

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL DOMINGUES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 56109

**FILED**

OCT 08 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *T. Malone*  
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Michael Domingues was convicted of two counts of first-degree murder in connection with the strangulation death of Arjin Pechpo and the stabbing death of her four-year-old son. A jury sentenced him to death for each murder. This court upheld the convictions and death sentences. Domingues v. State, 112 Nev. 683, 917 P.2d 1364 (1996). Thereafter, Domingues filed a post-conviction petition for a writ of habeas corpus on November 3, 1997, and an amended petition on February 27, 2003. The district court denied Domingues' claims related to the guilt phase of trial and denied as moot his claims related to the penalty hearing because it had struck his death sentences pursuant to Roper v. Simmons, 543 U.S. 551 (2005) (holding that Eighth Amendment's prohibition of cruel and unusual punishment precludes execution of offenders who were under 18 years of age when their crimes were committed), and imposed life-without-parole sentences pursuant to legislative directive, see 2005 Nev. Stat., ch. 33, § 2, at 63. On appeal, Domingues argues that the district

court erred by denying his guilt-phase claims of ineffective assistance of counsel and denying several penalty-phase claims as moot.

Guilt-phase claims

Domingues argues that the district court erred by denying four claims of ineffective assistance of counsel related to the guilt phase of trial. In reviewing those decisions, we give deference to the district court's factual findings if they are supported by substantial evidence and not clearly erroneous, but we review the district court's legal conclusions de novo. Nika v. State, 124 Nev. 1272, 1278-79, 198 P.3d 839, 844 (2008). We conclude that Domingues failed to show that counsel were ineffective, see Strickland v. Washington, 466 U.S. 668, 687 (1984) (requiring showing of deficient performance and prejudice to prove claim of ineffective assistance of counsel); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996), and therefore the district court properly denied his claims.

First, Domingues complains that the district court erred by denying his claim that counsel should have challenged the underrepresentation of minorities in the venire. A defendant enjoys a constitutional right to a trial before a jury selected from a representative cross-section of the community. Holland v. Illinois, 493 U.S. 474 (1990). Although the fair-cross-section requirement mandates that the manner in which jury venires are drawn must not systematically exclude distinctive groups in the community, Taylor v. Louisiana, 419 U.S. 522, 538 (1975), there is "no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." Holland, 493 U.S. at 483 (quoting Taylor, 419 U.S. at 538). The burden of demonstrating a prima facie violation of the fair-cross-section requirement rests with the defendant who must show (1) that the group allegedly excluded is a "distinctive" group in the community; (2) that the

representation of that group in venires is not fair and reasonable in relation to the number of such people in the community; and (3) that underrepresentation is due to systematic exclusion of the group in the selection process. Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 275 (1996). The Supreme Court has defined “systematic underrepresentation” as “underrepresentation . . . inherent in the particular jury-selection process utilized.” Duren v. Missouri, 439 U.S. 357, 366 (1979). Based on the record before us, we conclude that Domingues failed to demonstrate a systematic exclusion of any minority group, and therefore counsel were not ineffective for failing to challenge the jury venire on this basis. Accordingly, the district court did not err by denying this claim.

Second, Domingues contends that the district court erred by denying his claim that counsel were ineffective for not calling two witnesses to testify about the behavior and actions of Pechpo’s ex-boyfriend who was initially a suspect in the murders. The district court rejected this claim, reasoning that because the evidence elicited at trial established the time when the murders occurred and witnesses testified about the ex-boyfriend’s whereabouts at the time of the murders, the testimony of the two witnesses would not have altered the outcome of the trial. The record supports the district court’s findings and conclusions, and therefore it did not err by denying this claim.

