IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY NICHOLAS VIGNOLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51174

FILED

MAR 26 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Anthony Nicholas Vignoli's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On October 25, 2005, the district court convicted Vignoli, pursuant to a jury verdict, of trafficking in a controlled substance and conspiracy to sell a controlled substance. The district court sentenced Vignoli to serve a prison term of 10 to 25 years for the trafficking conviction and a concurrent prison term of 12 to 30 months for conspiracy. On appeal, this court affirmed Vignoli's convictions and sentences, but remanded to correct a clerical error in the judgment of conviction. See Vignoli v. State, Docket No. 46298 (Order of Affirmance and Limited Remand to Correct the Judgment of Conviction, May 22, 2006).

On April 27, 2006, while his direct appeal was pending, Vignoli filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State moved to dismiss the petition. The district court appointed counsel and counsel filed a supplemental petition. The State moved to dismiss the supplemental petition. The district court denied the State's motion to dismiss the petition. On January 15, 2008,

the district court denied Vignoli's petition after conducting an evidentiary hearing. This appeal followed.

Vignoli contends that the district court erred by finding that he did not receive ineffective assistance of trial and appellate counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and counsel's errors were so severe they rendered the jury's verdict unreliable. See 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). To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell "below an objective standard of reasonableness," and resulting prejudice such that "the omitted issue would have a reasonable probability of success on appeal." Kirksey v. State, 112 Nev. 980, 987-88, 998, 923 P.2d 1102, 1107, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

"[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, Vignoli argues that the district court erred in denying his claim that his trial counsel was ineffective for failing to investigate. Specifically, Vignoli asserts that, had his counsel investigated and informed him that his codefendants Albert Garcia and Marietta Henson would testify at trial, then Vignoli would not have accepted the State's plea offer.

We conclude that Vignoli failed to demonstrate that his counsel was deficient or that he was prejudiced. At the evidentiary hearing, Vignoli's counsel stated that he advised Vignoli that Garcia could testify at trial and that Vignoli should accept the State's plea offer. Further, as both Garcia and Henson were codefendants, the State could not have called either of them during its case in chief. See U.S. Const. Amend. V; Nev. Const. art. I, § 8. Henson and Garcia each had the right to testify in their own defense and could elect to exercise that right up until the close of their case in the defense. While the State called Henson in its rebuttal, it did so after she had pleaded guilty. Vignoli did not demonstrate that any investigation could have discovered that the State intended to call Henson and Garcia, that they would testify, or that Henson would plead guilty during the trial. Therefore, the district court did not err in denying this claim.

Second, Vignoli contends that the district court erred in denying his claim that his trial and appellate counsel were ineffective for failing to object below or argue on appeal that some State witnesses were improperly asked their opinion about whether Vignoli or other witnesses were truthful or lied during their testimony.

At trial, Garcia testified in his defense. During his examination by his own counsel, he stated that Vignoli, who previously testified that he had nothing to do with the drug deal, had lied during his

testimony. After Henson pleaded guilty pursuant to a guilty plea, the State called her to testify during the rebuttal case. Pursuant to the State's questions, Henson stated that Garcia and other State's witnesses told the truth, but that Vignoli lied. The State also called Garcia in its rebuttal and elicited nearly identical testimony. Vignoli's counsel did not object to any of the questions.

Vignoli's counsel was deficient for failing to object to the State's examination of Henson and Garcia. See Daniel v. State, 119 Nev. 498, 519, 78 P.3d 890, 904 (2003) (holding that the State is prohibited from "asking a defendant whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly challenged the truthfulness of those witnesses"); see also Gaxiola v. State, 121 Nev. 638, 654, 119 P.3d 1225, 1236 (2005) (noting that the State may not ask one witness if other witnesses lied). However, we conclude that Vignoli failed to demonstrate prejudice because there was overwhelming evidence of his guilt and the State's improper conduct did not affect his substantial rights. See Daniel, 119 Nev. at 519, 78 P.3d at 904 (providing that reversal is not warranted where the comments are harmless); King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) ("[W]here evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error."). Officers arrested Vignoli after Garcia delivered a small amount of methamphetamine to an undercover officer and a confidential informant. A subsequent search of the car revealed a larger amount of methamphetamine near Vignoli's seat. Further, both Garcia and Vignoli admitted that they agreed to sell the recovered methamphetamine and split the proceeds. Therefore, the district court did not err by denying this claim.

Third, Vignoli argues that the district court erred in denying his claim that his trial counsel was ineffective for failing to object to Garcia and Henson testifying, and his appellate counsel was ineffective for failing to argue that the State's failure to provide adequate notice that Garcia and Henson were going to testify violated his due process rights. He contends that the State failed to comply with NRS 174.234, held unconstitutional by Grey v. State, 124 Nev. ___, 178 P.3d 154 (2008), which required the State to provide notice of any witness five days in advance of trial.

We conclude that Vignoli failed to demonstrate that his counsel was deficient. The State must "file and serve upon the defendant a written notice containing the names and last known addresses of all witnesses the prosecuting attorney intends to call during the case in chief of the State." NRS 174.234(1)(a)(2). The State did not call Henson or Garcia during its case in chief. Moreover, the State could not have called either Garcia or Henson during its case in chief because they were codefendants in the same trial against Vignoli. See U.S. Const. Amend. V; Nev. Const. art. I, § 8. While both Garcia and Henson testified at trial, Garcia offered his testimony during his defense and the State's rebuttal, and Henson testified during the State's rebuttal case after she entered a guilty plea. Therefore, the district court did not err in denying this claim.

Fourth, Vignoli argues that the district court erred in denying his claim that his trial and appellate counsel were ineffective for failing to argue that the district court abused its discretion in denying Vignoli a reduced sentence pursuant to NRS 453.3405(2). He claims that he provided the same assistance that Garcia provided, yet received a more severe sentence than Garcia.

We conclude that Vignoli failed to demonstrate that a motion for a sentence reduction would have been successful or an appeal from the failure to grant Vignoli a substantial assistance departure would have been successful. NRS 453.3405(2) provides that the district court may reduce or suspend the sentence of any person convicted of trafficking in a controlled substance "if he finds that the convicted person rendered substantial assistance in the identification, arrest or conviction of any . . . person involved in trafficking in a controlled substance." The decision to grant "a sentence reduction under NRS 453.3405(2) is a discretionary function of the district court." Matos v. State, 110 Nev. 834, 838, 878 P.2d 288, 290 (1994); see also Parrish v. State, 116 Nev. 982, 988-89, 12 P.3d 953, 957 (2000). Vignoli claims that his testimony provided substantial assistance to the State's efforts to convict Garcia. However, Vignoli initially testified that he was not involved with the drug deal and knew nothing about a drug deal. He later admitted that Garcia and Henson's testimony, which implicated him, was true. His testimony did not provide specific information about the drug deal. Thus, in light of Vignoli's prior inconsistent testimony and Garcia and Henson's testimony, any assistance Vignoli provided in convicting Garcia could not be described as substantial. Therefore, the district court did not err in denying this claim.

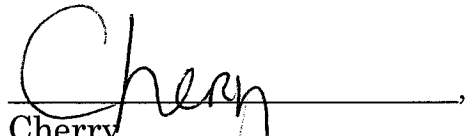
Fifth, Vignoli claims that the district court erred in denying his claim that his trial and appellate counsel were ineffective for failing to argue that the sentencing disparity between Vignoli and his co-defendants violated due process and the Equal Protection Clause. Vignoli specifically asserts that Garcia, who had a more significant role in the drug deal, received probation, while Vignoli was given the maximum sentence.

We conclude that Vignoli failed to demonstrate that his counsel was deficient or that he was prejudiced. There is no legal

requirement that codefendants receive identical punishment. Nobles v. Warden, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990). "The Equal Protection Clause of the Fourteenth Amendment mandates that all persons similarly situated receive like treatment under the law." Gaines v. State, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000). The State stipulated during Garcia's sentence that he provided substantial assistance, whereas Vignoli received no such stipulation. As discussed above, Vignoli failed to demonstrate that he would have been entitled to a downward departure for substantial assistance. Thus, despite Vignoli's assertions, he and his codefendant were not similarly situated. Therefore, the district court did not err in denying this claim.

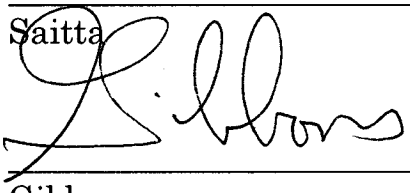
Having considered Vignoli's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta



_____, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Karla K. Butko
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk