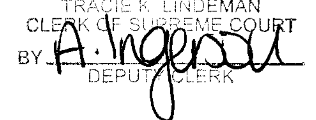
IN THE SUPREME COURT OF THE STATE OF NEVADA

CARLOS ANTONIO ESCOBAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53502



SEP 29 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Carlos Escobar's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge. Escobar raises four issues on appeal.

First, Escobar argues that he is entitled to a new trial because the trial court gave an unconstitutional instruction on the elements of premeditation and deliberation. This claim should have been raised on direct appeal and is procedurally barred absent a showing of good cause and actual prejudice. NRS 34.810(1)(b). The premeditation instruction given—known as the Kazalyn[1] instruction—was an accepted instruction until Byford v. State, 116 Nev. 215, 234-38, 994 P.2d 700, 713-15 (2000), announced a change in state law that applied prospectively to murder convictions that were not final when Byford was decided. Nika v. State, 124 Nev. 1272, 1289, 198 P.3d 839, 850 (2008), cert. denied, 558 U.S. ___, 130 S. Ct. 414 (2009). Because Escobar's direct appeal was pending when

[1]Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

Byford was decided, his conviction was not yet final, see Colwell v. State, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002), and he therefore established good cause to raise the claim in a post-conviction petition. Nika, 124 Nev. at 1289, 198 P.3d at 850.

However, Escobar fails to show prejudice. At least three witnesses testified that the party where the shooting occurred was peaceful until Escobar confronted the victim, asked him if he belonged to a rival gang, and challenged him to fight. The forensic evidence also strongly supports the proposition that Escobar acted willfully and with deliberation: Escobar shot the surviving victim some half-dozen times, walked to the van from which the victim had emerged, and shot into the vehicle, killing one of the occupants who was crouched down inside. See Byford, 116 Nev. at 236, 994 P.2d at 714 (defining deliberation, in part, as "the process of determining upon a course of action to kill as a result of thought"). Moreover, the jury was instructed on, and heard sufficient evidence to support, Escobar's guilt under NRS 200.450(3) (death resulting from a challenge to fight punished as first-degree murder). Accordingly, Escobar failed to demonstrate that the Kazalyn instruction prejudiced him and the district court therefore did not err in denying this claim.[2]

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[2]Escobar also suggests that trial and appellate counsel were ineffective for failing to object or raise a claim relating to the Kazalyn instruction. Because Byford constituted a change in state law, the Kazalyn instruction represented a correct statement of the law at the time of trial and trial counsel therefore had no basis to challenge it. Nika, 124 Nev. at 1289, 198 P.3d at 851. Additionally, even if appellate counsel was deficient for failing to raise this claim, Escobar was not prejudiced for the reasons explained above. See Strickland v. Washington, 466 U.S. 668, 694 (1984); Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

Second, Escobar claims that his convictions should be reversed because the trial court denied his motion to sever the charges in this case from a charge relating to another incident of which he was acquitted at the same trial. This claim should have been raised on direct appeal and is procedurally barred absent a showing of good cause and actual prejudice. NRS 34.810(1)(b). Escobar fails to articulate cause or prejudice.[3]

Third, Escobar argues that his trial counsel was ineffective for failing to call two additional witness: one to rebut the State's evidence that Rocky Perez was unavailable to testify and a second—Vicki Sanchez—to testify that the wounded victim had a gun. Escobar fails to demonstrate that counsel's performance fell below an objective standard of reasonableness or that he was prejudiced. See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 998, 923 P.2d 1102, 1107, 1114 (1996). The State's evidence that Rocky Perez was unavailable was the testimony of Perez, who, at a separate hearing, told the trial court that he feared for his life and would not testify, even under threat of contempt. As to Vicki Sanchez, she did testify at trial, so counsel was not deficient for failing to call her, and Escobar does not suggest that counsel was deficient in his examination. Accordingly, we conclude that the district court did not err by denying this claim.

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[3]In his reply brief, Escobar asserts that he intended to frame this issue as one that appellate counsel was ineffective for failing to raise. Escobar did not frame it this way and the claim is waived. Evans v. State, 117 Nev. 609, 646-47, 28 P.3d 498, 523 (2001). Even so, it had little chance of success on appeal as he was acquitted on the charges related to the second incident. See Strickland, 466 U.S. at 694; Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

Fourth, Escobar claims that the district court erred in failing to grant him an evidentiary hearing. Because his claims of ineffective assistance are not supported by specific factual allegations that would entitle him to relief if true, see Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984), we conclude that the district court did not err in resolving his petition without a hearing.

Accordingly, having considered Escobar's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.

_______________, J.
Cherry

_______________, J.
Saitta

_______________, J.
Gibbons

cc: Hon. Elissa F. Cadish, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk