

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE MANUEL BALTAZAR-
MONTERROSA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52828

FILED

NOV 03 2009

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing a petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On October 28, 2004, the district court convicted appellant, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon (count one) and robbery (count two). The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after 20 years, plus an equal and consecutive term for the deadly weapon enhancement for count one and a concurrent term of 40 to 180 months for count two. On appeal, this court affirmed the judgment of conviction and sentence. Baltazar-Monterrosa v. State, 122 Nev. 606, 137 P.3d 1137 (2006). The remittitur issued on August 8, 2006.

On April 30, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. Counsel was appointed and filed a supplemental petition.

Pursuant to NRS 34.770, the district court declined to conduct an evidentiary hearing. On October 23, 2008, the district court dismissed the petition. This appeal follows.

Ineffective Assistance of Trial Counsel

On appeal, appellant argues that the district court erred in dismissing eleven of his ineffective assistance of counsel claims without conducting 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 in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different. 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). 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. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Rejection of Plea Offer

First, appellant claims that trial counsel was ineffective for failing to provide him with sound legal advice regarding the State's plea offer so as to ensure that he understood the offer. The record indicates that appellant initially agreed to the plea offer, but changed his mind on

the day he was to enter a guilty plea. While the record is not entirely clear, it appears that the State offered to dismiss the deadly weapon enhancement in exchange for appellant's guilty plea to first-degree murder and robbery. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. To establish a claim of ineffective assistance of counsel for advice regarding a plea offer, a petitioner must demonstrate that the advice was not within the range of competence required by counsel in a criminal case and that "but for counsel's errors, he would have pleaded guilty and would not have insisted on going to trial." Turner v. Calderon, 281 F.3d 851, 879 (9th Cir. 2002). In order to demonstrate that trial counsel's performance was not within the required range of competence, the petitioner "must demonstrate gross error on the part of counsel' . . . that 'the advice . . . he received was so incorrect and so insufficient that it undermined [the petitioner's] ability to make an intelligent decision about whether to accept the [plea] offer.'" Id. at 880 (second alteration in original) (quoting McMann v. Richardson, 397 U.S. 759, 772 (1970) and U.S. v. Day, 969 F.2d 39, 43 (3d Cir. 1992)). In the instant case, appellant does not allege that trial counsel failed to inform him of the plea offer or discuss the plea offer with him. In fact, the record indicates that appellant was informed of the plea offer as appellant initially agreed to it, but changed his mind shortly before the entry of plea hearing. Further, appellant fails to demonstrate gross error on the part of counsel in providing advice concerning the plea offer. In addition, appellant fails to demonstrate a reasonable probability that he would have insisted on accepting the plea offer had trial counsel offered different advice. Under these circumstances, appellant failed to demonstrate that

his trial counsel was ineffective. Therefore, the district court did not err in dismissing this claim without conducting an evidentiary hearing.

Filing of Second Amended Information

Second, appellant argues that his trial counsel was ineffective for failing to object to the filing of a second amended information. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. An amended information, which dropped the deadly weapon enhancement from the charges, was filed on the day appellant was to enter a guilty plea. Following appellant's rejection of the plea agreement, a second amended information was filed which reinstated the original charges, including the deadly weapon enhancement and included a clarification of the facts of the crime, specifically that a towel or linen was used to strangle the victim. As the second amended information was filed following appellant's rejection of a plea agreement, appellant fails to demonstrate that the second amended information was improper. See NRS 173.035(4). Further, as no additional offense was added and the additional facts did not affect appellant's substantial rights, he again fails to demonstrate that the second amended information was improper. See NRS 173.095. Accordingly, appellant fails to demonstrate that there was a reasonable probability that there would have been a different outcome in the proceedings had his trial counsel objected to the filing of the second amended information. Therefore, the district court did not err in dismissing this claim without conducting an evidentiary hearing.

Spanish Interpreter

Third, appellant argues that his trial counsel was ineffective for failing to ensure that a Spanish interpreter was available to discuss the case with appellant. Appellant fails to demonstrate that he was prejudiced. A review of the record reveals that there was an interpreter present during the proceedings before the district court and there is nothing in the record to indicate that appellant had any trouble understanding those proceedings. To the extent that appellant alleges that there was not an interpreter available for out-of-court proceedings, appellant put forth only bare and naked claims without any factual support. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Accordingly, appellant fails to demonstrate a reasonable probability that the outcome of the proceedings would have been different had his trial counsel sought further assistance of Spanish interpreters. Therefore, the district court did not err in dismissing this claim without conducting an evidentiary hearing.

State's Witnesses

Fourth, appellant argues that his trial counsel was ineffective for failing to cross-examine witnesses about possible coercion of Fernando Morales' testimony and for failing to object when Morales stated that he was afraid of appellant. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel attempted to question Morales about possible coercion, but was precluded from doing so by the district court. Further, this court considered and rejected the underlying claims on direct appeal. Because this court had rejected the merits of the underlying claims, appellant

cannot demonstrate that he was prejudiced. Therefore, the district court did not err in dismissing these claims without conducting an evidentiary hearing.

Fifth, appellant argues that the district court erred in dismissing his claim that his trial counsel was ineffective for failing to object when the State recalled Dr. Olson to testify. Appellant argues that the State should not have been permitted to use rebuttal expert testimony when appellant did not call experts of his own to testify. Appellant fails to demonstrate that he was prejudiced. Dr. Olson was not called as a rebuttal witness, but rather was recalled during the State's case-in-chief for further testimony. In her testimony after being recalled, Dr. Olson simply testified that she had tremendous respect for Dr. Clark's abilities as a forensic pathologist and stated that she (Dr. Olson) had not worked on many strangulation cases. Appellant does not cite to any authority to support his contention that recalling Dr. Olson during the State's case-in-chief was improper. To the extent that appellant argues his trial counsel was ineffective for failing to object to the nature of Dr. Olson's recall testimony, trial counsel did object and was overruled by the district court. Further, there was substantial evidence of appellant's guilt given his confession, his statement to Moreno that he had killed someone, and appellant's bloody clothes and bloody apartment. Appellant fails to demonstrate that there was a reasonable probability of a different outcome had his trial counsel objected to the recalling of Dr. Olson. Therefore, the district court did not err in dismissing this claim without conducting an evidentiary hearing.

Defense Witnesses

Sixth, appellant argues that his trial counsel was ineffective for failing to secure expert witnesses to testify concerning the cause of death of the victim. Appellant fails to demonstrate that he was prejudiced. Two expert witnesses testified on behalf of the State that strangulation by ligature was the likely cause of death. Appellant fails to identify any expert that would have testified in a different manner. Accordingly, he fails to demonstrate that there was a reasonable probability of a different outcome at trial had his trial counsel sought further expert witness testimony. Therefore, the district court did not err in dismissing this claim without conducting an evidentiary hearing.

Seventh, appellant argues that his trial counsel was ineffective for failing to call witnesses to testify in his defense and for failing to call appellant to testify in his own defense. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At trial, Percy Collins and Roy Young were called by the defense to testify. In addition, appellant was canvassed by the district court and appellant stated that he did not want to testify at trial. "The accused has the ultimate authority to make certain fundamental decisions regarding the case, such as whether to plead guilty, waive a jury, testify on one's own behalf, or take an appeal." Raquepaw v. State, 108 Nev. 1020, 1022, 843 P.2d 364, 366 (1992), overruled on other grounds by DeRosa v. Dist. Ct., 115 Nev. 225, 985 P.2d 157 (1999), overruled on other grounds by City of Las Vegas v. Walsh, 121 Nev. 899, 124 P.3d 203 (2005). Further, appellant does not indicate the nature of the testimony of any additional witnesses and does not demonstrate that there would have been

a reasonable probability of a different outcome at trial had additional witnesses testified. Therefore, the district court did not err in dismissing this claim without conducting an evidentiary hearing.

Towel as a Deadly Weapon

Eighth, appellant argues that his trial counsel was ineffective for failing to argue that the State had not proven that the towel was used as a deadly weapon. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant has not indicated by what means trial counsel should have argued this issue. To the extent that appellant argues that his counsel should have argued this issue prior to trial, appellant's trial counsel filed a pre-trial petition for a writ of habeas corpus arguing that there was insufficient evidence to allege that the towel was used as a deadly weapon. To the extent that appellant argues that trial counsel should have argued this issue during trial, two expert witnesses testified at trial that ligature was the likely cause of death by asphyxiating the victim and a towel was found wrapped around the victim's neck. Appellant fails to demonstrate that there was a reasonable probability that the outcome of the trial would have been different had his trial counsel argued further that the State had not proven that the towel was used as a deadly weapon. Therefore, the district court did not err in dismissing this claim without conducting an evidentiary hearing.

Ninth, appellant argues that the district court erred in dismissing his claim that his trial counsel was ineffective for failing to argue that appellant did not intend to commit murder. Appellant fails to demonstrate that he was prejudiced. As there was substantial evidence of

appellant's guilt as discussed earlier, appellant fails to demonstrate a reasonable probability of a different outcome had his trial counsel argued that appellant did not intend to commit murder. Therefore, the district court did not err in dismissing this claim without conducting an evidentiary hearing.

Jury Instructions

Tenth, appellant argues that his trial counsel was ineffective for failing to request that the district court give a jury instruction on the defense theory of the case. Appellant argues that the jury was not properly instructed that a towel is an unforeseen deadly weapon. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. NRS 193.165 does not require that the weapon used was foreseen to be a deadly weapon, only that the manner in which it is used was readily capable of causing substantial bodily harm or death. A towel used to asphyxiate someone fits the definition of a deadly weapon listed in NRS 193.165(6)(b). Appellant does not cite anything to support his position that a proposed jury instruction would have been appropriate. Mazzan v. Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000) (stating that "[c]ontentions unsupported by specific argument or authority should be summarily rejected on appeal"). Further, as there was substantial evidence of appellant's guilt as discussed earlier, appellant fails to demonstrate that there was a reasonable probability of a different outcome had his trial counsel requested a jury instruction on an unforeseen deadly weapon. Therefore, the district court did not err in dismissing this claim without conducting an evidentiary hearing.