Third, Domingues argues that the district court erred by denying his claim that counsel were ineffective for not challenging the admission of his statements to the police concerning his theft of Pechpo’s credit card. In particular, he argues that his police statement was involuntary because he was not advised of his right to have a parent present during the interview and that his statements could be used in an adult prosecution for murder. “A confession’s voluntariness is determined

by considering the effect of the totality of the circumstances on the will of the defendant.” Rowbottom v. State, 105 Nev. 472, 482, 779 P.2d 934, 940 (1989), overruled on other grounds by Jezdik v. State, 121 Nev. 129, 110 P.3d 1058 (2005), and Big Pond v. State, 128 Nev. \_\_\_, 270 P.3d 1244 (2012). The absence of parental notification is a factor in determining the voluntariness of a juvenile’s confession. Ford v. State, 122 Nev. 796, 802, 138 P.3d 500, 504-05 (2006). The record here shows that (1) Domingues was advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966); (2) he was of at least average intelligence; (3) he was sufficiently mature—despite his argument to the contrary; (4) the recorded interview lasted approximately 20 minutes; (5) there is no indication of repeated or prolonged questioning or physical punishment; (6) he had been arrested previously; and (7) he was aware of the reason for the interview, which was conducted at a police station. See Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987) (identifying factors to consider in determining voluntariness of confession).

Viewing those circumstances, we conclude that Domingues failed to show that counsel were deficient in failing to challenge the admission of his police statement. See Elvik v. State, 114 Nev. 883, 891, 965 P.2d 281, 286 (1998) (concluding that failure of police officer to inform 14-year-old murder suspect that statements could be used against him in adult criminal trial was insufficient alone to render statements inadmissible where nature of charges and identity of interrogator reflected unquestionably adversarial police atmosphere and suspect was of above-average intelligence and had been arrested on at least one previous instance). Moreover, even assuming counsel were deficient, Domingues failed to demonstrate prejudice because other evidence admitted at trial indicated that he had entered Pechpo’s house after the murders, retrieved

property, and used her credit card to purchase items at Target. Because the record supports the district court's findings and conclusions, it properly denied this claim.

Fourth, Domingues argues that his constitutional right to the effective assistance of counsel was denied because counsel David Wall had a conflict of interest. The nature of the alleged conflict centers on Wall's representation of Gregory Gray in an unrelated criminal matter years before Domingues' trial. Domingues contends that because of that representation, Wall declined to call Gray, who would have testified in support of Domingues' defense that someone else, in particular Pechpo's ex-boyfriend, killed Pechpo and her son. At an evidentiary hearing on the matter, Wall testified that he spoke with Gray but did not recall anything from that conversation that would have been helpful to the defense or that led him to believe that he "needed to protect Gregory Gray at the expense of Michael Domingues." The district court accepted Wall's testimony that Gray was not of assistance to the defense and concluded that Wall would have withdrawn from Domingues' case if he had perceived a conflict of interest. Based on those findings, which are supported by the record, we conclude that Domingues failed to demonstrate that counsel was deficient, see Waid v. Dist. Ct., 121 Nev. 605, 609, 119 P.3d 1219, 1222 (2005) (recognizing that disqualification for conflict of interest involving former client is warranted only if prior representation and current representation are substantially related), or prejudice considering Gray's dubious utility to the defense and the overwhelming evidence supporting Domingues' convictions. Therefore, the district court did not err by denying this claim.

#### Penalty-phase claims

Domingues argues that the district court erred by concluding that his claims of ineffective assistance of counsel related to the penalty

phase were rendered moot when the district court struck the death sentences and imposed life terms in prison without the possibility of parole. We agree. NRS 176.025(1) provides that a death sentence may not be imposed upon a person who was less than 18 years old at the time of the commission of the crime and that “[a]s to such person, the maximum punishment that may be imposed is life imprisonment without the possibility of parole.” At the time of Domingues’ trial, three possible punishments were available—death and life in prison with or without the possibility of parole. 1989 Nev. Stat., ch. 408, § 1, at 865. Because it was possible for Domingues to receive a lesser sentence than that imposed after the death sentences were struck, his ineffective-assistance-of-counsel claims related to the penalty hearing are not moot. Therefore, we reverse and remand this matter for the district court to consider the merits of Domingues’ penalty-phase claims of ineffective assistance of counsel.

For the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



Saitta

, J.



Pickering

, J.



Hardesty

, J.

cc: Hon. Michelle Leavitt, District Judge  
Law Office of Patricia M. Erickson  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk