

IN THE SUPREME COURT OF THE STATE OF NEVADA

CORY MCKINLEY MILLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50951

FILED

APR 13 2009

FRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Alvarado
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On June 2, 2006, the district court convicted Miller, pursuant to a jury verdict, of one count of coercion and one count of open or gross lewdness. The district court sentenced Miller to a prison term of 28 to 72 months for coercion and a consecutive jail term of 12 months for lewdness. Initially, the district court ordered the sentences suspended and placed Miller on probation. However, the district court later revoked Miller's probation after determining that he had violated the conditions of his probation. We affirmed the judgment of conviction on direct appeal. Miller v. State, Docket No. 45699 (Order of Affirmance and Limited Remand to Correct the Judgment of Conviction, May 1, 2006).

On April 27, 2007, Miller filed a post-conviction petition for a writ of habeas corpus in the district court. Miller later filed a supplemental petition, the State filed a response, and the district court conducted a brief hearing on the petition. Thereafter, the district court ordered Miller's petition denied. This appeal followed.

Miller challenges the district court's ruling on three claims of ineffective assistance of counsel, and he argues with regard to each of these claims that the district court erred by finding counsel effective without the benefit of an evidentiary hearing.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient, and that the petitioner was prejudiced by counsel's performance. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). To demonstrate prejudice, the petitioner "must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Id. at 988, 923 P.2d at 1107 (citing Strickland, 466 U.S. at 694). The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong. See Strickland, 466 U.S. at 697.

"A post-conviction habeas petitioner is entitled to an evidentiary hearing 'only if he supports his claims with specific factual allegations that if true would entitle him to relief.' However, if the record belies the petitioner's factual allegations, the petitioner is not entitled to an evidentiary hearing." Means v. State, 120 Nev. 1001, 1016, 103 P.3d 25, 35 (2004) (quoting Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004)).

First, Miller contends that trial counsel was ineffective for failing to obtain the recordings of the victim's 911 calls. Miller claims that the recordings of "[t]hese calls may have demonstrated that [the victim] did not complain the [he] had sexually touched her." (Emphasis added.) Miller further asserts that trial counsel should have requested the

spoliation of evidence jury instruction described in Bass-Davis v. Davis, 117 P.3d 207, 211 (2005), opinion withdrawn by 133 P.3d 251 (2005), and superseded on reconsideration by 122 Nev. 442, 134 P.3d 103 (2006) (en banc).

Miller raised a similar contention in his direct appeal, and we determined that

[T]he North Las Vegas Police Department records custodian testified that the CD or tape used to record a 911 call is kept for 60 days before being reused, the radio dispatcher keeps an “as verbatim as possible” log of what a 911 caller has reported, and the 911 logs are frequently subpoenaed by the State or defendants. We note that the log for the victim’s 911 call was entered into evidence during the trial and that Miller used this log during his cross-examination of the victim. We conclude that Miller has failed to demonstrate that the State acted in bad faith, that he was unduly prejudiced by the loss of the 911 recording, or that the exculpatory value of the recording was readily apparent.

Miller, Docket No. 45699 (Order of Affirmance and Limited Remand to Correct the Judgment of Conviction, May 1, 2006), at 2. Given our prior determination of this matter, we conclude that Miller has not shown that the result of the trial would have been different if counsel had obtained recordings of the victim’s 911 calls or that he was entitled to an adverse inference instruction “based on negligently lost or destroyed evidence.” See Bass-Davis, 122 Nev. at 449-50, 134 P.3d at 108 (emphasis added). Accordingly, the district court did not abuse its discretion by denying this contention without the benefit of an evidentiary hearing.

Second, Miller contends that trial counsel was ineffective for failing to investigate the victim and obtain the written statement that she prepared for the police.

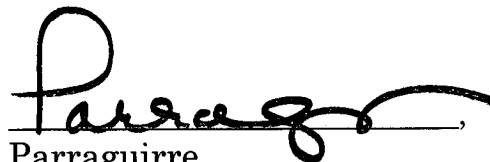
The record on appeal reveals that Miller's previous retained counsel specifically requested the victim's written statement during the preliminary hearing. The justice court continued the preliminary hearing and ordered the State to provide the written statement. In the interim, the State obtained an indictment, new prosecutors were assigned to the case, a deputy public defender was appointed as Miller's trial counsel, and trial counsel requested the victim's recorded statement. During the trial, counsel realized that he had not been provided with the victim's written statement. The district court ordered a recess, questioned the parties regarding discovery of the written statement, instructed the State to provide counsel with the written statement, and allowed counsel to review the written statement with Miller before the trial resumed. Thereafter, counsel informed the district court that the written statement did not contain any exculpatory material and was very similar to the victim's recorded statement, which had been provided to counsel. When the trial resumed, counsel used the written statement in his cross-examination of the victim.

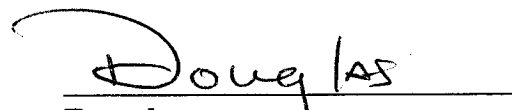
Under these circumstances, Miller has not demonstrated that trial counsel's performance was deficient and that the result of the trial would have been different if counsel had obtained the victim's written statement earlier. Further, Miller has failed to show that counsel would have uncovered exculpatory evidence by investigating the victim. Accordingly, the district court did not abuse its discretion by denying this contention without the benefit of an evidentiary hearing.

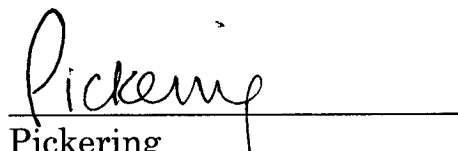
Third, Miller contends that trial counsel was ineffective for failing to file pretrial motions to dismiss the counts of first-degree kidnapping and sexual assault. However, the grand jury found probable cause to believe that Miller had committed these offenses and the petit jury found Miller not guilty of these offenses. Under these circumstances, Miller has not demonstrated that the district court was likely to grant a motion to dismiss nor has he shown that he was prejudiced by defense counsel's performance. Accordingly, the district court did not abuse its discretion by denying this contention without the benefit of an evidentiary hearing.

Having consider Miller's contentions and concluded that they Are without merit, we

ORDER the judgment of the district court AFFIRMED.


Parraguirre, J.


Douglas, J.


Pickering, J.

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