IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK SALVATORE D'AGOSTINO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35178

FILED

SEP 10 2002

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus.

On December 12, 1990, the district court convicted appellant Frank D'Agostino, pursuant to a jury verdict, of one count each of first-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and first-degree arson. Based on the jury's finding in the penalty phase, the district court sentenced D'Agostino to death. On appeal, this court affirmed the conviction but reversed the death sentence and remanded for a new penalty hearing.[1]

On August 13, 1993, while the case was on remand to the district court for a new penalty hearing, D'Agostino filed a motion for a new trial or, in the alternative, a new appeal. The district court denied

[1]D'Agostino v. State, 107 Nev. 1001, 823 P.2d 283 (1991) ("D'Agostino I").

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the motion on October 1, 1993. On appeal, this court affirmed the district court's order denying the motion.[2]

After numerous continuances and delays in conducting the new penalty hearing ordered by this court in 1991, the parties eventually stipulated to a sentence of two consecutive terms of life in prison without the possibility of parole on the first-degree murder conviction. On July 28, 1997, the district court entered an amended judgment of conviction and sentenced D'Agostino to the stipulated sentence for the murder conviction, two consecutive terms of 15 years for the robbery conviction, and a consecutive term of 15 years for the first-degree arson conviction. The district court also gave D'Agostino credit for 2,602 days of presentence incarceration.

On February 27, 1998, D'Agostino filed a post-conviction petition for a writ of habeas corpus with the assistance of counsel. The district court declined to conduct an evidentiary hearing and denied the petition on September 21, 1999. This appeal followed.

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[2]D'Agostino v. State, 112 Nev. 417, 915 P.2d 264 (1996) ("D'Agostino II").

Ineffective assistance[3]

In his petition, D'Agostino raised numerous claims of ineffective assistance of trial and appellate counsel. Those claims are analyzed under the two-part test set forth in Strickland v. Washington.[4] To state a claim sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) but for counsel's mistakes, there is a reasonable probability that the verdict would have been different.[5] Where the claim involves the performance of appellate counsel, the prejudice prong requires that the petitioner demonstrate that an omitted issue would have had a reasonable probability of success on appeal.[6] The court need not consider both prongs of the Strickland test if

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[3]D'Agostino also raises each of the legal issues underlying his ineffective-assistance claims as independent claims of trial court error or prosecutorial misconduct. Claims of trial court error and prosecutorial misconduct could have been raised on direct appeal. D'Agostino therefore waived those issues that were not presented on appeal. See NRS 34.810(1)(b). We have considered the underlying issues of trial court error and prosecutorial misconduct only to the extent necessary to resolve the ineffective-assistance claims, which were properly raised in the post-conviction petition.

[4]466 U.S. 668 (1984) (trial counsel); see also Smith v. Robbins, 528 U.S. 259, 285 (2000) (appellate counsel); accord Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[5]Strickland, 466 U.S. at 697.

[6]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

the petitioner makes an insufficient showing on either prong.[7] Moreover, this court has held that an evidentiary hearing is not necessary where claims in a post-conviction petition are belied by the record or are not supported by sufficient factual allegations that, if true, would entitle the petitioner to relief.[8]

D'Agostino claims that trial counsel provided ineffective assistance by failing to conduct adequate pretrial investigation and discovery, interview family and friends to obtain character evidence, interview witnesses before trial, retain various experts, argue that Rose Lakel was an accomplice, present a defense based on voluntary intoxication, and adequately impeach various witnesses. Having reviewed these claims and the record, we conclude that D'Agostino's claims are not supported by sufficient factual allegations, are belied by the record,[9] or otherwise lack merit.

We note in particular that that the district court properly rejected D'Agostino's claim relating to his trial counsel's alleged failure to conduct pretrial interviews with other inmates who shared the twelve-man Florida jail cell with D'Agostino and Michael Gaines. D'Agostino claimed that if his counsel had conducted such interviews, counsel could have presented at trial the testimony of Dennis Roberts, one of

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[7]Strickland, 466 U.S. at 697.

[8]Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

[9]We specifically note that trial counsel argued that Lakel was an accomplice and appellate counsel raised this issue on appeal.

D'Agostino's Florida cellmates, who allegedly could have testified that Gaines looked through D'Agostino's paperwork anytime D'Agostino was not in the cell, that D'Agostino did not confess to Gaines, and that Gaines made statements indicating that he fabricated the confession in an attempt to gain benefits in his own case. Although Robert's testimony, if credible, might have undermined Gaines' trial testimony regarding the murder, in light of the other highly incriminating evidence and testimony in this case, we nonetheless conclude that D'Agostino failed to demonstrate a reasonable probability that the outcome of the trial would have been different even if counsel had presented Robert's testimony.

