


IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT ANTHONY SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55078

FILED

DEC 10 2010

TRACEE 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 Robert Smith's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Smith, while under the influence of PCP, shot and killed a man outside of Smith's apartment. He was convicted, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon, and this court affirmed that conviction on appeal. Smith v. State, Docket No. 32283 (Order Dismissing Appeal, July 7, 2000). Smith filed a timely post-conviction petition for a writ of habeas corpus, which, after much delay, the district court denied. In this appeal that followed, Smith, among other contentions, claims that the district court erred by denying several claims of ineffective assistance of trial and appellate counsel.

Ineffective assistance of trial counsel

For Smith to successfully prove his claims of ineffective assistance of trial counsel sufficient to invalidate his judgment of conviction, he must demonstrate (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness and

(2) prejudice in that counsel's errors were so severe that they rendered the jury's verdict unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 998, 923 P.2d 1102, 1107, 1114 (1996).

First, Smith contends that had counsel effectively investigated, his mother and aunt would have testified to various potentially exculpatory facts that they learned from people in the neighborhood and would have led counsel to other witnesses. Smith also asserts that a neighbor would have related her daughter's statement that someone else was responsible for the crime. The witnesses' proffered testimony is composed entirely of inadmissible hearsay and the assertion that they could lead to further witnesses is "mere speculation" that finds no support in the record, see Sterling v. State, 108 Nev. 391, 396, 834 P.2d 400, 403 (1992), and Smith therefore failed to demonstrate counsel's deficiency or that he was prejudiced. Accordingly, the district court did not err in rejecting this claim.

Second, Smith claims that his counsel was ineffective for failing to investigate an incident where the victim was shot previously and a prior murder in the neighborhood, speculating that an acquaintance of Smith's, Mario Sanchez, could have been responsible for both incidents. Smith's theory in his petition—and at trial—was that Sanchez killed the victim because the victim was dating the mother of his child. Counsel addressed both shootings when he cross-examined detectives, the mother of Sanchez's child, and Sanchez, so it is unclear what further investigation would have yielded. Accordingly, Smith failed to demonstrate counsel's deficiency, and we conclude that the district court did not err in rejecting this claim.

Third, Smith claims that counsel was ineffective for telling the jury in opening statements that Sanchez could be responsible for the murder but presenting no supporting evidence. Smith failed to articulate what evidence counsel was ineffective for failing to produce, especially given counsel's thorough cross-examination of each State's witness whereby counsel effectively established Sanchez as a possible perpetrator for the jury. Therefore, Smith failed to convince us that counsel's performance was deficient and we conclude that the district court did not err in rejecting this claim.

Fourth, Smith contends that counsel was ineffective for failing to call his brother Albert to testify that Albert was smoking PCP with the eyewitness, thereby impeaching the eyewitness' testimony. Smith asserts that Albert would have also testified that Smith was indoors at the time the victim was shot. In Smith's first trial, Albert testified to those facts and also admitted that he had struck the eyewitness in the arm with a machete. Given Albert's dubious credibility, and the fact that counsel's choice of which witnesses to call is a strategic decision that is "virtually unchallengeable absent extraordinary circumstances," Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000)), we conclude that counsel was not deficient for failing to call this witness at Smith's second trial. Accordingly, the district court did not err in rejecting this claim.

Fifth, Smith asserts that counsel was ineffective for failing to object to a detective's testimony that "three persons confirmed the identity of the shooter." At trial, two witnesses named Smith as the shooter. The

third was much more equivocal, but even if counsel was deficient for failing to object, we discern no prejudice given the strength of the other two identifications. Accordingly, the district court did not err in rejecting this claim.

Ineffective assistance of appellate counsel

Smith claims that his appellate counsel was ineffective. To successfully prove such a claim, Smith 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, 112 Nev. at 998, 923 P.2d at 1114.

First, Smith argues that appellate counsel was ineffective for failing to raise several prior bad act claims of error. To the extent he argues that evidence of his possession of the type of gun used to commit the murder and his PCP use on the night of the shooting are collateral bad acts, he errs—these facts are directly relevant to establishing motive and means. Additionally, while evidence of his possession of a bag of marijuana is not directly relevant, any error is harmless given the extensive testimony on Smith's PCP use. Therefore, because Smith failed to demonstrate a reasonable probability that these claims would have succeeded on appeal, we conclude that the district court did not err in denying them.

Second, Smith argues that appellate counsel was ineffective for failing to raise a claim of error related to detectives' search of his mother's apartment, which he contends was conducted in violation of his Fourth Amendment rights. His mother testified that Smith had been residing in her apartment for three weeks before the shooting. When

detectives entered, she gave consent to the search and signed a consent form. Smith therefore failed to demonstrate a reasonable probability that this contention would have succeeded on appeal, and we conclude that the district court did not err in denying this claim.¹

Third, Smith claims that appellate counsel was ineffective for failing to properly raise claims of error relating to prosecutorial misconduct, sufficiency of the evidence, and the deadly weapon enhancement. This court considered and rejected these claims on direct appeal. The doctrine of the law of the case prevents further litigation of these issues and cannot be avoided by a more detailed and precisely focused argument. Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, the district court did not err in denying these claims.

Next, Smith contends 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 err in resolving his petition without a hearing.

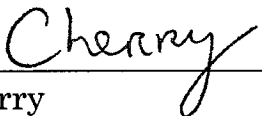
¹Smith argues that he should be allowed to raise his prior bad act and Fourth Amendment claims of error in his post-conviction petition. In an attempt to overcome the applicable procedural bar, see NRS 34.810(1)(b), he cites as good cause an assertion that he raised these claims in a pro per appellate brief. Noting that Smith was represented by counsel, this court rejected his submissions. Further, even if Smith could establish good cause, the prior bad act and Fourth Amendment claims are, as noted above, meritless. Thus, he cannot demonstrate prejudice and his claims are procedurally defaulted.

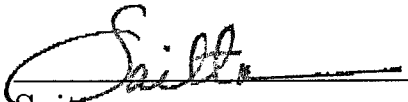
Smith also argues that the cumulative errors of counsel prejudiced him. We conclude that because Smith's ineffective assistance of counsel claims lacked merit, he failed to demonstrate any cumulative error and is therefore not entitled to relief on this basis. Therefore, the district court did not err in denying this claim.

Finally, Smith contends that the district court erred in failing to consider the grounds for relief raised in prior petitions that were submitted to the district court during the nine years his post-conviction petition was in that court. At a hearing in 2008, the district court found Smith's previous proper person petitions to be illegible and ordered them to be resubmitted. In its order denying the instant petition, the district court found that Smith's failure to raise those claims in this subsequent petition acted as a waiver. We agree and conclude that the district court did not err in refusing to consider those claims.

Having considered Smith'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. Michelle Leavitt, District Judge
Attorney General/Carson City
Clark County District Attorney
Federal Public Defender/Las Vegas
Eighth District Court Clerk