Penalty Hearing

Eleventh, appellant argues that his trial counsel was ineffective for failing to present appellant's statement in allocution at the penalty hearing. Appellant argues that his trial counsel failed to object when the district court did not ask appellant if he wanted to make a statement in allocution. Appellant argues that he would have stated that he had only been in the country for a short time and did not have a lengthy criminal history. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. During the penalty hearing, the district court asked appellant if he wanted to make a statement in allocution, to which appellant responded that he did not. Following a short break, the district court again asked appellant if he wanted to make a statement, and appellant again responded that he did not. Further, appellant's short criminal history was noted at the penalty hearing. Given the nature of the crime, appellant fails to demonstrate that there was a reasonable probability that the outcome of the penalty hearing would have been different had he stated that he had only been in the country for a short time. Therefore, the district court did not err in dismissing this claim without conducting an evidentiary hearing.

Remaining trial counsel claims

Next, appellant argues that the district court erred in dismissing the following claims of ineffective assistance of trial counsel: (1) ineffective for failing to present mitigation at the penalty phase of the trial; (2) ineffective for arguing that a jury for the penalty phase should have been waived by appellant; (3) ineffective for failing to seek a psychiatric evaluation of appellant; and (4) ineffective for failing to

generate an attorney-client relationship of trust. Appellant provides these claims in a list and makes no specific argument for why an evidentiary hearing should have been conducted concerning these claims or why the district court erred in dismissing these claims. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225; see also Mazzan, 116 Nev. at 75, 993 P.2d at 42. Therefore, we conclude that appellant fails to demonstrate that the district court erred by dismissing these claims without conducting an evidentiary hearing.

Ineffective Assistance of Appellate Counsel

Next, appellant argues that the district court erred in dismissing three claims of ineffective assistance of appellate counsel without conducting an evidentiary hearing. 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, 998, 923 P.2d 1102, 1113-14 (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).

Towel as a Deadly Weapon

First, appellant argues that the district court erred in dismissing his claim that his appellate counsel was ineffective for failing to argue whether the towel was actually a deadly weapon. Appellant argues that, as one of the State's expert witnesses testified that there was

only a 50 percent chance that the towel killed the victim, there was insufficient evidence to prove that the towel was a deadly weapon. Appellant fails to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. During trial, both of the State's expert witnesses testified that in their opinion, the cause of death was strangulation by ligature. Their testimony, taken together with the fact that the victim's body was found with a towel around his head and neck, indicates that there was sufficient evidence presented for a reasonable juror to conclude that the towel constituted a deadly weapon. Thus, appellant fails to demonstrate that this issue had a reasonable probability of success on appeal. Therefore, the district court did not err in dismissing this claim without conducting an evidentiary hearing.

Intent to Murder

Second, appellant argues that the district court erred in dismissing his claim that his appellate counsel was ineffective for failing to argue that appellant did not intend to commit murder. For reasons discussed previously, appellant fails to demonstrate that this issue had a reasonably probability of success on appeal. Therefore, the district court did not err in dismissing this claim without conducting an evidentiary hearing.

Inconsistent Theories of the Case

Third, appellant argues that the district court erred in dismissing his claim that his appellate counsel was ineffective for failing to argue that the State improperly used inconsistent theories of the case to convict him. Appellant fails to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. This claim was

raised on direct appeal and this court rejected this claim. The doctrine of law of the case prevents further litigation of the underlying claim and cannot be avoided by a more detailed and precisely focused argument. See Hall v State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, the district court did not err in dismissing this claim without conducting an evidentiary hearing.¹

Cumulative Error

In addition, appellant claims that, due to cumulative errors of trial and appellate counsel, he received ineffective assistance of counsel. Appellant fails to demonstrate that he was prejudiced. As appellant fails to demonstrate he was prejudiced by any of the claims above, he fails to demonstrate cumulative error amounting to ineffective assistance of counsel. Therefore, the district court did not err in denying this claim.

Dismissal of the Petition by the District Court

Next, appellant argues that the district court erred in dismissing his petition as barred by law of the case. A review of the record reveals that the district court only dismissed as barred by law of the case those claims that had been considered and rejected in appellant's direct appeal. The district court considered the remaining claims on the merits

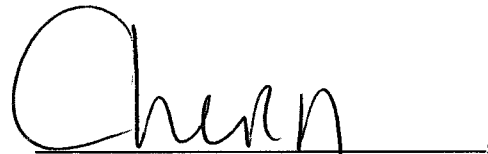
¹To the extent that appellant argues that his appellate counsel was ineffective for failing to argue that the jury instructions on the use of victim impact evidence and use of sympathy as a factor in sentencing were improper, appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114; see also Mazzan, 116 Nev. at 75, 993 P.2d at 42.

as ineffective assistance of counsel claims. Therefore, we conclude that this claim is without merit.

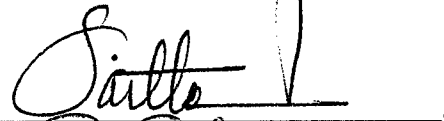
Conclusion

Accordingly, having considered appellant'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. 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