D'Agostino next claims that trial counsel was ineffective for conceding his guilt on charges of grand larceny and first-degree arson without his consent. We disagree. This case is distinguishable from Jones v. State[10] because it only involves a partial concession of guilt, and unlike Jones, D'Agostino did not testify at trial. As we emphasized in Jones, our decision was limited to the circumstances in that case wherein defense counsel "undermined his client's testimonial disavowal of guilt during the guilt phase of the trial."[11] Therefore, we conclude that to prevail on this claim, D'Agostino must meet both prongs of the Strickland test.[12] In light

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[10]110 Nev. 730, 877 P.2d 1052 (1994).

[11]Id. at 739, 877 P.2d at 1057 (original emphasis).

[12]Young v. Catoe, 205 F.3d 750, 760 (4th Cir.), cert. denied, 531 U.S. 868 (2000); U.S. v. Simone, 931 F.2d 1186, 1196 (7th Cir. 1991); Ramirez v. U.S., 17 F. Supp. 2d 63, 67-68 (D.R.I. 1998), aff'd, 187 F.3d 622 (1st Cir.

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of the significant evidence in the record supporting a finding of guilt on the larceny and arson charges, we conclude that D'Agostino failed to demonstrate a reasonable probability that the outcome of the trial would have been different absent counsel's partial concession of guilt. Therefore, the district court correctly rejected this claim because D'Agostino failed to demonstrate the requisite prejudice.

D'Agostino claims that trial and appellate counsel were ineffective for failing adequately to challenge the method in which the trial court addressed the defense invocation of the spousal privilege, the admission of testimony regarding a witness's drug transaction with D'Agostino, the constitutionality of the statutory reasonable doubt instruction, and several comments during the prosecutor's closing argument. The substantive legal issues underlying these claims were adequately challenged at trial and on direct appeal. This court considered and rejected the claims in D'Agostino I. They are, therefore, subject to the law of the case doctrine and cannot be relitigated in the context of ineffective-assistance claims.[13]

D'Agostino claims that trial and appellate counsel were ineffective for failing to challenge the information on the ground that it failed to specify the State's theory in support of the murder charge. We conclude that, to the extent that the information failed to allege

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1999); People v. Elam, 689 N.E.2d 662, 667 (Ill. App. Ct. 1998); Jackson v. State, 41 P.3d 395, 399 (Okla. Crim. App. 2001).

[13]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

premeditation and deliberation, the remedy would have been amendment of the information and the defense was not prejudiced because it was clearly aware of the State's theory. We further conclude that no language alleging a felony-murder theory was necessary because, contrary to D'Agostino's representations, the State never proceeded on a felony-murder theory.[14]

D'Agostino next challenges trial counsel's qualifications to represent a capital defendant under the 1990 version of SCR 250 and appellate counsel's failure to raise this issue on appeal. At the time of trial, the district court had discretion to determine whether an attorney not included in the pool of capital defense attorneys was otherwise qualified to defend a capital case.[15] The trial court made that determination in this case and, after inquiry from the court, D'Agostino agreed that counsel was qualified. Under the circumstances, we conclude that D'Agostino is not entitled to relief on this claim.

D'Agostino also claims that trial counsel provided ineffective assistance by failing to file pretrial motions to: (1) disclose statements by D'Agostino; (2) strike D'Agostino's alias from the charging document; (3) suppress D'Agostino's statements; (4) suppress D'Agostino's statements to jail-house snitch Michael Gaines; (5) permit voir dire on racial bias; (6) depose Rose Lakel; (7) inspect and test physical evidence; (8) control pretrial publicity or change the venue; (9) challenge the composition of the

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[14]We note that the jury was not instructed on felony murder.

[15]See SCR 250(IV) (1990).

jury pool based on systemic under-representation of cognizable groups; (10) preclude prosecutorial misconduct; (11) preclude unconstitutional jury instructions; (12) challenge the death penalty statutes; and (13) preclude the State from introducing evidence of other bad acts. D'Agostino failed to allege sufficient facts that, if true, would have required reasonably competent counsel to file the first nine motions listed above; his claims are supported by nothing more than the title of the unfiled motion and citations to legal authorities. As for the two blanket motions regarding prosecutorial misconduct and jury instructions, we conclude that D'Agostino cannot demonstrate deficient performance because such motions were not necessary to protect his rights. A motion challenging the death penalty statutes would not have been successful, as this court has repeatedly upheld the constitutionality of the death penalty and Nevada's death penalty scheme.[16] Moreover, D'Agostino cannot demonstrate prejudice because this court reversed his death sentence in D'Agostino I. Lastly, the record belies the final allegation; trial counsel filed a motion in limine to exclude evidence of other bad acts. Based on the foregoing, we conclude that the district court properly denied these claims without conducting an evidentiary hearing.

D'Agostino also claims that trial and appellate counsel were ineffective for failing to move to dismiss the charges on the ground that the State destroyed or failed to gather certain evidence. We conclude that

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[16]See, e.g., Gallego v. State, 117 Nev. ___, ___, 23 P.3d 227, 242 (2001); Colwell v. State, 112 Nev. 807, 814-15, 919 P.2d 403, 408 (1996); Bishop v. State, 95 Nev. 511, 517-18, 597 P.2d 273, 277 (1979).

D'Agostino was not entitled to dismissal of the charges based on the State's failure to gather photographs, fingernail scrapings, and carpet samples.[17] In this respect, we observe that these issues were adequately addressed during cross-examination in an attempt to challenge the adequacy of the investigation and the credibility of the State's witnesses.[18] We further conclude that D'Agostino has not demonstrated bad faith or prejudice as a result of the destruction of files in three of Rose Lakel's criminal cases.[19]

D'Agostino also claims that trial and appellate counsel were ineffective for failing to challenge the trial court's removal of Jurors 64 and 87 for cause and failure to remove Juror 89 for cause, and the jury selection procedure used by the trial court. We conclude that these claims lack merit. The record reflects that the court properly removed Jurors 64 and 87 because they indicated during voir dire that they could not impose the death penalty under any circumstances in which they could be called upon as jurors.[20] The record also reflects that D'Agostino was not prejudiced by the court's failure to remove Juror 89 because that juror was not seated on the petit jury and D'Agostino did not have to use a peremptory challenge to remove him. The record further indicates that

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[17]See Daniels v. State, 114 Nev. 261, 266-68, 956 P.2d 111, 114-15 (1998).

[18]See id. at 266-67, 956 P.2d at 115.

[19]See id. at 266-67, 956 P.2d at 115-16.

[20]See Morgan v. Illinois, 504 U.S. 719, 728 (1992).

even if the selection of the alternates did not technically comply with NRS 175.061(4), D'Agostino cannot demonstrate prejudice based on his attorneys' failure to challenge that procedure.

D'Agostino further claims that trial and appellate counsel were ineffective for failing to challenge the State's use of peremptory challenges to remove women from the jury. He relies entirely on the number of peremptory challenges used to remove women to demonstrate that counsel should have objected. Although the record is not entirely clear, the parties represent that the State used five of its nine peremptory challenges to remove women. We conclude that the State's use of 55.5 percent of its peremptory challenges to remove women does not create a sufficient pattern of strikes against women to create an inference of discrimination.[21] Accordingly, we conclude that D'Agostino failed to allege sufficient facts establishing a prima facie showing of gender discrimination.[22] Absent such a showing, we further conclude that D'Agostino has not demonstrated that his attorneys were ineffective for failing to raise this issue.

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[21]Compare Libby v. State, 113 Nev. 251, 934 P.2d 220 (1997) (use of seven out of nine, or 77.7 percent, of peremptory challenges to remove women creates an inference of discrimination), with Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997) (use of five out of eight peremptory challenges, or 62.5 percent, of peremptory challenges to remove women did not create an inference of discrimination).

[22]See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994); Batson v. Kentucky, 476 U.S. 79 (1986).

D'Agostino claims that trial counsel was ineffective for failing to request voir dire about pretrial publicity and community pressure to return a guilty verdict and death sentence in this case. The record belies this claim; the district court questioned the entire jury pool about pretrial publicity and excused the only prospective juror who had heard about the case. Moreover, absent any allegations that the jurors selected to sit on the petit jury harbored some bias against D'Agostino based on pretrial publicity, we conclude that he cannot demonstrate prejudice.[23]

D'Agostino claims that trial and appellate counsel were ineffective for failing to move to suppress Rose Lakel's testimony on the ground that the State violated the federal anti-gratuity statute in procuring her testimony.[24] We conclude that D'Agostino cannot demonstrate prejudice because the statute does not prohibit the State from providing benefits to a cooperating witness and cannot be used as a basis for excluding testimony.[25]

D'Agostino also claims that trial and appellate counsel were ineffective for failing to challenge numerous unrecorded conferences on the grounds that they deprived him of his right to a meaningful appellate review, his right to be present, and his right to a public trial. Having reviewed the record, we conclude that D'Agostino has not made sufficient

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[23]See Floyd v. State, 118 Nev. ___, 42 P.3d 249 (2002).

[24]See 18 U.S.C. § 201(c)(2) (2002).

