IN THE SUPREME COURT OF THE STATE OF NEVADA

JONATHAN CORNELIUS DANIELS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35002

FILED

MAR 27 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF 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.

On December 22, 1995, the district court convicted appellant, pursuant to a jury verdict, of two counts of first-degree murder with the use of a deadly weapon (Counts I and II) and two counts of robbery with the use of a deadly weapon (Counts V and VI). The district court sentenced appellant to serve four consecutive terms of life in the Nevada State Prison without the possibility of parole for Counts I and II, and to two concurrent terms of thirty years for Counts V and VI. The sentences imposed for Counts V and VI are to run concurrently to the sentences imposed for Counts I and II. This court dismissed appellant's direct appeal.[1] The remittitur issued on April 21, 1998.

On March 19, 1999, 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

[1]Daniels v. State, 114 Nev. 261, 956 P.2d 111 (1998).

conduct an evidentiary hearing. On September 19, 1999, the district court denied appellant's petition. This appeal followed.

In his petition, appellant first raised numerous claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.[2] The court need not consider both prongs of the Strickland test if the defendant makes an insufficient showing on either prong.[3] Further, judicial review of an attorney's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy.[4] Moreover, we have held that a petitioner is not entitled to relief on claims that are belied or repelled by the record or are not sufficiently supported by specific factual allegations that would, if true, entitle the petitioner to relief.[5]

First, appellant claimed that his trial attorneys failed to pursue a temporary insanity defense based upon appellant's alleged ingestion of phencyclidine ("PCP") prior to committing the instant crimes. Appellant further contended that sufficient evidence of his insanity at the time of commission existed including (1) his alleged ingestion of PCP; (2) witness testimony that prior to committing the crimes appellant was

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[2]See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

[3]See Strickland, 466 U.S. at 697.

[4]See id. at 689.

[5]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

"acting 'all high and stuff,' was 'talking crazy' and 'trippin[g]'"; and (3) appellant's own statement to LVMPD officers subsequent to his arrest, in which appellant repeated four times that he did not know why he had killed the two victims.

Our review of the record on appeal reveals that the district court did not err in denying appellant relief on this claim. First, appellant made insufficient factual allegations to show that he was legally insane due to his ingestion of PCP.[6] Appellant failed to establish either (1) that he was in a delusional state such that he could not know or understand the nature of his act or (2) that his delusion was such that he could not appreciate the wrongfulness of his conduct.[7] Further, appellant's purposeful conduct in carrying out these crimes rendered pursuit of a temporary insanity defense difficult if not impossible.[8] Also, appellant confessed to the instant offenses hours after their commission at which time he appeared normal, did not appear to need any assistance and made a detailed factual admission to LVMPD officers including admitting that he had robbed a convenience store and killed two people in the process.

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[6]See id. at 502, 686 P.2d at 225.

[7]Finger v. State, 117 Nev. ___, ___, 27 P.3d 66, 72 (2002) (stating the M'Naghten test for legal insanity followed in Nevada).

[8]One of the State's eyewitnesses testified that appellant exited a car at the convenience store with his gun drawn. The State's other eyewitness described appellant as grabbing a convenience store clerk "by the neck" and, while holding her at gunpoint, "he told her to open the cash register." Appellant then "started taking money out of the cash register [and] putting it in his pockets." Appellant then shot and killed the first victim, another clerk, when he approached appellant despite appellant's oral warnings to that clerk that he not "take another step." Appellant then shot and killed the clerk that he had initially grabbed when she attempted to get away.

Thus, it was not objectively unreasonable for defense counsel to forego a temporary insanity defense and instead attempt to defend appellant on the basis that his ingestion of PCP precluded him forming the requisite intent to support the State's prosecution of appellant for first-degree premeditated murder.[9] Finally, appellant did not allege, nor does the record suggest, that defense counsel abandoned a plea of not guilty by reason of insanity in contravention of appellant's wishes.[10] Thus, we conclude that appellant failed to demonstrate that his trial attorneys were ineffective for failing to pursue an insanity defense.

Next, appellant claimed that his trial attorneys failed to adequately investigate an insanity defense before abandoning it. Specifically, appellant contended that his trial counsel abandoned a temporary insanity defense "without conducting a thorough investigation of the affects [sic] PCP had on [appellant]." The record on appeal belies appellant's claim.[11] First, prior to trial appellant's trial counsel had appellant evaluated by a psychiatrist, two psychologists and a medical doctor to thoroughly investigate appellant's mental state. Defense counsel

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[9]See NRS 193.220 (providing, in pertinent part, that while "[n]o act committed by a person . . . in a state . . . of voluntary intoxication shall be deemed less criminal by reason of his condition . . . whenever the actual existence of any particular . . . intent is a necessary element to constitute a particular . . . crime, the fact of his . . . intoxication may be taken into consideration in determining the . . . intent."); NRS 200.030(1) (providing, in pertinent part, that "[m]urder of the first degree is murder which is: (a) [p]erpetrated . . . by any . . . kind of willful, deliberate and premeditated killing."); see also Strickland, 466 U.S. at 694.

[10]See generally, Johnson v. State, 117 Nev. ___, ___, 17 P.3d 1008, 1014-15 (2001) (holding that a defendant can make certain fundamental decisions regarding the objectives of representation, such as whether to present a defense of not guilty by reason insanity).

[11]See Hargrove, 100 Nev. at 503, 686 P. 2d at 225.

also had appellant's hair tested to confirm his ingestion of PCP prior to commission of the crimes. As discussed above, appellant's counsels' defense theory was that appellant was under the influence of PCP when he killed the two victims and was therefore unable to premeditate the killings. In support of this defense, appellant's trial counsel called the following expert witnesses to testify at appellant's trial: (1) a doctor of chemistry certified in drug toxicology; (2) a doctor of neuropsychology with a significant background in the neural affects of drug abuse; (3) a medical doctor board certified in both psychiatry and neurology who had first personally interviewed appellant well in advance of trial; and (4) a forensic chemist specializing in drug toxicology. All of these defense expert witnesses testified that PCP can produce psychosis by inducing a state all but indistinguishable from non-drug induced paranoid schizophrenia and all opined that appellant was so affected when he committed the crimes. Thus, we conclude that appellant failed to demonstrate that his trial attorneys were ineffective for conducting inadequate pretrial investigation regarding appellant's intoxicated state.

Next, appellant claimed that his trial attorneys were ineffective for failing to make a "good faith argument for the extension, modification or reversal of the existing laws, governing voluntary intoxication, to include PCP." First, appellant did not clearly identify the Nevada statutes as to which his suggested argument should have been made.[12] Second, even assuming that appellant intended that this argument be made with regard to NRS 193.220 he failed to articulate any basis for such a "good faith argument."[13] Finally, the jury received

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[12]Id. at 502, 686 P.2d at 225.

[13]Id.

instructions regarding appellant's alleged voluntary intoxication and the possibility that he was thereby deprived of the ability to form specific intent. Indeed, Jury Instruction No. 21 was a nearly verbatim recitation of the relevant language of NRS 193.220. Thus, NRS 193.220 applied with respect to appellant's alleged ingestion of PCP. We therefore conclude that appellant cannot demonstrate that he was prejudiced by defense counsels' failure to argue for the extension or modification of Nevada's intoxication statute to include PCP or for the statute's reversal because it does not currently include PCP.[14]

Finally, appellant claimed that his trial attorneys failed to "object to the unanimity instruction given during the guilt phase of [appellant's] trial." Specifically, appellant alleged that because appellant's potential "punishment included death, the jury should have been admonished [at] voir dire and at [the close] of trial that they did not have to relinquish [their] individual views in order to reach a verdict." First, appellant's complaint with regard to voir dire has no basis in law. Thus, it was not objectively unreasonable for defense counsel to have refrained from requesting appellant's suggested admonition.[15] Further, appellant cannot demonstrate that he was prejudiced by his attorneys' failure to challenge the unanimity instruction given in this case.[16] Jury Instruction No. 33 advised jurors to "bring to the consideration of the evidence [their] everyday common sense and judgment as reasonable men and women," and suggested that they "draw reasonable inferences from the evidence . . . in the light of common experience." This instruction clearly informed the

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[14]Strickland, 466 U.S. at 697.

[15]Id. at 694.

[16]Id. at 697.

jury not to surrender their individual perspectives in reaching a verdict. Thus, we conclude that appellant's claims of ineffective assistance of trial counsel are all without merit.

Appellant next raised several claims of ineffective assistance of appellate counsel. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."[17] Appellate counsel is not required to raise every non-frivolous issue on appeal.[18] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[19] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[20]

First, appellant contended that his appellate counsel was ineffective for failing to challenge the underrepresentation of African-Americans in Clark County venires due to systematic exclusion as evidenced by the absence of African-Americans on appellant's jury. Again, our review of the record on appeal reveals that the district court did not err in denying appellant relief on this claim. Appellant has the burden of establishing a prima facie violation of the fair-cross-section requirement.[21] To demonstrate a prima facie violation, appellant must demonstrate (1)

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[17]Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

[18]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[19]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

[20]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[21]Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 275 (1996).

that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[22] Appellant failed to satisfy this three-part test. First, appellant failed to provide any evidence that the representation of African-Americans in the relevant venire was not fair and reasonable in relation to the number of African-Americans in the community. In fact, the record suggests that a number of minority prospective jurors were subject to voir dire but that many were properly excused after they expressed an inability to impose a death sentence even with respect to the most heinous of crimes.[23] Further, other than asserting that African-Americans are systematically excluded from serving on juries in Clark County, appellant failed to present any evidence that the alleged underrepresentation was due to systematic exclusion of African-Americans in the jury selection process. Thus, we

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[22]Duren v. Missouri, 439 U.S. 357, 364 (1979); see also Evans, 112 Nev. at 1186, 926 P.2d at 275.

[23]See Wainwright v. Witt, 469 U.S. 412, 424 (1985) (holding that with regard to excusing a prospective juror deciding a capital case for cause, the proper question is whether the prospective juror's views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"); see also Aesoph v. State, 102 Nev. 316, 319, 721 P.2d 379, 381 (1986) (holding that "a person's constitutional right to a fair trial is not violated by the removal for cause, prior to the guilt phase of a . . . capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial.").

conclude that appellant failed to demonstrate that this issue had a reasonable probability of success on appeal.[24]

Next, appellant claimed that his appellate counsel was ineffective for failing to make a "good faith argument for the extension, modification or reversal of the existing laws, governing voluntary intoxication, to include PCP." As discussed above with regard to appellant's claims of ineffective assistance of trial counsel, this claim is without merit and thus appellant's appellate counsel was not ineffective for failing to raise it on direct appeal.

Finally, appellant claimed that his appellate counsel was ineffective for failing to raise on direct appeal (1) that "due to some confusion with [a] taped message that had been prepared for the jurors, [appellant] lost the opportunity to question four blacks [sic] and one [H]ispanic prospective juror;" (2) an alleged instance of prosecutorial misconduct occurring during the State's closing argument and (3) "an accused person's right to preserve exculpatory evidence." Appellant failed to support the first and second of these claims with sufficient factual allegations, which if true, would have entitled him to relief.[25] As to the third claim, it is belied by the record on appeal.[26] Appellant's appellate counsel argued on direct appeal that the State's failure to gather blood evidence from appellant immediately following his arrest prejudiced appellant by making it impossible for him to conclusively establish that he was under the influence of PCP when he committed the robbery and

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[24]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[25]See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

[26]Id. at 503, 686 P. 2d at 225.

murders.[27] Thus, we conclude that these three claims of ineffective assistance of appellate counsel are likewise without merit.

Appellant next raised the following seven claims in his habeas petition: (1) that the district court failed to conduct a competency hearing on its own initiative after defense counsel suggested that a plea of temporary insanity might be entered on behalf of appellant; (2) that the district court improperly excused prospective African-American jurors thus vitiating "the array;" (3) that the district court demonstrated racial bias against appellant; (4) that the district court demonstrated bias against defense counsel; (5) "[w]hether or not due process required the Court [sic] to admonish or instruct the jury that they did not have to surrender their individual views of facts and evidence in order to [reach] a verdict where the law requires that a verdict must be unanimous;" (6) "[w]hether or not due process . . . required the court, sua sponte, to instruct the jury to find that the robbery was a motivating factor for the murders;" and (7) that Clark County's jury selection system is unconstitutional because it "is deliberately designed to undermine the right of an African-American to have a fair number of members of his race on his jury." Appellant waived these claims by failing to raise them in his direct appeal and by failing to plead specific facts that demonstrate good cause for failing to raise them in the earlier proceeding.[28]

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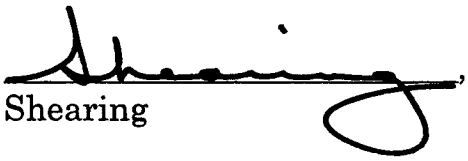
[27]Daniels, 114 Nev. at 266, 956 P.2d at 114.

[28]See NRS 34.810(1)(b)(2), (3) (providing that the district court shall dismiss a petition, absent a demonstration of good cause and prejudice, if the claims raised in the petition could have been raised on direct appeal); see also Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) (holding claims that are appropriate on direct appeal must be pursued on direct appeal, or they are waived), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

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.[29] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
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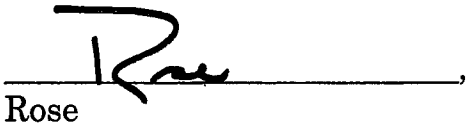

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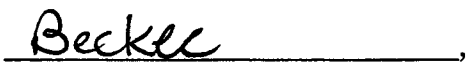

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Becker

cc: Hon. John S. McGroarty, District Judge
Attorney General/Carson City
Clark County District Attorney
Jonathan Cornelius Daniels
Clark County Clerk

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[29]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).