

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE RAY LEWIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50872

FILED

JUN 18 2009

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is a proper person appeal from an order of the district court denying appellant Willie Lewis' post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On June 16, 2006, the district court convicted appellant, pursuant to a jury verdict, of three counts of lewdness with a minor under the age of 14, and forty-one counts of sexual assault on a minor under the age of 16. The district court sentenced appellant to multiple concurrent and consecutive terms totaling life in the Nevada State Prison with the possibility of parole after 24 years. This court affirmed the jury's verdict in part on direct appeal, but concluded that thirty-six of the forty-one counts of sexual assault were not supported by sufficient evidence.¹ Lewis

¹In its order, this court also noted, sua sponte, that the district court had improperly sentenced appellant to life in prison with the possibility of parole after 5 years on Count 3 of sexual assault on a minor under the age of 16. This court asserted that the proper sentence, as a matter of law
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v. State, Docket No. 47630 (Order Affirming In Part, Reversing In Part, and Remanding, August 7, 2007). The remittitur issued on September 4, 2007. The district court entered an amended judgment of conviction on October 24, 2007, striking thirty-six of the forty-one counts of sexual assault. Because the sentences for the stricken counts had been imposed concurrently with the counts remaining, appellant's sentence remained a term of life in the Nevada State Prison with the possibility of parole after 24 years. No appeal was taken from the amended judgment of conviction.

On October 16, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On January 22, 2008, the district court denied the petition. This appeal followed.

Appellant claimed that he received ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient

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pursuant to NRS 200.366(3), was life in prison with the possibility of parole after 20 years, and instructed the district court to correct the judgment of conviction. On remand, both appellant and the State filed motions opposing the correction, noting that the alleged instance of assault took place between 1994 and 1995, prior to the enactment of 1995 amendments NRS 200.366, which provided that the appropriate sentence for sexual assault on a minor under the age of 16 was 20 years to life. Therefore, the district court did not make the correction requested by this court in the amended judgment of conviction. Because the State concedes that Count 3 related to behavior prior to the 1995 amendments to NRS 200.366, the district court did not err in letting the sentence for Count 3 stand as originally written.

to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697. Generally, the “[t]actical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances.” See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) abrogated in part on other grounds by Harte v. State, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000). However, “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” Strickland, 466 U.S. at 690-91. For the reasons stated below, we conclude that the district court did not err in summarily denying a number of appellant’s claims, but erred in failing to hold an evidentiary hearing on several of appellant’s claims related to his attorney’s failure to interview and call certain witnesses.

Claims properly denied by the district court

Failure to request a psychological examination of M.L. and S.L.

First, appellant claimed that trial counsel was ineffective for failing to request an independent psychological examination of the victims, S.L. and M.L. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. To obtain an independent psychological examination of a child sexual assault victim, a defendant must

demonstrate that a compelling need exists for the examination. Koerschner v. State, 116 Nev. 1111, 1116, 13 P.3d 451, 455 (2000). In determining whether or not a compelling need exists, a district court weighs (1) whether the State “calls or obtains some benefit from an expert in psychology or psychiatry;” (2) “whether evidence of the offense is supported by little or no corroboration beyond the testimony of the victim;” and (3) “whether there is a reasonable basis for believing that the victim’s mental or emotional state may have affected his or her veracity.” Id. at 1116-17, 13 P.3d at 455; see also Abbott v. State, 122 Nev. 715, 728, 138 P.3d 462, 471 (2006) (reaffirming the test set forth in Koerschner). For the purposes of this analysis, a police detective who interviews a child victim is an expert only “when he does more than merely relate the facts and instead analyzes the facts and/or states whether there was evidence that the victim was coached or biased against the defendant.” Abbott, 122 Nev. at 728, 138 P.3d at 471.

Here, the State did not call any experts in psychology to testify at trial. While a police detective testified regarding his interviews with S.L. and M.L., he testified only to the facts of the interview, and did not offer any opinion regarding whether or not S.L. and M.L. were telling the truth, biased, or had been coached, indicating that he was not an expert witness under Abbott or Koerschner. Beyond his blanket allegations that M.L. and S.L. were lying, appellant presented no evidence to suggest that S.L. or M.L. had any mental or emotional conditions that would have affected their ability to tell the truth. In addition, while the only evidence supporting the charged acts was the testimony of S.L. and M.L., the testimony of the sisters indicated a common scheme of abuse, and corroborated each other. Accordingly, it is highly unlikely that the district

court would have found a compelling reason to order an independent psychological examination of the victims. Counsel cannot be deemed ineffective for failing to file futile motions. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Therefore, the district court did not err in denying this claim.

Failure to request a continuance

Second, appellant claimed that counsel was ineffective for failing to request a continuance when appellant failed to appear in court following a recess on the second day of trial. Appellant, who was free on his own recognizance, also did not appear when the jury returned its verdict. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Appellant first failed to appear following lunch recess on the second day of trial. Counsel for the State and appellant voiced concerns about continuing in appellant's absence at a bench conference. Just as the district court was about to dismiss the jury for another recess, appellant appeared, and trial continued. As it did not appear that trial was going to proceed without the presence of the defendant, counsel was not ineffective for failing to formally request a continuance. In addition, this court has indicated that "[t]he defendant's voluntary absence [from trial] waives his right to be present and he cannot thereafter complain of a situation which he created." Hanley v. State, 83 Nev. 461, 467, 434 P.2d 440, 444 (1967). Thus, even if counsel had filed a motion for a continuance, it is unlikely that the motion would have had any likelihood of success. Further, appellant failed to demonstrate how his absence when the jury returned its verdict could have had any reasonable probability of changing the result of trial, as the jury had already arrived at a verdict. Therefore, the district court did not err in denying this claim.

Failure to investigate

Third, appellant claimed that trial counsel was ineffective for failing to investigate and discover that the State attempted to have appellant's sons make allegations against him, and paid each of his sons a \$25 interview fee. Appellant failed to demonstrate that he was prejudiced. None of appellant's sons testified at trial. Appellant failed to demonstrate how further investigation into this matter would have had any reasonable probability of affecting the jury's verdict. Accordingly, the district court did not err in denying this claim.

Failure to interview and present witnesses

Fourth, appellant claimed that trial counsel was ineffective for failing to call various family and friends, including Susan Warren, Jerrica Warren, Robert English, and appellant's sons, to testify that appellant was a loving father, that S.L. and M.L. were happy and had not complained of any abuse, and that appellant had never made any inappropriate advances towards other children in his acquaintance. Appellant failed to demonstrate that he was prejudiced. Evidence that appellant was a loving father, as well as evidence that S.L. and M.L. appeared happy, and that appellant had not made other inappropriate advances had very little probative value in determining whether the alleged instances of sexual abuse actually occurred. Further, to the extent that any of this evidence was probative, it was presented to the jury. Appellant's girlfriend testified that appellant was a very loving father. S.L. admitted at trial that she still maintained contact with her father, and allowed him to visit her two young children. M.L. testified that she was "close" with her father until the abuse started. Both S.L. and M.L. testified that they had not told anyone about the abuse until November of

2002. Accordingly, appellant did not demonstrate how this additional evidence would have had a reasonable probability of affecting the jury's verdict. Therefore, the district court did not err in denying this claim.

