

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANTE HANAIEI PATTISON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55248

FILED

JUL 13 2011

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. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant argues that the district court erred in denying his claims of ineffective assistance of trial counsel raised in his May 14, 2008, petition. 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 must be shown, Strickland, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings regarding ineffective assistance of counsel but review the court's application of the law to those

facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant argues that trial counsel was ineffective for failing to object to references made by the State to the length of time appellant was observed at Lake's Crossing and to comments on appellant's silence at Lake's Crossing. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. As appellant put his sanity in question, the mental health evaluations at Lake's Crossing, the time taken in forming opinions concerning those evaluations, and appellant's failure to fully cooperate with those evaluations were admissible at trial. See Estes v. State, 122 Nev. 1123, 1133-34, 146 P.3d 1114, 1121 (2006). Appellant fails to demonstrate a reasonable probability of a different outcome had counsel objected to references to the length of time appellant was housed at Lake's Crossing or to his silence at that facility. Therefore, appellant fails to demonstrate that the district court erred in denying this claim.

Second, appellant argues that trial counsel was ineffective for failing to object when the State discussed prior bad act evidence concerning appellant's drug use. Appellant fails to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant's drug use was initially introduced by appellant as his drug history was considered in the mental health evaluations conducted by appellant's expert witnesses. Appellant fails to demonstrate that any later discussion by the State of appellant's drug use was prejudicial as his drug use was important in considering whether appellant was legally insane on the night of the murders. Therefore, the district court did not err in denying this claim.

Third, appellant argues that trial counsel was ineffective for failing to object to the State's questions concerning appellant's refusal to consent to a blood draw on the night of the murders because they shifted the burden of production of evidence to appellant. Appellant fails to demonstrate that he was prejudiced. Given the testimony and appellant's defense of legal insanity, appellant fails to demonstrate a reasonable probability that an objection to questions concerning a lack of a blood draw would have resulted in a different outcome at trial. Therefore, the district court did not err in denying this claim.

Fourth, appellant argues that trial counsel was ineffective for failing to object to the instruction on implied malice because "abandoned and malignant heart" does not clearly define malice. The instruction given at trial was the proper statutory definition for implied malice, see NRS 200.020(2), and therefore, appellant cannot demonstrate that his trial counsel's performance was deficient. Given the jury's determination that appellant was not legally insane, the facts of the crime demonstrate that he killed with express malice when he shot the victims. See NRS 200.020(1). Therefore, appellant fails to demonstrate a reasonable probability of a different outcome had his counsel objected to the implied malice instruction. Therefore, appellant fails to demonstrate that the district court erred in denying this claim.

Next, appellant argues that the district court erred in denying his claims of ineffective assistance of appellate counsel. To prove ineffective assistance of appellate 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 the omitted issue would have a reasonable probability of success on appeal. Kirksey v.

State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Both components of the inquiry must be shown, Strickland, 466 U.S. at 697.

First, appellant argues that his appellate counsel was ineffective for failing to argue that the State impermissibly questioned a defense expert concerning the irresistible impulse test for insanity when that is not the standard for insanity in Nevada. Appellant fails to demonstrate that counsel's performance was deficient or that he was prejudiced. At trial, the State acknowledged that the irresistible impulse test was not the standard for legal insanity in Nevada and was attempting to ascertain whether appellant met the irresistible impulse test, but not the insanity standard adopted by this court in Finger v. State, 117 Nev. 548, 27 P.3d 66 (2001). The defense expert agreed that the irresistible impulse test is not Nevada's test for insanity and the expert then stated the correct test. In addition, the jury was properly instructed on insanity. Thus, appellant fails to demonstrate a reasonable likelihood of a different outcome had counsel argued that the State impermissibly raised questions concerning the irresistible impulse test. Therefore, the district court did not err in denying this claim.

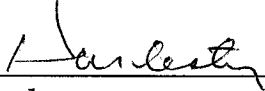
Second, appellant argues that his appellate counsel was ineffective for failing to argue that the length of time appellant was at Lake's Crossing and his silences there should have been inadmissible, the prior bad act evidence was improper, the State's questions concerning the lack of a blood draw were improper, and the implied malice definition was

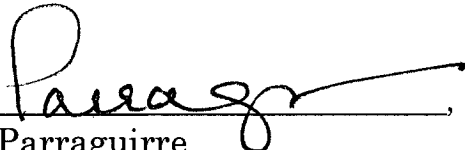
not clear. For the reasons discussed above, appellant fails to demonstrate that his counsel's performance was deficient or prejudice in these areas. Therefore, the district court did not err in denying these claims.

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

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

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