

IN THE SUPREME COURT OF THE STATE OF NEVADA

LEONARD ARTHUR WINFREY,

No. 34799

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

DEC 12 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Ruben*
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 December 20, 1995, the district court convicted appellant Leonard Arthur Winfrey, pursuant to a jury verdict, of one count of conspiracy to commit murder and two counts of first-degree murder with the use of a deadly weapon and, pursuant to a guilty plea, of one count of possession of a stolen vehicle. The district court sentenced Winfrey to serve six years in prison for the conspiracy count, two consecutive terms of life in prison with the possibility of parole for one murder count, two consecutive terms of life in prison without the possibility of parole for the other murder count, and ten years in prison for the possession of a stolen vehicle count. The district court further ordered that all of the sentences be served consecutively.¹ On appeal, this court affirmed the judgment of conviction.² The remittitur issued on May 28, 1998.

On April 29, 1999, Winfrey filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Winfrey or to conduct an evidentiary hearing. On August 24, 1999, the district court denied the petition. This appeal followed.

¹Winfrey's co-defendant, Travers Arthur Greene, was convicted of the same charges in a separate trial and was sentenced to death for each murder. See Greene v. State, 113 Nev. 157, 931 P.2d 54 (1997).

²Id.

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In his petition, Winfrey claimed that he received ineffective assistance of counsel at trial and on direct appeal. We conclude that the district court did not err in rejecting these claims without conducting an evidentiary hearing.

Claims of ineffective assistance of counsel are analyzed under the two-part test set forth in Strickland v. Washington.³ 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 that counsel's deficient performance prejudiced the defense.⁴ To establish prejudice based on the deficient performance of counsel at trial, a petitioner must show that but for counsel's mistakes, there is a reasonable probability that the verdict would have been different.⁵ To establish prejudice based on the deficient performance of counsel on appeal, a petitioner must show that the omitted issues would have a reasonable probability of success on appeal.⁶ The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁷ Moreover, a petitioner is not entitled to an evidentiary hearing unless the petitioner makes sufficient factual allegations that are not belied or repelled by the record and that, if true, would entitle the petitioner to relief.⁸

Winfrey first claimed that counsel provided ineffective assistance at trial by failing to object to and on appeal by failing to challenge an alleged instance of prosecutorial misconduct during cross-examination of Winfrey. In particular, Winfrey claimed that the prosecutor improperly commented on his right to remain silent by cross-examining him regarding inconsistencies between his post-Miranda statement to police and his testimony at trial. We conclude that this claim lacks merit.

³466 U.S. 668 (1984); accord Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴Strickland, 466 U.S. at 687.

⁵Id. at 694.

⁶Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

⁷Strickland, 466 U.S. at 697.

⁸Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Winfrey waived his right to remain silent and made a statement to police following his arrest. At trial, his testimony differed somewhat from his post-arrest statement and provided significant detail that was omitted from his post-arrest statement. During cross-examination, the prosecutor sought to impeach Winfrey's credibility by inquiring into the apparent inconsistencies and omissions. Based on the United States Supreme Court decision in Anderson v. Charles,⁹ we conclude that the prosecutor did not improperly comment on Winfrey's right to remain silent because Winfrey did not invoke his right to remain silent.¹⁰ The prosecutor properly attempted to impeach Winfrey's credibility by comparing his post-arrest statement to his trial testimony. That is permissible under Anderson.¹¹ Accordingly, we conclude that counsel was not deficient for failing to object at trial or raise this issue on appeal.

Winfrey next claimed that counsel provided ineffective assistance at trial by failing to object to and on appeal by failing to challenge alleged prosecutorial misconduct during closing argument. The alleged prosecutorial misconduct involved cross-examination of Winfrey and statements during closing argument that challenged Winfrey's credibility based on the fact that he had the opportunity to listen to the evidence against him before testifying. Winfrey claimed that the prosecutor's conduct violated the Fifth and Fourteenth Amendments to the United States Constitution. We conclude that this claim lacks merit.

The United States Supreme Court recently held in Portuondo v. Agard,¹² that it is not unconstitutional for a prosecutor, during closing argument, to point out that the defendant had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly. Based on the decision in Agard, we conclude that the prosecutor's questioning and comments in this case did not violate the Fifth and Fourteenth Amendments to the United States Constitution. Accordingly, we conclude

⁹447 U.S. 404 (1980).

¹⁰Id. at 408.

¹¹Id. at 408-09.

¹²529 U.S. 61 (2000).

that Winfrey was not prejudiced by counsel's failure to raise this issue at trial or on appeal.

Winfrey also claimed that counsel provided ineffective assistance at trial by failing to present expert testimony during the guilt phase of the trial regarding Winfrey's dyslexia and his impulse control disorder. Although such evidence was presented at the penalty phase, Winfrey claimed that it was also relevant during the guilt phase with respect to the issue of his intent because it would explain why he became involved with co-defendant Travers Arthur Greene. We disagree and conclude that trial counsel was not ineffective for failing to present this evidence at the guilt phase. Having reviewed the record, we conclude that there is not a reasonable probability that this evidence would have changed the outcome of the guilt phase. Accordingly, we conclude that Winfrey cannot demonstrate prejudice as a result of trial counsel's failure to present this evidence during the guilt phase.

Finally, Winfrey claimed that counsel provided ineffective assistance on appeal by failing to challenge the sufficiency of the evidence to support the jury's verdict. Winfrey primarily argued that there was no direct evidence of an agreement necessary for a conspiracy. We conclude that this claim also lacks merit.

This court has explained that it is rarely possible to establish a conspiracy through direct proof; instead, a conspiracy usually is established by inference from the conduct of the parties.¹³ For example, a conspiracy conviction may be supported by "a coordinated series of acts," in furtherance of the criminal purpose, "sufficient to infer the existence of an agreement."¹⁴ Our review of the record in this appeal reveals sufficient evidence from which a rational jury could find a conspiracy beyond a reasonable doubt. Moreover, with respect to the murder charges, the State also presented sufficient evidence that Winfrey aided and abetted co-defendant Greene in shooting the victims. It is for the jury, not this court, to determine the credibility of the witnesses.¹⁵ Given the record in this

¹³Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996).

¹⁴Id. (quoting Gaitor v. State, 106 Nev. 785, 790 n.1, 801 P.2d 1372, 1376 n.1 (1990), overruled on other grounds by Barone v. State, 109 Nev. 1168, 866 P.2d 291 (1993)).

¹⁵McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

case, we would not have interfered with the jury's verdict on direct appeal. Accordingly, we conclude that a challenge to the sufficiency of the evidence would not have had a reasonable probability of success on appeal. Winfrey therefore cannot demonstrate prejudice as a result of counsel's failure to raise this issue on appeal.

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.¹⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Young J.
Young

Agosti J.
Agosti

Leavitt J.
Leavitt

cc: Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Leonard Arthur Winfrey
Clark County Clerk

¹⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).