent to assist counsel. Acknowledging that the experts diverged, the district court concluded that based on the entirety of the evidence—which included its own observations—Vanisi had the "present capacity, despite his mental illness, to assist his attorneys if he chooses to do so." We

¹Vanisi also claims that while he is not presently incompetent to be executed, he may become so in the future. This claim was raised below and we conclude that the district court did not err in denying it as no relief was requested. We note that specific procedures are in place in the event that Vanisi becomes incompetent to be executed. See NRS 176.425–.455.

conclude that the district court's competency determination was based on substantial evidence and uphold its decision. See Doggett v. Warden, 93 Nev. 591, 594, 572 P.2d 207, 209 (1977).²

Protective order

Vanisi claims that the district court erred by denying his motion for a protective order and unsealing his supplemental petition. He argues that he was entitled to a protective order precluding the State from disclosing any privileged information to law enforcement authorities, using the information at a second trial, or disclosing it to any "public or private entity, including the news media." Vanisi fails to demonstrate that the district court erred.

Vanisi's motion for a protective order was based on Bittaker v. Woodford, 331 F.3d 715, 717, 722 (9th Cir. 2003), in which the Ninth Circuit Court of Appeals limited the implied waiver of the attorney-client privilege in a habeas corpus proceeding to "what is needed to litigate the claim[s]" and upheld a protective order precluding the State from disclosing privileged materials "to any other persons or offices." However, in this case, Vanisi expressly waived his attorney-client privilege as it

²Because the district court's finding that Vanisi was competent was supported by substantial evidence, we do not reach the question of whether the procedures set forth in Rohan should be adopted in Nevada, but leave that question for resolution in a more appropriate case. See, e.g., Paul v. U.S., 534 F.3d 832, 848 (8th Cir. 2008) (finding it unnecessary to decide whether there is a statutory right to competency because the district court found the petitioner competent and the finding was not clearly erroneous), cert. denied, ___ U.S. ___, 130 S. Ct. 51 (2009).

related to his representation at trial.³ Furthermore, Vanisi wholly failed to articulate compelling reasons for sealing his post-conviction proceedings from the public. See Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006). And the admissibility of any of the disclosed information at a subsequent trial is a question better left until the issue arises. See Bittaker, 331 F.3d at 730 n.3 (O’Scannlain, J., concurring); Molina, 120 Nev. at 193 n.25, 87 P.3d at 539 n.25.

Procedurally barred claims

In his petition below, Vanisi claimed that his convictions and sentence should be overturned because (1) he was denied the right to consular contact under the Vienna Convention;⁴ (2) he was denied the right to represent himself; (3) the district court erred in refusing to allow

³We also note that, in Nevada, the implied waiver of the attorney-client privilege in a habeas proceeding is limited to that proceeding by statute. See NRS 34.735; Molina v. State, 120 Nev. 185, 193 n.25, 87 P.3d 533, 539 n.25 (2004). A district court order is unnecessary to limit the implied waiver.

⁴Vanisi’s claim that the procedural bars do not apply to Article 36 claims is without merit. See Sanchez-Llamas v. Oregon, 548 U.S. 331, 337 (2006).

Also, in his petition below, Vanisi stated that this claim “can be reviewed as an allegation of ineffective assistance of trial and appellate counsel.” To the extent that it was raised as such, the claim is without merit because the evidence presented shows that the Tongan consulate was contacted and refused to provide Vanisi with assistance. See Osagiede v. U.S., 543 F.3d 399, 413 (7th Cir. 2008) (holding that in order to succeed on a claim of ineffective assistance of counsel based on an Article 36 violation, a petitioner must demonstrate that the consulate could have assisted the petitioner with his case and that the consulate would have done so).

counsel to withdraw; (4) Nevada's death penalty scheme operates arbitrarily and capriciously; (5) the death penalty violates the Eighth Amendment; (6) his conviction and sentence are invalid under the International Covenant on Civil and Political Rights; (7) lethal injection violates the Eighth Amendment; (8) his trial and appellate judges were elected; (9) there is a risk that an innocent person will be executed; (10) his rehabilitation outweighs the government's interest in retribution and deterrence; (11) the death penalty violates international law; (12) prosecutors can apply Nevada's death penalty scheme arbitrarily; (13) he had a "death-qualified" jury; (14) his sentence was imposed under the influence of passion, prejudice, or other arbitrary factors; (15) he is insane and was precluded from entering an insanity plea; and (16) the robbery aggravating circumstance is invalid under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). The district court denied each of these claims finding that they were procedurally barred, barred by the doctrine of the law of the case, or without merit. The district court did not err.

All of these claims could have been raised on direct appeal and are procedurally barred absent a showing of good cause and actual prejudice. NRS 34.810(1)(b). With the exception of his challenge to the robbery aggravator, Vanisi failed to demonstrate good cause or prejudice. And Vanisi's claims that he was denied the right to represent himself and that his sentence was the result of passion or prejudice were addressed on direct appeal. They are therefore barred by the doctrine of the law of the case. See Bejarano v. State, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006); Vanisi v. State, 117 Nev. 330, 337-41, 344, 22 P.3d 1164, 1169-72, 1173-74 (2001).

As to Vanisi's challenge to the robbery aggravator, because McConnell has retroactive application, see Bejarano, 122 Nev. at 1078, 146 P.3d at 274, Vanisi established good cause to raise this claim in a post-conviction petition.⁵ However, he failed to show prejudice.

Here, McConnell is implicated because Vanisi was charged with first-degree murder under three alternative theories—(1) the murder was a felony murder based on robbery; (2) the murder was willful, premeditated, and deliberate; or (3) the murder was perpetrated by lying in wait—and the jury verdict did not specify upon which theory it relied in finding Vanisi guilty of first-degree murder. See McConnell, 120 Nev. at 1069, 102 P.3d at 624 (“deem[ing] 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”); see also Bejarano, 122 Nev. at 1079, 146 P.3d at 274 (McConnell “applies in cases where the defendant was charged with alternative theories of first-degree murder and a special verdict form failed to specify which theory or theories the jury relied upon to convict”).

To uphold a death sentence after striking an invalid aggravating factor, this court must reweigh. Archanian, 122 Nev. at 1040, 145 P.3d at 1023. A McConnell error is harmless if, after reweighing, this court can conclude beyond a reasonable doubt that the jury would have found the defendant death eligible, and likewise conclude that the jury

⁵To the extent that Vanisi claimed that his appellate counsel was ineffective for failing to raise this claim on direct appeal, he failed to demonstrate that counsel's performance was deficient because the legal basis for this claim was not available at the time his appeal was filed.

would have selected the death penalty absent the erroneous aggravating circumstance. See Hernandez v. State, 124 Nev. ___, ___, 194 P.3d 1235, 1240-41 (2008); Bejarano, 122 Nev. at 1082-83, 146 P.3d at 276-77; Leslie v. Warden, 118 Nev. 773, 784, 59 P.3d 440, 448 (2002).

Absent the invalid aggravator, two remain: (1) the murder was committed upon a peace officer engaged in the performance of his official duty and the defendant knew he was a peace officer and (2) the murder involved the mutilation of the victim. Of the three aggravators found by the jury, the invalid robbery aggravator was the least compelling. The two remaining aggravators are strong, and none of the mitigating evidence is particularly compelling. Accordingly, we conclude that it is beyond a reasonable doubt that, absent the robbery aggravator, the jury would still have found Vanisi death eligible and that the jury would have imposed a sentence of death. Therefore, Vanisi failed to show prejudice sufficient to overcome the procedural bars, and the district court did not err in denying this claim.

Ineffective assistance of trial counsel

In his petition, Vanisi claimed that his trial counsel were ineffective for (1) breaching the attorney-client relationship, (2) failing to present a defense or argue at closing, and (3) failing to investigate or consult with a mitigation specialist. Vanisi also claims that he was prejudiced by the cumulative impact of counsel's deficiencies.

To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). To

establish prejudice, a defendant must show that but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. Id. at 694.

Breach of attorney-client relationship

Vanisi argues that the district court erred by denying his claim that trial counsel were ineffective for breaching attorney-client confidentiality. Prior to trial, defense counsel filed a motion to withdraw and requested an ex-parte hearing on the motion. The trial court granted counsel's request and held a sealed proceeding in the courtroom without the presence of the State. During that hearing, defense counsel relayed confidential communications to the district court, including Vanisi's stated intention to perjure himself. Vanisi claimed that this disclosure was a breach of attorney-client confidentiality and amounted to ineffective assistance of counsel.

Vanisi failed to demonstrate that counsel's performance was deficient or that he was prejudiced. The United States Supreme Court has specifically stated that an attorney's duty of confidentiality "does not extend to a client's announced plans to engage in future criminal conduct," including the intent to commit perjury. Nix v. Whiteside, 475 U.S. 157, 174 (1986). Accordingly, defense counsel's decision to attempt to withdraw and inform the court of Vanisi's intended perjury—in a sealed hearing outside the presence of the jury and the prosecution—was not unreasonable. Furthermore, because the disclosed information was not provided to the prosecution or the jury, Vanisi failed to demonstrate a reasonable probability that absent counsel's disclosure, the result of trial would have been different.

Failure to present a defense or argue in closing

Vanisi contends that the district court erred by denying his claim that trial counsel were ineffective for failing to present an adequate defense or argue on his behalf at the close of the guilt phase of trial. The district court concluded that trial counsel were not deficient because they did all they could in light of the circumstances and that Vanisi had failed to demonstrate prejudice. The district court did not err.

At an evidentiary hearing, Vanisi's attorneys testified that Vanisi told them that he had multiple defenses but refused to disclose them. As a result, they limited their efforts at trial in order to avoid undercutting Vanisi's undisclosed defenses. In light of Vanisi's refusal to cooperate with his counsel and his specific direction that they "sit on [their] hands" during trial, we conclude that counsel's actions did not fall below an objective standard of reasonableness.

Furthermore, even if counsel's performance was deficient, Vanisi failed to show prejudice because there was overwhelming evidence of his guilt, including: (1) his repeated statements that he intended to rob and kill a police officer, (2) the testimony of witnesses who were with him when he purchased the murder weapon, (3) the testimony of eyewitnesses who placed him at the scene, (4) the DNA and physical evidence linking him to the crime, and (5) his statements to family members admitting what he had done. Therefore, the district court did not err in denying this claim.

Failure to investigate or consult with a mitigation specialist

Vanisi contends that the district court erred in denying his claim that trial counsel were ineffective for failing to investigate the possible effects of substance abuse on his state of mind and for failing to

call a mitigation expert. Vanisi failed to show that counsel's performance was deficient or that he was prejudiced.

Vanisi did not present any significant additional mitigating evidence or demonstrate how a mitigation specialist could have added to the mitigating evidence. The testimony of attorney Richard Cornell that there might be a psychiatrist out there willing to testify that Vanisi was in a manic phase aggravated by drug use was purely speculative. Furthermore, it conflicted with the trial testimony of Vanisi's expert that there was no evidence that a violent manic episode occurred at the time of the crime or that Vanisi abused methamphetamines. Therefore, the district court did not err in denying this claim.

Cumulative error

Vanisi argues that the district court erred by denying his claim that, but for the collective failures of counsel, he would have been able to put on a meaningful defense. Other than claiming that someone else killed Sergeant Sullivan—which would have amounted to perjury—Vanisi did not identify what defenses he could have offered at trial. Because Vanisi failed to demonstrate that counsel performed deficiently or that he was prejudiced, the district court did not err by denying this claim.

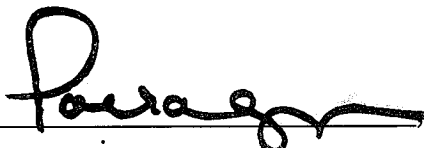
Ineffective assistance of appellate counsel

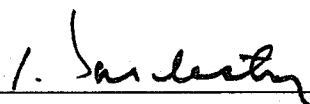
Other than those addressed above, Vanisi failed to raise any specific claims that his appellate counsel was ineffective. Rather, in both his petition below and his briefs on appeal, he included a generic claim that "all other errors alleged herein which were not raised by appellate counsel should have been." This court has previously stated that we "will not accept such conclusory, catchall attempts to assert ineffective assistance of counsel." Evans v. State, 117 Nev. 609, 647, 28 P.3d 498, 523

(2001). Because Vanisi failed to provide specific argument that his appellate counsel was ineffective, we decline to consider this claim. See id.

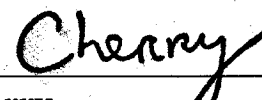
Having reviewed all of Vanisi's claims and concluded that no relief is warranted, we


ORDER the judgment of the district court AFFIRMED.


 C.J.
Parraguirre

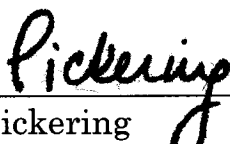
 J.
Hardesty

 J.
Douglas

 J.
Cherry

 J.
Saitta

 J.
Gibbons

 J.
Pickering

cc: Hon. Connie J. Steinheimer, District Judge
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