

IN THE SUPREME COURT OF THE STATE OF NEVADA

FOSTER RALPH GORDON,
Appellant,
vs.
WARDEN, NORTHERN NEVADA
CORRECTIONAL CENTER, JIM
BENEDETTI,
Respondent.

No. 56442

FILED

APR 06 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 appellant Foster Gordon's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.


Gordon was convicted of sexually assaulting a mentally-impaired individual for whom he had been a caregiver. Following affirmance of his conviction on direct appeal, Gordon filed a timely post-conviction petition in the district court, which the district court denied following an evidentiary hearing. He now argues that his counsel was ineffective for advising him not to testify at trial. To prove a claim of ineffective assistance of trial counsel, Gordon 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, 923 P.2d 1102, 1107 (1996).

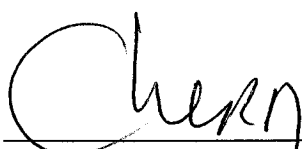
Gordon fails to demonstrate that counsel's performance was deficient or that he was prejudiced. Gordon acknowledged at the

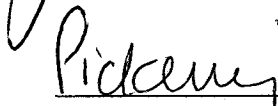
evidentiary hearing that he declined to testify because he was convinced of his innocence and thought his testimony was unnecessary. Further, counsel testified at the hearing that her trial strategy was to let his taped interview with police investigators—in which Gordon adamantly denied the charges—speak for itself because she did not believe that Gordon would perform well under cross-examination. Because this type of strategic calculation is “virtually unassailable absent extraordinary circumstances,” Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (internal quotations omitted), we conclude that the district court did not err in denying this claim. For the same reason, we also sustain the district court’s dismissal of Gordon’s claim that his counsel was ineffective for failing to seek suppression of the taped interview. The record gave no indication that the interview—to and from which Gordon drove himself and which was held at a social services building—was an “in-custody” interview. Therefore, not only did admission of the interview accord with counsel’s above-mentioned strategy, a suppression motion would have been a frivolous exercise.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Cherry


_____, J.
Pickering

cc: Hon. Jerome Polaha, District Judge
Merchant Law Firm, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk