


IN THE SUPREME COURT OF THE STATE OF NEVADA

TAIWAN ALLEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51656

FILED

APR 09 2009
TRACEE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Taiwan Allen's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On February 4, 2004, the district court convicted appellant, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve a term of life in the Nevada State Prison without the possibility of parole. This court affirmed appellant's judgment of conviction and sentence on appeal. Allen v State, Docket No. 42847 (Order of Affirmance, April 20, 2005). The remittitur issued on May 17, 2005.

On February 22, 2006, appellant filed a timely post-conviction petition for a writ of habeas corpus. The State opposed the petition. Counsel was appointed to represent appellant. After conducting an evidentiary hearing, the district court denied appellant's petition. This appeal follows.

Appellant argues that the district court erred in denying ten claims of ineffective assistance of trial 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 there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different. 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 set forth in Strickland). The court need not consider both prongs if the petitioner makes an insufficient showing on either prong. Strickland, 466 U.S. at 697. A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant claims that his trial counsel was ineffective for failing to introduce evidence that indicated that the victim's nine-year-old daughter was incompetent to testify. Appellant claims that his trial counsel should have presented the multidisciplinary team report from the Clark County School District, which appellant claims would have supported a finding of incompetency for the child witness. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. "A child is competent to testify if he or she is able to receive just impressions and relate them truthfully." Evans v. State, 117 Nev. 609, 624, 28 P.3d 498, 509 (2001). A child's competency must be determined on a case-by-case basis, but this court has enumerated six considerations that are relevant to that determination:

"(1) the child's ability to receive and communicate information; (2) the spontaneity of the child's statements; (3) indications of 'coaching' and 'rehearsing'; (4) the child's ability to remember; (5)

the child's ability to distinguish between truth and falsehood; and (6) the likelihood that the child will give inherently improbable or incoherent testimony."

Id. (quoting Felix v. State, 109 Nev. 151, 173, 849 P.2d 220, 235 (1993)).

A review of the record reveals that the child witness was thoroughly questioned by counsel at the preliminary hearing concerning her memory and truthfulness. Further, counsel questioned her concerning hallucinations and medications she was taking and used this questioning to argue that the child witness was not competent to testify. As such, counsel made a thorough presentation about the child's competency to the district court. The district court determined that appellant failed to demonstrate that the child witness was incompetent to testify and stated at the evidentiary hearing that the additional report from the Clark County School District would not have altered the outcome of the proceedings given that the report did not add new information to what had already been presented relating to the child's competency. At the hearing to determine her competency, the child witness stated that she knew the difference between a lie and the truth, and she was able to understand and respond to questioning by counsel. Substantial evidence supports the district court's finding that appellant's trial counsel was not ineffective for failing to present the school system's report, and thus, we conclude that the district court did not err in denying this claim.

Second, appellant claims that his trial counsel was ineffective for failing to hire a forensic expert to analyze gunshot residue on the victim's hands. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. At the evidentiary hearing, appellant's trial counsel testified that he did not hire an expert to analyze gunshot residue on the victim's hands because he believed that this type of

testimony would have been harmful to appellant's case. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances" and appellant failed to demonstrate any such circumstances. See Ford v State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Further, because the evidence showed the victim was shot at close range, appellant failed to demonstrate that testimony about gunshot residue would have had a reasonable probability of altering the outcome at trial. Substantial evidence supports the district court's finding that appellant's trial counsel was not ineffective for failing to hire a gunshot residue expert, and thus, we conclude that the district court did not err in denying this claim.

Third, appellant claims that his trial counsel was ineffective for failing to hire a forensic expert to analyze blood spatter patterns at the crime scene. Appellant failed to demonstrate that he was prejudiced. The State presented evidence and expert testimony concerning the blood spatter patterns and appellant failed to demonstrate what additional evidence could have been obtained by hiring a different blood spatter expert. As such, appellant failed to demonstrate that there was a reasonable probability that there would have been a different outcome of the proceedings had an additional blood spatter expert testified. Substantial evidence supports the district court's finding that appellant's trial counsel was not ineffective for failing to hire a blood spatter expert, and thus, we conclude that the district court did not err in denying this claim.

Fourth, appellant claims that his trial counsel was ineffective for failing to interview and present testimony from a doctor in Wisconsin. Appellant claims that he was treated for gunshot wounds by an emergency room doctor while in Wisconsin after the shooting. Appellant claims that

this doctor's testimony could have supported his claim that the victim shot him and that he shot back in self-defense. Appellant failed to demonstrate that his trial counsel was ineffective or that he was prejudiced. At the evidentiary hearing, appellant's trial counsel testified that he was not told by appellant or by appellant's family prior to trial about a doctor in Wisconsin or about medical treatment in Wisconsin. In addition, at trial, the jury was presented with evidence that appellant had suffered gunshot wounds around the time of the shooting. Appellant failed to demonstrate that there was a reasonable probability of a different outcome of the proceedings had his trial counsel interviewed or presented testimony from the Wisconsin doctor. Substantial evidence supports the district court's finding that appellant's trial counsel was not ineffective for failing to interview or present testimony from the Wisconsin doctor, and thus, we conclude that the district court did not err in denying this claim.