Claims erroneously denied without an evidentiary hearing

In addition to the claims properly denied by the district court, appellant also claimed that trial counsel was ineffective for failing to investigate, interview, and present a number of witnesses regarding his claims that he had a contentious relationship with his daughters, S.L. and M.L., and their mother, Andrea James; that his daughters were manipulative and prone to lying to get what they wanted; and that his daughter's claims of sexual abuse were false, propagated by James, and motivated primarily by jealousy of appellant's various paramours. An appellant is entitled to an evidentiary hearing if he raises claims supported by factual assertions that, if true, would entitle him to relief, and those claims are not belied by the record on appeal. Hargrove v. State, 100 Nev. 498, 502-503, 686 P.2d 222, 225 (1984). Based on our review of the record on appeal, we conclude that the district court erred in denying the claims related to the following witnesses without first conducting an evidentiary hearing.²

Mekedes Francisco

Appellant first claimed that trial counsel was ineffective for failing to interview and present his paramour, Mekedes Francisco, as a witness. In her opening statement, trial counsel indicated that M.L. and S.L. had lied throughout the course of the investigation, and crafted this

²On remand, the district court may also wish to consider whether the appointment of counsel is appropriate pursuant to NRS 34.750.

lie only when Mekedes Francisco, one of appellant's new paramours, began living with appellant. Trial counsel called Francisco as a witness at trial, but her testimony did not support counsel's opening statement. Rather, Francisco testified that she generally had a good relationship with both M.L. and S.L., and that appellant was a loving father. Because an evidentiary hearing was not conducted, we are unable to ascertain whether counsel had interviewed Francisco prior to trial, and whether Francisco's testimony at trial was consistent with Francisco's interview, or inconsistent with prior statements and a surprise to counsel. Counsel's decisions related to Francisco may have been the result of reasonable strategy. However, as stated earlier, "strategic choices [of counsel] made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. Without additional information, it is impossible to determine whether counsel's decisions related to calling and examining Francisco were a reasonable strategy or the result of insufficient preparation for trial. Therefore, we remand this matter to the district court for an evidentiary hearing on this claim.

Pamela McCoy

Second, appellant claimed that trial counsel was ineffective for failing to interview and call as a witness his paramour, Pamela McCoy. Appellant claimed that McCoy would have testified that his daughters were jealous of McCoy's relationship with their father, and fabricated any stories of abuse in an attempt to separate her and appellant. As it appears that McCoy was still living with appellant when S.L. and M.L. made their initial allegations of abuse, this proposed testimony would have been probative in supporting appellant's alleged motive for S.L. and

M.L. to fabricate their allegations. While counsel may have had valid strategic reasons for not interviewing or presenting McCoy as a witness, because the district court did not hold an evidentiary hearing on this claim, we cannot determine whether counsel's actions were the result of a legitimate tactical decision. See Strickland, 466 U.S. at 690-91. Therefore, we remand this matter to the district court for a hearing on this claim.

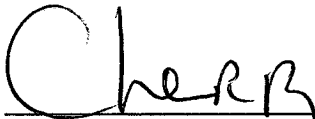
Mack Sims, Jr. and Charlie Scott

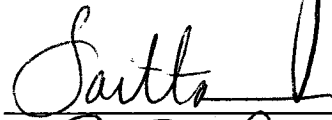
Third, appellant claimed that counsel was ineffective for failing to call his brother, Mack Sims, Jr., and his cousin, Charlie Scott, as witnesses. Appellant claimed that Sims would have testified that S.L. and M.L. would often lie to get what they wanted, and would complain to James when they did not get their way, creating problems between the victim's mother and appellant. Appellant claimed that Scott would testify that when appellant spent time with Scott's children (S.L. and M.L.'s cousins) S.L. and M.L. would become jealous, and fabricate lies about their cousins to their mother, causing the victim's mother to become angry. Were these allegations true, they would have provided support for appellant's theory that S.L. and M.L. had a reputation for lying, and fabricated their claims of abuse out of jealousy. While counsel may have had valid strategic reasons for not presenting these witnesses, because the district court did not hold an evidentiary hearing on this claim, we cannot determine whether counsel's actions were the result of a legitimate tactical decision. See Strickland, 466 U.S. at 690-91. Therefore, we remand this matter to the district court for a hearing on this claim.


Conclusion

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.³


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

³We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Hon. Michelle Leavitt, District Judge
Willie Ray Lewis
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk