IN THE SUPREME COURT OF THE STATE OF NEVADA

ERNOLD MARVIN HENLEY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34650

FILED

JUN 27 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus.

On May 13, 1994, the district court convicted appellant, pursuant to a jury verdict, of one count of second degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in prison with the possibility of parole. On July 29, 1994, the district court entered an amended judgment of conviction to give appellant credit for presentence incarceration. This court dismissed appellant's direct appeal, rejecting his challenge to the voluntary manslaughter instruction and the sufficiency of the evidence to support the jury's verdict.[1] The remittitur issued on October 6, 1998.

On April 30, 1999, 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 August 2, 1999, the district court denied the petition. This appeal followed.

[1]Henley v. State, Docket No. 25945 (Order Dismissing Appeal, September 14, 1998).

01-10808

In his petition, appellant first claimed that he received ineffective assistance of trial counsel. Based on our review of the record, we conclude that the district court did not err in rejecting this claim. We will address each allegation of ineffective assistance below.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must meet the two-part test set forth in Strickland v. Washington.[2] A petitioner must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's errors were so severe that they rendered the jury's verdict unreliable.[3] The court, however, need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.[4] Moreover, we have held that a petitioner is not entitled to an evidentiary hearing on claims that are belied or repelled by the record or are not sufficiently supported by specific factual allegations that would, if true, entitle the petitioner to relief.[5]

Appellant alleged that trial counsel provided ineffective assistance by failing to move to suppress evidence, interview defense witnesses, conduct an adequate pretrial investigation, seek a continuance to prepare for the State's rebuttal witness, and object to improper voir dire by the prosecutor. These allegations in the petition are conclusory. Appellant failed to specify the evidence that

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[2]466 U.S. 668 (1984); accord Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[3]Strickland, 466 U.S. at 687.

[4]Id. at 697.

[5]Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

trial counsel should have moved to suppress, the witnesses that counsel should have interviewed or how their testimony would have affected the outcome, or what additional investigation might have revealed. Appellant also failed to identify any deficiencies in trial counsel's cross-examination of the State's rebuttal witness that might have been cured by additional time to prepare for the witness. Finally, appellant failed to specify any instances of improper voir dire by the prosecutor, and our review of the record reveals no prosecutorial misconduct during voir dire. We therefore conclude that appellant failed to support these claims with sufficient factual allegations demonstrating that counsels' performance fell below an objective standard of reasonableness or that counsels' errors were so severe that they rendered the jury's verdict unreliable.

Appellant further alleged that trial counsel provided ineffective assistance by failing to advise him that the State could call rebuttal witnesses if he testified. At trial, appellant testified that the victim pulled a gun on him and that the gun discharged while they struggled over it. In rebuttal, the State called an inmate who essentially testified that appellant admitted shooting the victim because he was angry and believed the victim had stolen some of his property. Even assuming that counsel should have advised appellant about the possibility of rebuttal testimony and that counsel failed to do so, we conclude that appellant cannot demonstrate prejudice because there is no reasonable probability that the outcome would have been different without the testimony from appellant and the rebuttal witness.[6]

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[6]See Strickland, 466 U.S. at 694 (explaining that to establish prejudice based on ineffective assistance, petitioner must show that but for counsel's error, there is a

continued on next page . . .

Appellant also alleged that trial counsel provided ineffective assistance by failing to object to the "open" murder charge. We disagree. The information alleged, in relevant part, that appellant "without authority of law and with malice aforethought, wilfully and feloniously kill[ed] JOSE RODRIGUEZ, a human being, by shooting the said JOSE RODRIGUEZ in the head with a deadly weapon, to wit: a firearm." We have previously held that an "open" murder charge need not specify the degree of murder.[7] Nonetheless, we have indicated that where the State intends to pursue a felony-murder theory or a first-degree murder theory based on the means specifically enumerated in NRS 200.030(1)(a),[8] the State must give sufficient notice of its theory even in an "open" murder charge.[9] Such specificity was not required in this case as the State never proceeded on a felony-murder theory or on one of the means enumerated in NRS 200.030(1)(a). The information in this case was sufficient to put appellant on notice of the State's theory. Accordingly, we conclude that trial counsel were not deficient for failing to challenge the "open" murder charge.

Appellant next alleged that trial counsel were ineffective for failing to object when the prosecutor brought a camera to record his closing argument. Appellant claims that trial counsel should have objected based on SCR 230. We

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. . . *continued*
reasonable probability that the outcome would have been different).

[7]See, e.g., Biondi v. State, 101 Nev. 252, 255, 699 P.2d 1062, 1064 (1985).

[8]The murders specifically enumerated in NRS 200.030(1)(a) are those perpetrated by means of poison, lying in wait, torture, and (prior to a 1999 amendment) child abuse.

[9]See Alford v. State, 111 Nev. 1409, 1413-15, 906 P.2d 714, 716-17 (1995).

disagree. SCR 230 sets forth requirements for the media to obtain the court's permission to "broadcast, televise, record or take photographs in the courtroom." It does not apply to the prosecutor, who apparently recorded his closing argument for educational or training purposes, not for a media broadcast. Under the circumstances, we conclude that appellant cannot demonstrate that trial counsel were deficient for failing to object to the prosecutor's conduct.

Appellant finally alleged that trial counsel Robert Archie had a conflict of interest because he was running for judicial office while representing appellant. The allegation in the petition is conclusory and unsupported by any specific allegations demonstrating an actual conflict of interest that adversely affected counsel's performance.[10] We therefore conclude that appellant has not demonstrated that he is entitled to the relief requested.

In his petition, appellant also claimed that he was deprived of his right to due process based on the "open" murder charge and the prosecutor's conduct in bringing a camera to record his closing statement. These claims could have been raised on direct appeal from the judgment of conviction and are, therefore, waived absent a demonstration of cause and prejudice.[11] We have addressed them in this decision only to the extent that appellant also raised them in the context of his ineffective assistance claims.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not

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[10]See Cuyler v. Sullivan, 446 U.S. 335, 350 (1980).

[11]NRS 34.810(1)(b).

entitled to relief and that briefing and oral argument are unwarranted.[12] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Rose

cc: Hon. Jack Lehman, District Judge
Attorney General
Clark County District Attorney
Ernold Marvin Henley
Clark County Clerk

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[12]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).