IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL HAMPTON SONNER,

Appellant,

vs.

WARDEN, ELY STATE PRISON, E.K. MCDANIEL,

Respondent.

No. 35077

FILED

JUN 09 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court denying a petition for a post-conviction writ of habeas corpus in a death penalty case. The court held an evidentiary hearing before denying the petition.

Appellant Michael Hampton Sonner contends first that his petition should have been granted because his trial judge had a conflict of interest because of a prior attorney-client relationship with the prosecuting attorney. Sonner also contends that the prosecuting attorney violated state law by representing a criminal defendant while prosecuting Sonner. We decline to consider these issues again. This court concluded they had no merit on direct appeal. See Sonner v. State, 112 Nev. 1328, 1335, 930 P.2d 707, 712 (1996) (Sonner I); Sonner v. State, 114 Nev. 321, 327-28, 955 P.2d 673, 677 (1998) (modifying Sonner I on rehearing). Our previous holdings are now the law of the case. See Pertgen v. State, 110 Nev. 554, 557-58, 875 P.2d 361, 363 (1994).

Sonner also contends that he should have received habeas relief because his trial counsel were ineffective in two ways. To establish ineffective assistance of counsel, a defendant must show that an attorney's representation fell

below an objective standard of reasonableness and that the attorney's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). To establish prejudice, the defendant must show that but for the attorney's mistakes, there is a reasonable probability that the result of the proceeding would have been different. Id. at 694.

Sonner claims that trial counsel were ineffective because after he was found guilty they failed to ask for a continuance of the penalty phase so that the district court could first sentence him on the noncapital offenses. He reasons that then his counsel could have argued to the jury that consecutive life sentences for the murder would be sufficient punishment when combined with the term of life in prison without possibility of parole which he received for being a habitual criminal.

Sonner's evidence did not establish proof of an objective standard of reasonableness requiring counsel to seek to continue a penalty phase in this manner. Nor does he cite specific legal authority for deeming counsel deficient for failing to seek such a continuance. Such a novel proposition, therefore, deserves little consideration by this court. Cf. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Even assuming that counsel should have requested a continuance, their failure to do so did not prejudice Sonner for at least two reasons. First, the district court made clear that there is no reasonable probability that it would have granted such a request. Second, even if Sonner had received the other sentences first, we discern no reasonable probability that that information would have changed the jury's verdict. Jurors had the option of giving him two consecutive terms of life in prison without possibility of

parole for the murder and weapon enhancement, but chose to give him death. Given the numerous aggravating circumstances of this murder, Sonner's heinous criminal history, and his own request for death, it is unlikely that jurors would have decided that Sonner did not deserve death simply because he might receive three consecutive life terms. Trial counsel were not ineffective in this respect.

Sonner also claims that his trial counsel were ineffective because they failed to present evidence at the penalty phase that he had adjusted well to his incarceration. Sonner asserts that this evidence could have been provided by a Lakes Crossing Center psychologist who testified at a pretrial competency hearing that Sonner was well behaved at the center and never attempted to escape. Sonner asserts that personnel at the Pershing County Jail could have provided similar evidence.[1] Sonner apparently presented no evidence at the evidentiary hearing from the psychologist or any jail personnel, so Sonner made no showing of what kind of evidence could have been presented at his trial on this matter.

Even assuming that trial counsel could have and should have presented evidence that Sonner was adjusting to incarceration and had not attempted to escape, Sonner was not prejudiced. The mitigating effect of such evidence would have been slight, at best, and there is no reasonable probability that it would have made any difference in the face of the State's case, particularly the evidence that Sonner had been

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[1]In violation of NRAP 28(e), Sonner's appellate counsel fails to refer to any records before this court to support these assertions. Sonner's counsel cites to the original record on appeal. However, the record on appeal is not transmitted to this court in appeals from orders denying post-conviction relief in capital cases; instead, the parties must file appendices and request transcripts pursuant to the Nevada Rules of Appellate Procedure. See SCR 250(7)(b); NRAP 9-10, 30, 32.

incarcerated before for violent crime, had twice escaped, and had consequently committed further violent crimes, including robbery, rape, and a double murder. Sonner's trial counsel were not ineffective in this regard. Accordingly, we

ORDER this appeal dismissed.

Maupin, J.

Shearing, J.

Becker, J.

cc: Hon. Richard Wagner, District Judge
Attorney General
Pershing County District Attorney
Lockie & Macfarlan, Ltd.
Pershing County Clerk