Fifth, appellant claims that his trial counsel was ineffective for stating during opening statements that appellant still had bullets in his body. Appellant asserts that the evidence showed that only bullet fragments remained in appellant's body rather than entire bullets. Appellant argues that this misrepresentation lowered counsel's creditability with the jury. Appellant failed to demonstrate that he was prejudiced. As the jury was presented with evidence that appellant had been shot and had bullet fragments in his body, appellant failed to demonstrate that there was a reasonable probability of a different outcome at trial had counsel not stated that bullets were still in his body. The district court concluded that appellant's self-defense claim would not have been further bolstered by evidence of entire bullets in his body. Substantial evidence supports the district court's finding and thus, we conclude that the district court did not err in denying this claim.

Sixth, appellant claims that his trial counsel was ineffective for stating during opening statements that the victim's ex-husband would testify that the victim had a history of violence. Rather, the victim's ex-husband testified that the victim was not a violent person. Appellant argues that his trial counsel should have interviewed the ex-husband prior to trial to know the nature of his testimony. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. At the evidentiary hearing, appellant's trial counsel testified that the ex-husband could not be located prior to trial, so he could not have conducted a pretrial interview. Appellant's trial counsel testified that police reports indicated that the victim had assaulted her ex-husband and counsel believed that the ex-husband would testify consistent with those police reports. The district court concluded that appellant's trial counsel was not ineffective for making this claim during opening statements or for not conducting a pretrial interview with the ex-husband. Substantial evidence supports the district court's finding. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claims that his trial counsel was ineffective for stating during opening statements that the victim owned a .38 caliber handgun. During trial, there was evidence that the victim possessed .38 caliber bullets and had been a corrections officer, but no weapons were recovered from the crime scene and no evidence was presented that the victim actually owned a handgun. Appellant failed to demonstrate that he was prejudiced. As evidence was presented that the victim owned .38 caliber bullets and had been a corrections officer, the argument was made that the jury could infer that the victim owned a .38 caliber firearm. In addition, the defense presented evidence that appellant had gunshot wounds from a .38 caliber weapon and still had fragments in his body from

a .38 caliber bullet. The district court concluded that appellant's trial counsel was not ineffective during opening statements in this regard and substantial evidence supports that finding. Therefore, we conclude that the district court did not err in denying this claim.

Eighth, appellant claims that his trial counsel was ineffective because counsel did not discuss a plea offer from the State with appellant. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. At the evidentiary hearing, appellant's trial counsel testified that he informed appellant of a plea offer and that appellant rejected that offer. Substantial evidence supports the district court's finding that appellant's trial counsel discussed the plea offer with appellant, and thus, we conclude that the district court did not err in denying this claim.

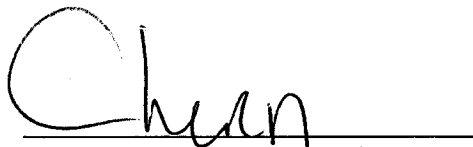
Ninth, appellant claims that his trial counsel was ineffective for failing to hire an investigator to aid in the interviewing of witnesses. Appellant argues that his trial counsel should have been prepared to impeach a witness if he or she did not testify in accord with what was stated during the pretrial interview. Appellant failed to demonstrate that he was prejudiced. Appellant failed to identify any of the witnesses who testified differently than what was stated during a pretrial interview. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.


Tenth, appellant claims that his trial counsel was ineffective for misrepresenting his experience and for collecting too low of a retainer fee. Appellant claims that his trial counsel stated that he had worked on numerous murder trials and that the low fee indicated that trial counsel did not put sufficient time or hire enough experts for an adequate murder defense. Appellant failed to demonstrate that his trial counsel was


deficient or that he was prejudiced. At the evidentiary hearing, appellant's trial counsel testified that he did not overstate his experience. Appellant's trial counsel testified that he employed investigators and that the fees for experts were paid for by appellant's father separately and independently from his fees. The district court concluded that appellant's trial counsel did not misrepresent his experience and was not ineffective for charging too low a fee, and substantial evidence supports that finding. Therefore, we conclude that the district court did not err in denying this claim.

Accordingly, having considered Allen's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Donald M. Mosley, District Judge
Christiansen Law Offices
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk