

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN THOMAS KIZZIAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52146

FILED

DEC 04 2009

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

ORDER OF AFFIRMANCE

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

On August 1, 2006, the district court convicted appellant, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon and one count of robbery with the use of a deadly weapon. The district court sentenced appellant to two consecutive terms of life in the Nevada State Prison without the possibility of parole for first-degree murder with the use of a deadly weapon, and two consecutive terms of 72 to 180 months for robbery with the use of a deadly weapon. This court affirmed the judgment of conviction and sentence on direct appeal. Kizziar v. State, Docket No. 47809 (Order of Affirmance, March 22, 2007). The remittitur issued on April 17, 2007.

On March 28, 2008, 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 June 20, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant made seven claims of ineffective assistance of trial and appellate counsel. Petitioner further claimed that the district court erred in admitting evidence he claimed was illegally seized, and that he was actually innocent. For the reasons stated below, we conclude that each of appellant's claims lacks merit, and that the district court did not err in denying appellant's petition.

Ineffective Assistance of Counsel

To state a claim of ineffective assistance of trial counsel sufficient 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). Similarly, to support a claim of ineffective assistance of appellate counsel, a petitioner must show that his counsel's performance both fell below an objective standard of reasonableness and that an omitted issue had a reasonable probability of success on appeal. Strickland, 466 U.S. at 694; Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996). 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. In addition, a petitioner is not entitled to relief based on "bare" or "naked" claims. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Rather, the petitioner bears the burden of

alleging specific facts which, if true, would entitle the petitioner to relief. Id. at 502-503, 686 P.2d at 225.

Failure to Present Evidence at Preliminary Hearing

First, appellant claimed that trial counsel was ineffective for failing to present evidence of his original co-defendant's confession to the facts of the crime at the preliminary hearing. In this, appellant asserted that immediately prior to the preliminary hearing, he wrote a statement of facts in which he alleged that his co-defendant had killed the victim, and that he only hit the victim once, in self-defense. He claimed that, in the presence of trial counsel, his co-defendant, Deezel Shamot, acknowledged that appellant's statement of facts was accurate. Appellant failed to demonstrate that counsel was deficient, or that he was prejudiced. At a preliminary hearing, the State is only required to present evidence sufficient "to support a reasonable inference that the accused committed the offense." Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971). The State is not required to prove a defendant's guilt beyond a reasonable doubt, nor is the State required to "negate all inferences which might explain his conduct." Id. Appellant conceded in his "statement of facts" that he struck the victim with a baseball bat, but claimed that he was acting in self-defense. While this statement may have "explained" the motive behind appellant's conduct, the State was not required at the preliminary hearing to negate any inference that appellant acted in self-defense. Further, the fact that Shamot admitted to killing the victim did not exclude appellant as a participant in the crime. Accordingly, given the other overwhelming evidence presented against appellant, appellant failed to demonstrate a reasonable probability that the outcome of the preliminary hearing would have been different had trial counsel

attempted to present Shamnot's "confession." Therefore, the district court did not err in denying this claim.¹

Burden Shifting

Second, appellant claimed that trial counsel was ineffective for inappropriately shifting the burden of proof to the defense during opening argument, and that appellate counsel was ineffective for failing to raise this issue on appeal. Appellant claimed that defense counsel "plead [appellant] guilty to the jury with his opening statement (this opening statement made jury instructions moot), which shifted the burden of proof onto [appellant], which relieved the burden of persuasion beyond a reasonable doubt." Appellant failed to demonstrate that trial or appellate counsel was deficient or that he was prejudiced. During the opening statement, counsel did not insinuate that the defense was going to "prove" anything. Rather, trial counsel merely indicated that the facts presented would support appellant's theory of defense: that he only acted in self defense. This statement by trial counsel did not improperly shift the burden of proof. Further, because appellant failed to demonstrate that this statement was improper, any argument related to burden shifting

¹To the extent appellant may have claimed that trial counsel was ineffective for failing to present his own self-serving affidavit and Shamnot's "confession" at trial, each of these pieces of evidence was inadmissible hearsay. See NRS 51.035. Further, given the other overwhelming evidence presented against appellant, including his own admission to Peter Haberkorn that he and Shamnot killed the victim for financial gain, appellant failed to demonstrate a reasonable probability that the result of trial would have been different had this evidence been presented. Therefore, appellant failed to demonstrate that counsel was deficient or that he was prejudiced.

would not have had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Failure to Investigate and to Present Witnesses

Third, appellant claimed that trial counsel was ineffective for failing to investigate potential witnesses and for failing to present any witnesses on his behalf at trial. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. In his petition, appellant claimed that a number of people had witnessed Shammot confess to killing the victim. Appellant also listed a number of people he requested that trial counsel investigate and call as witnesses, but he did not identify the content of their potential testimony.² Prior to trial, trial counsel informed the district court that appellant had provided him with a list of witnesses that he wished to have subpoenaed, but that he had reviewed the witnesses and their potential testimony and concluded that any testimony was related to collateral matters, and was inadmissible. Tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances, and appellant demonstrated no such extraordinary circumstances here. 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). In addition, as indicated above, the fact that Shammot admitted to participating in the victim's death has very little probative value with respect to appellant's guilt, as

²Appellant specifically identified as potential witnesses: a police officer at the Clark County Detention Center who's name he had forgotten; Jeff Aitken; Anissa Bonnell; Officer Gloria; and Conrad Krebbs.

the State's theory was that appellant and Shamot acted together to murder the victim. Given the other overwhelming evidence presented against appellant, appellant failed to demonstrate a reasonable probability of a different result had trial counsel presented appellant's potential witnesses at trial or performed additional investigation. Accordingly, the district court did not err in denying this claim.

Failure to Assist at Sentencing

Fourth, appellant claimed that trial counsel was ineffective for failing to assist him at sentencing. Beyond his blanket allegation that trial counsel failed to assist him, appellant did not specify what actions counsel should have taken, or what witnesses or evidence should have been presented on his behalf. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Therefore, the district court did not err in denying this claim.

Failure to Contact

Fifth, appellant claimed that trial and appellate counsel were ineffective for failing to interview him, meet with him, or otherwise communicate with him. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. At a calendar call prior to trial, trial counsel indicated that he had met with appellant twice in the Clark County Detention Center and had driven and met with appellant twice at High Desert State Prison. Counsel had an investigator appointed for the case, who also visited appellant at High Desert. Thus, appellant's claim that counsel would not meet with him was belied by the record on appeal. Further, appellant failed to demonstrate how the result of trial would have been different had trial counsel met with appellant on additional occasions. Appellant also failed to demonstrate a reasonable probability of

a different outcome on appeal had appellate counsel met with him in person. Therefore, the district court did not err in denying this claim.

Conflict of Interest

Sixth, appellant claimed that trial and appellate counsel were ineffective for failing to withdraw due to a conflict of interest. Appellant contended that trial counsel was conflicted because he should have withdrawn once he became a witness to Shammot's alleged "confession." Appellant claimed that appellate counsel also had a conflict and should have withdrawn due to his deteriorating relationship with appellant throughout trial, including an instance where appellant physically attacked counsel. Appellant failed to demonstrate that counsel was conflicted. To assert a claim that counsel was ineffective due to a conflict of interest, a petitioner must demonstrate an "actual conflict of interest which adversely affects a lawyer's performance." Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). Generally, such conflicts exist "when an attorney is placed in a situation conducive to divided loyalties." Id. (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir.1991)). With respect to trial counsel witnessing Shammot's "confession" that appellant's statement of facts was accurate, both appellant's statement of facts and Shammot's supposed confession to its contents would have been inadmissible at trial. See NRS 51.035; NRS 51.065. Thus, counsel was not a likely witness at trial and no conflict existed as a result of counsel witnessing Shammot's "confession." With respect to appellate counsel and appellant's strained relationship, while appellant clearly did not like appellate counsel, appellant failed to allege any facts to suggest that his personal feelings about appellate counsel had any effect on the quality of

appellate counsel's representation of him. Accordingly, the district court did not err in denying this claim.

Failure to Provide Case File

Seventh, appellant claimed that appellate counsel was ineffective for failing to provide him with his entire case file. Appellant requested the file after counsel withdrew following his direct appeal, but claimed that he had never received the file. Appellant further claimed that the file contained the affidavit that he wrote prior to the preliminary hearing, which Shamnot "confessed" was true. Appellant failed to demonstrate that he was prejudiced. Pursuant to NRS 7.055, appellant was entitled to a copy of his case file. Nonetheless, appellant failed to demonstrate how he was prejudiced by counsel's failure to provide his file. Appellant included his own reconstructed version of his statement of facts in his petition, and even assuming that the provided affidavit was an accurate copy, appellant failed to demonstrate that he was entitled to relief. Appellant alleged no other claims that he needed his case file to support. Accordingly, appellant failed to demonstrate reasonable probability of a different result had counsel provided appellant with his case file. Therefore, the district court did not err in denying his claim.³

³To the extent appellant claimed that he was denied access to the prison law library in violation of Bounds v. Smith, 430 U.S. 817, 828 (1977) and Lewis v. Casey, 518 U.S. 343 (1996), this claim, in and of itself, was not cognizable in a post-conviction petition for a writ of habeas corpus. See NRS 34.720; NRS 34.724.

Admission of Illegally Seized Evidence

In addition to his claims of ineffective assistance of counsel, appellant claimed that the district court erred in admitting evidence he claimed was illegally seized. Appellant could have raised this claim on direct appeal and failed to do so. Therefore, appellant waived the right to raise this claim absent a demonstration of good cause and prejudice. NRS 34.810(1)(b)(3); NRS 34.810(3). Appellant raised no facts to show either good cause or prejudice. Accordingly, the district court did not err in denying this claim.

Actual Innocence

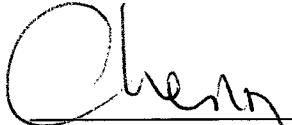
Finally, appellant claimed that he was actually innocent. Even assuming a freestanding actual innocence claim is cognizable in a post-conviction petition for a writ of habeas corpus, beyond his own self-serving statements, appellant made no colorable showing of actual innocence. See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (noting that to make a “colorable showing” of actual innocence a petitioner must demonstrate that “it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation”). Therefore, the district court did not err in denying this claim.


Conclusion

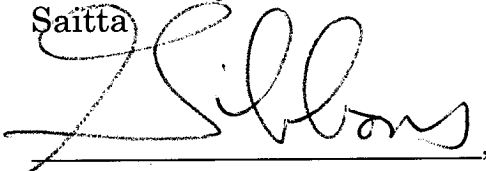
Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Luckett v. Warden, 91

Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Eighth Judicial District Court Dept. 7, District Judge
John Thomas Kizziar
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁴We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.