IN THE SUPREME COURT OF THE STATE OF NEVADA

RICARDO JOSE LOPEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54256

FILED

SEP 10 2010

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 denying a post-conviction petition for a writ of habeas corpus and a post-conviction petition for a writ of habeas corpus filed pursuant to Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Direct Appeal Claims

First, appellant argues that the district court erred by failing to instruct the jury that express malice is an element of first-degree murder and implied malice is an element of second-degree murder. Appellant was found guilty of first-degree murder, thus, the jury, "must have found beyond a reasonable doubt that [appellant] murdered [the victim] deliberately, willfully, and with premeditation. These elements of the crime conclusively established express malice . . . [i]mplied malice [therefore] played no part in th[e] case." Scott v. State, 92 Nev. 552, 556-57, 554 P.2d 735, 738 (1976). The instructions given at trial were the proper statutory definition for both express and implied malice and for the degrees of murder. See NRS 200.020; NRS 200.030. There was overwhelming evidence presented that appellant committed first-degree

murder, and therefore, appellant cannot demonstrate any prejudice from the instructions for second-degree murder.

Second, appellant argues that there was insufficient evidence presented to convict him of both first-degree murder and attempted murder. At trial, multiple witnesses testified that appellant first displayed a weapon and soon after shot two unarmed victims, while one had both hands displayed to show he was not armed and the other was sitting in his vehicle with his hands on the steering wheel. Further, the incident was recorded by a police officer conducting unrelated surveillance of the area and the recording was played for the jury. Based on this evidence, we conclude that the State met the elements of first-degree murder and attempted murder and a reasonable juror could have been convinced of appellant's guilt beyond a reasonable doubt. NRS 200.010; NRS 200.030; NRS 193.330; Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998).

Third, appellant argues that the State failed to prove beyond a reasonable doubt that appellant's actions were not done in self-defense. The evidence presented at trial demonstrated that appellant shot two unarmed males and did so without legal justification. See NRS 200.120; NRS 200.200(1). In addition, the evidence at trial demonstrated that appellant was not confronted with the appearance of imminent danger which aroused in his mind an honest belief and fear that he was about to be killed or suffer great bodily injury. Runion v. State, 116 Nev. 1041, 1051-52, 13 P.3d 52, 59 (2000). Finally, the evidence presented at trial indicated that appellant was the original aggressor, and the right of self-defense is ordinarily not available to an original aggressor. See id.

Fourth, appellant argues that the State committed prosecutorial misconduct during closing arguments by stating that pointing a gun at someone shows an intent to kill and that the victims' actions during the incident did not support appellant's claim of self-defense. The evidence presented at trial demonstrated that appellant displayed his gun, then later pointed the weapon and shot the two unarmed victims. Thus, the challenged statements were reasonable inferences drawn from the evidence presented at trial and, therefore, were proper. Greene v. State, 113 Nev. 157, 177, 931 P.2d 54, 67 (1997), receded from on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000); Jain v. McFarland, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993).

We affirm the denial of the Lozada petition.

Post-Conviction Claims

Next, appellant argues that the district court erred in denying his claims of ineffective assistance of counsel.[1] To prove ineffective assistance of 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 there is a reasonable probability that, but for counsel's errors, the outcome 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). Both components of the inquiry

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[1]We note that appointment of post-conviction counsel for this portion of the petition was discretionary. See NRS 34.750.

must be shown, 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).[2]

First, appellant argues that his trial counsel was ineffective for having less than 60 days to prepare for trial following his appointment. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Prior to trial, counsel informed the district court that he was ready to proceed to trial and nothing in the record indicated that this statement by counsel was untrue. Further, given the overwhelming evidence of appellant's guilt, appellant fails to demonstrate a reasonable probability that the outcome of trial would have been different had counsel had more time to prepare for trial and appellant provides no evidence that he was prejudiced by the length of the time to prepare for trial. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, appellant argues that his trial counsel was ineffective for failing to offer a jury instruction providing a clear definition of implied malice and second-degree murder. As discussed previously, the instructions on malice and the degrees of murder were a correct statement

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[2]We note that appellant's petition was filed on May 5, 2008, more than two years after the filing of the judgment of conviction on August 18, 2006. Thus, appellant's petition was untimely filed. See NRS 34.726(1). The district court orally concluded that appellant had demonstrated good cause to excuse the untimely filing at a hearing conducted on March 27, 2009.

of the law. Further, as there was overwhelming evidence presented that appellant committed first-degree murder, appellant fails to demonstrate a reasonable probability that the outcome of trial would have been different had counsel sought further instructions on second-degree murder or implied malice. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Third, appellant argues that his trial counsel was ineffective for failing to object when the State committed prosecutorial misconduct during closing arguments. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. As discussed previously, the challenged statements were reasonable inferences drawn from the evidence presented at trial and, therefore, were proper. Further, as there was overwhelming evidence of appellant's guilt, appellant fails to demonstrate a reasonable probability of a different outcome had his counsel objected to the challenged statements. Therefore, the district court did not err in denying this claim.

Fourth, appellant argues that his trial counsel was ineffective for failing to call Dr. John Paglini to testify at the penalty hearing to present mitigation evidence about appellant's family history. Appellant fails to demonstrate that he was prejudiced. At the penalty hearing, appellant's uncle testified extensively about appellant's family history of drug abuse and violence. Further, Dr. Paglini's report indicated that appellant was at a high risk to be involved with violence and that appellant had intense anger and rage towards society. Given the nature of Dr. Paglini's report and that any information about appellant's family history would have been duplicative of testimony provided by appellant's uncle, appellant fails to demonstrate a reasonable probability that the

outcome of the penalty hearing would have been different had Dr. Paglini been called to testify. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fifth, appellant argues that his trial counsel was ineffective for failing to seek a mental health evaluation to determine appellant's competency because he informed counsel that he was "hearing voices," was young, and had a low IQ. Appellant fails to demonstrate that counsel was deficient or that he was prejudiced. A review of the record reveals that appellant responded to all questions posed to him and nothing indicates that appellant was precluded from aiding his counsel or understanding the charges against him. Melchor-Gloria v. State, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983) (citing Dusky v. United States, 362 U.S. 402 (1960)). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Having considered appellant's contentions and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Law Offices of Cynthia Dustin, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk