

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHARMARLO ANTOINE TINCH,

No. 34577

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

NOV 06 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. Bark*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Sharmarlo Antoine Tinch's post-conviction petition for a writ of habeas corpus.

Tinch was convicted, pursuant to a jury verdict, of murder with use of a deadly weapon and conspiracy to commit murder. The district court sentenced Tinch to two consecutive terms of life with the possibility of parole on the murder charge and an additional concurrent term of six years on the conspiracy charge. Tinch filed a direct appeal, wherein this court affirmed Tinch's conviction. See Tinch v. State, 113 Nev. 1170, 946 P.2d 1061 (1997).

Tinch filed a timely proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel who then filed supplemental points and authorities. Pursuant to NRS 34.770, the district court denied Tinch's petition without conducting an evidentiary hearing. This appeal followed.

In his petition, Tinch alleged several claims of ineffectiveness of trial counsel including: 1) waiver of the preliminary hearing; 2) failure to fully investigate Tinch's case; 3) failure to interview and investigate alibi witnesses as well as search for additional alibi evidence; and 4) failure to file a motion to exclude prior bad act testimony

and to request a Petrocelli hearing to contest the existence of the alleged bad acts.¹

In support of his petition, Tinch submitted his own five-page affidavit setting forth his understanding of potential witnesses' testimony. No other affidavits were submitted. In addition, Tinch did not proffer testimony from any expert concerning gang affiliations or eyewitness identification to support his claim that he was prejudiced by the failure to call such experts at trial.

FACTS

Tinch and a co-defendant, Arlanders Gibson, were charged with the fatal shooting of Kentral Washington. Washington was shot by an individual leaning out of a white Honda motor vehicle on February 28, 1994, at approximately 1:00 p.m. The State alleged that this was a gang-related drive-by shooting. The State presented evidence that Tinch was a member of the Rolling 60's street gang, while Washington was a member of a rival gang, the Comstock 40's. Tinch was identified at trial as the shooter by three witnesses, Omar Walls, Tony McCullum, and Leora Watkins. Walls and McCullum were members of the Comstock 40's, the gang to which

¹Tinch asserted additional claims alleging: 1) failure to file pre-trial motions; 2) failure to communicate with Tinch before Tinch testified; 3) failure to use a "gang expert" to rebut testimony offered by the State; 4) failure to use an identification expert to show that the identification of Tinch was unreliable; 5) failure to adequately impeach the State's witness, Walls; and 6) failure to file a motion for mistrial based on the prosecutor's improper qualification of the reasonable doubt instruction in closing argument. Tinch also raised three issues of ineffective assistance of appellate counsel: 1) failure to appeal the sufficiency of the evidence; 2) failure to appeal the prosecutor's improper qualification of the reasonable doubt instruction; and 3) failure to appeal a ruling regarding the scope of the cross-examination of Walls. We have examined these claims and find them to be without merit.

Washington belonged. Watkins resided on the street where the murder occurred and had no gang affiliations.

Walls was reluctant to testify and eventually was arrested on a material witness warrant. His statements to the police did not identify Tinch by name. Instead he indicated that the shooter was known to him. He gave the police the only name he had for Tinch, a nickname, and told the police that the shooter was wearing a blue Seattle Seahawks beanie cap. He also identified Tinch as the shooter from a photographic line-up.

McCullum could not be located until the day before he gave his trial testimony. Prior to that time he had not indicated to the police that he could identify the shooter. The State only learned that McCullum would identify Tinch as the shooter the day before McCullum testified at trial. The State immediately notified trial counsel of this new evidence. The district court indicated that defense counsel should interview McCullum before he testified and if counsel needed additional time to prepare for cross-examination, then counsel should request additional time. No additional time was requested. While McCullum did testify that Tinch shot Washington, he also testified that Walls and Washington had guns and that Walls was shooting at the Honda. In addition, McCullum indicated that a fellow member of the Comstock 40's removed Washington's gun from the scene prior to the arrival of police. McCullum's testimony directly contradicted Walls' version of the events.²

As a part of its case-in-chief, the State presented evidence of two prior uncharged acts involving Tinch and

²Although McCullum's testimony might support a claim of self-defense, Tinch has never asserted that he shot Washington
continued on next page . . .

Washington. According to Walls, two weeks before the shooting, Tinch and several other persons in a white Honda flashed gang hand signs at members of the Comstock 40's, including Washington. Walls also testified that, the next day, Tinch shot at Washington and other members of the Comstock 40's.

Gibson was thought to be the driver of the white Honda on the day that Washington was killed. Gibson, who was also charged in connection with the death of Washington, challenged the sufficiency of the evidence introduced at his preliminary hearing. Thereafter, the district court granted part of his pretrial petition for a writ of habeas corpus. Subsequent to the granting of the writ, the State negotiated a plea agreement with Gibson in which Gibson pleaded guilty to a reduced charge, receiving a three-year sentence.

Tinch denied that he was the shooter. He presented an alibi defense through two witnesses, Timothy Crane and LaTonya Houston. Tinch testified that at the time of the shooting, he was at Houston's home. He had gone to Houston's home at about 9:30 a.m. to get a haircut, and except for a brief period between 11:00 a.m. and 12:30 p.m., had spent the entire day with Crane. Crane confirmed Tinch's story and Houston testified that when she came home at 2:00 p.m. on February 28, 1994, Tinch was asleep in her house. Crane and Houston were cross-examined about whether they could be mistaken about the date. Houston said she knew it was the same day as the shooting because it was the day she had gone to get her child's social security card.

. . . continued
in self-defense. Tinch has always insisted on the alibi defense pursued by his counsel.

Although the notice of alibi listed two additional witnesses, Eric Finlay (a.k.a. E-Roc) and Leora Bird, neither was called to testify.

DISCUSSION

To sustain a claim of ineffective assistance of trial counsel, Tinch must demonstrate that his trial counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense to such a degree that, but for counsel's ineffectiveness, the results of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Prejudice is shown by a demonstration that trial counsel's "errors were so severe that they rendered the jury's verdict unreliable." *Pertgen v. State*, 110 Nev. 554, 558, 875 P.2d 361, 363 (1994) (citations omitted).

On May 5, 1994, a criminal complaint was filed against Tinch charging him with conspiracy to commit murder, murder with use of a deadly weapon and attempted murder with use of a deadly weapon. At the time set for preliminary hearing, Tinch was represented by Stephen Dahl, a member of the Clark County Public Defender's Office. Tinch waived his right to a preliminary hearing and the matter was bound over to district court.

On May 25, 1994, another attorney from the public defender's office, David Wall, was assigned to represent Tinch. On February 6, 1995, Wall moved to withdraw as counsel due to a conflict of interest. Wall stated that the public defender's office also represented one of the State's key witnesses against Tinch, Omar Walls. The motion was granted and the district court appointed attorney Phil Dunleavy to replace Wall.

Tinch's first contention, regarding the waiver of the preliminary hearing, is belied by the record. Tinch's own affidavit in support of his petition states that the waiver was a strategic decision. The State's primary witness, Walls, had expressed a reluctance to testify, and Dahl did not want Walls' testimony preserved at a preliminary hearing in light of the possibility Walls would disappear and be unavailable to testify at trial.

Tinch, however, asserts that this was not a reasonable tactical decision and cites to the disposition in co-defendant Gibson's case as evidence of the prejudicial effect of this decision. "Tactical decisions are virtually unchallengeable absent extraordinary circumstances." Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (citing Strickland v. Washington, 466 U.S. 668, 691 (1984)). No such extraordinary circumstances exist in this case. No evidentiary hearing was necessary on this issue and neither prong of Strickland has been satisfied.

Tinch next contends that his counsel failed to fully investigate his case. Tinch asserts that Dahl, Wall and Dunleavy failed to adequately investigate the case and this resulted in the loss of exculpatory evidence. Tinch does not specify what evidence was lost or how it would prejudice his case. Bare allegations or naked claims for relief are insufficient to support a request for an evidentiary hearing or a claim of ineffective assistance of counsel. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Tinch makes two additional factual allegations regarding this claim. First, Tinch asserts that he informed Dunleavy that numerous persons, including his aunt, Bird, and his sister, Angela Hill, could have testified that he never owned or wore a Seattle Seahawks beanie cap. Even if true,

Tinch has not demonstrated how failure to interview and call witnesses on this issue so prejudiced his defense that it rendered the jury's verdict unreliable. Walls did not identify Tinch because he thought Tinch wore such a beanie. Walls was familiar with Tinch as a result of the interaction between the two gangs in the general area where Tinch and Washington lived. At most, such evidence would simply have gone to Walls' credibility, i.e., that Walls was blaming Tinch for Washington's death because Tinch was a rival gang member and not because Walls could actually identify the shooter. This issue was argued extensively at trial, and the district court could have reasonably concluded that the addition of this evidence would not have affected the jury verdict. See Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994) (this court defers to district court's finding of fact regarding claims of ineffective assistance of counsel). As such the district court did not need to conduct an evidentiary hearing on this allegation.

The second factual issue raised on the claim of failure to investigate involves Dunleavy's failure to interview McCullum prior to the trial or to request a continuance or additional time to interview him during the trial. The record is clear that McCullum could not be found by either the State or Dunleavy until the day before McCullum testified. The sole allegation is that had Dunleavy been aware of McCullum's testimony at an earlier date or sought a continuance, he could have been more effective in his cross-examination of Walls. This is unsubstantiated speculation, and the district court did not err in finding that such an allegation did not warrant an evidentiary hearing and that counsel's performance in this regard was not deficient.

Tinch next contends that Dunleavy failed to investigate and present evidence regarding his alibi. Tinch alleges that Dunleavy never spoke to Crane or Houston before calling them as witnesses. This allegation is belied by the record. Thus an evidentiary hearing was not warranted. See Grondin v. State, 97 Nev. 454, 634 P.2d 656 (1981).

However, Tinch also alleges that Dunleavy failed to contact or attempt to locate his aunt, Bird, as well as Finlay. According to Tinch's affidavit, Bird would have testified that she called Tinch to tell him that the police were looking for him on the day of the shooting and that he was surprised that he was a suspect and he denied shooting Washington. Finlay would have testified that he accompanied Tinch to Houston's home and that Tinch told him Tinch was going to the home to get his hair cut.

Tinch also alleges that Dunleavy was ineffective because he should have obtained records from the social security administration to corroborate Houston's testimony regarding the reason she remembers the date of the murder was the date she saw Tinch asleep in her home.

The district court could not have reached any determination about whether Dunleavy's failure to call Bird and Finlay or obtain records was deficient without an evidentiary hearing. Thus the district court's finding, that Dunleavy's performance in this regard was reasonable and that an evidentiary hearing on the reasonableness of Dunleavy's conduct was unnecessary, is not supported by the record. However, the record does support the district court's additional finding that the failure to call Bird or Finlay or present the social security documents did not prejudice Tinch. As the second prong of Strickland was not satisfied, the

district court did not err in denying an evidentiary hearing on the first prong of Strickland.

Several aspects of the proposed testimony are in conflict with uncontested facts in the record or do not significantly enhance the alibi defense. For example, although Tinch claims Bird advised him on the day of the murder that he was sought by the authorities, the uncontradicted testimony of the police officers at trial indicated that Tinch was not a suspect in the Washington murder until several days after the shooting. Moreover, neither Bird nor Finlay was with Tinch when the shooting occurred. Neither could testify as to his whereabouts at the time of the murder. The same is true of Houston; she can only confirm that Tinch was present in her home after the shooting.

Thus, even if the testimony of Bird, Finlay and Houston were true, their statements do not exculpate Tinch. Given other factors noted by the district court, such as Bird's relationship to Tinch or Finlay's felony convictions, the district court could conclude that the failure to call Bird and Finlay, as well as the failure to obtain documents in support of Houston's testimony, did not prejudice Tinch under the second prong of Strickland and that the absence of this testimony did not render the jury's verdict unreliable. A district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference on appeal where supported by substantial evidence. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Tinch's next contention involves the failure of Dunleavy to file a motion in limine to exclude evidence of prior bad acts, i.e., the two confrontations between Tinch and Washington approximately two weeks before Washington's death. Tinch states in his affidavit that he told Dunleavy about

three persons who would contest Walls' version of those events. Tinch argues that this testimony was crucial in making a record. With such a record, Tinch contends that either the district court, or this court on appeal, would have concluded that the prior bad acts had not been proven by clear and convincing evidence.

Tinch's affidavit indicates that on the occasion involving the prior shooting incident, he was exiting his grandmother's house when he was attacked and shot at by Washington. He claims his aunt, Bird, would testify that he left his grandmother's house without a gun and ran back in and told her he was being shot at shortly after he left the house. He then called two friends to pick him up because he was afraid to walk to his next destination. The two friends (one known only as "Doughboy") would testify that Tinch called them and told them he had been shot at by Washington. Finally, Tinch indicated that Danny Pollard and Deon Scales would testify that although Tinch was present at the time of the hand-signs incident, he was not the one who flashed the signs, thus contradicting Walls' version of that incident.

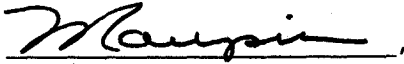
Without conducting an evidentiary hearing, the district court could not have made any finding about why Dunleavy failed to call most of these witnesses, or that the failure to call them was reasonable under the circumstances. However, the district court could conclude from the record that the inclusion of these witnesses would not have affected the admissibility of the acts and the failure to request Petrocelli hearing did not render the jury's verdict unreliable.

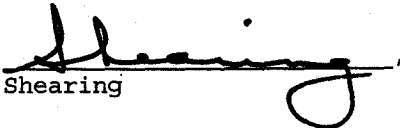
Only two of the witnesses had direct knowledge of what took place between Tinch and Washington on the prior occasions. Moreover, Tinch does not deny that some type of

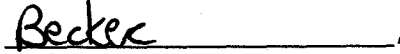
encounter took place. Even assuming the witnesses' hearsay testimony would be admissible, it would go more to the issue of who was the aggressor in those incidents, rather than negating that the events took place and that there was bad blood between Tinch and his gang and Washington and Washington's gang. Tinch does not argue that the shooting of Washington was in self-defense. Rather, he claims that he was not involved. The incidents were proven by clear and convincing evidence. Even if a court believed Tinch's witnesses and prohibited reference to Tinch as the shooter or the person who flashed the gang signals, the remainder of the incidents, demonstrating a confrontation between rival gang members involving Tinch, would have been admissible. Given that the majority of the incidents would have been admissible, the district court did not err in concluding that the failure to request a Petrocelli hearing would not have affected the outcome of the trial or render the jury verdict unreliable. Thus the second prong of Strickland was not met.

Having fully reviewed the briefs and the record, we conclude that Tinch's contentions lack merit. See Strickland v. Washington, 466 U.S. 668 (1984); Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989); Jones v. Barnes, 463 U.S. 745 (1983); Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Accordingly, we affirm the order of the district court denying Tinch's petition.


Maupin J.


Shearing J.


Becker J.

cc: Hon. Jack Lehman, District Judge
Clark County District Attorney
Attorney General
David M. Schieck
Clark County Clerk