[25]See Leonard v. State, 117 Nev. 53, 17 P.3d 397 (2001); accord U.S. v. Feng, 277 F.3d 1151 (9th Cir. 2002).

factual allegations to support a conclusion that he was deprived of his right to a meaningful appellate review[26] or that he was prejudiced by his absence from the unrecorded conferences.[27] We further conclude that the conferences did not violate D'Agostino's right to a public trial.[28]

D'Agostino also claims that trial and appellate counsel were ineffective for failing to challenge more than sixty alleged instances of prosecutorial misconduct during opening and closing arguments and several instances of prosecutorial misconduct during examination of witnesses and presentation of the evidence.[29] We have reviewed all of the challenged comments. The vast majority of the comments, considered in context, did not warrant an objection.[30] Moreover, we conclude that none of the comments were so egregious, individually or cumulatively, to

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[26]Cf. United States v. Brumley, 560 F.2d 1268 (5th Cir. 1977); United States v. Selva, 559 F.2d 1303 (5th Cir. 1977). We note that Brumley and Selva were based on a federal act requiring reporters to record all proceedings held in open court in federal district court. See 28 U.S.C. § 753(a)(2002). That act does not apply to state courts.

[27]See Kirksey, 112 Nev. at 1000, 923 P.2d at 1115.

[28]See United States v. Norris, 780 F.2d 1207, 1210-11 (5th Cir. 1986); People v. Harris, 12 Cal. Rptr. 2d 758, 765 (Ct. App. 1992).

[29]We note that appellant cited his petition filed in district court, not the record, for most of the alleged instances of prosecutorial misconduct. Those cites are not sufficient to comply with NRAP 28.

[30]See Bussard v. Lockhart, 32 F.3d 322, 324 (8th Cir. 1994) (discussing ineffective-assistance claims based on failure to object to prosecutorial misconduct).

support a showing of prejudice. We therefore conclude that these ineffective-assistance claims lack merit.

D'Agostino next claims that trial and appellate counsel were ineffective for failing to object to or challenge jury instructions defining deliberation and premeditation, implied malice, and malice aforethought and the jury instruction regarding equal and exact justice. We have rejected similar challenges to those instructions[31] and conclude that D'Agostino cannot demonstrate prejudice based on the performance of trial or appellate counsel in this respect.

D'Agostino also complains that trial and appellate counsel were ineffective for failing to challenge an instruction that told the jury that it was "not called upon to return a verdict as to the guilt or innocence of any other person." After a thorough review of the record, we have determined that this instruction was not given in this case. Accordingly, this claim is patently without merit.[32]

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[31]See, e.g., Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000) (explaining that Kazalyn instruction on premeditation and deliberation is not constitutional error and that decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), is not retroactive); Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 483 (2000) (reaffirming prior decisions that upheld implied malice instruction using language in NRS 200.020(2) where jury is properly instructed on presumption of innocence and State's burden of proof); Leonard v. State, 114 Nev. 1196, 1209-11, 969 P.2d 288, 296 (1998) (upholding malice aforethought instruction and equal and exact justice instruction); Guy v. State, 108 Nev. 770, 776-77, 839 P.2d 578, 582-83 (1992) (upholding malice aforethought instruction).

[32]We note that counsel for appellant cited the post-conviction petition, not the trial transcripts or record, as evidence that this

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D'Agostino claims that appellate counsel was ineffective due to an actual conflict of interest. Based on our review of the allegations and the record, we conclude that D'Agostino has not demonstrated that his appellate attorneys had a conflict of interest that adversely affected their performance.[33]

D'Agostino finally complains that appellate counsel provided ineffective assistance by failing to request a continuance of the oral arguments on the ground that counsel was not feeling well. Our review of the record and the oral arguments from D'Agostino I and D'Agostino II indicates that attorney Alan J. Buttell, who represented D'Agostino in connection with D'Agostino II, informed this court during oral argument that he was not feeling well. However, Mr. Buttell's co-counsel, attorney Norman J. Reed, was present and conducted most of the oral argument. Moreover, Mr. Buttell did not indicate that he or Mr. Reed were unable to proceed with the argument, and it appears that both attorneys were

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instruction had been given. That citation, like many others in the opening brief, does not comply with NRAP 28. Moreover, counsel had an opportunity to correct this error and identify the location of the instruction or admit that it was not given in reply to the State's answering brief, which represented that the instruction had not been given. Counsel failed to correct her error. We appreciate the serious nature of this case and counsel's desire to meet her duty to zealously represent her client; however, her client is not served by wasting the resources of the district court and this court on patently frivolous claims.

[33]See Mickens v. Taylor, 535 U.S. ___ (2002); Cuyler v. Sullivan, 446 U.S. 335, 350 (1980).

familiar with the issues and record and were adequately prepared for the oral argument. Under the circumstances, and considering D'Agostino's failure to allege any particular prejudice as a result of counsel's performance in this respect, we conclude that this ineffective-assistance claim also lacks merit.

Brady violation

D'Agostino claims that the State violated Brady v. Maryland[34] by failing to disclose evidence that the defense could have used to impeach three witnesses. We conclude that the allegations regarding Rose Lakel's criminal history in other jurisdictions and Anthony Wells' and Ruben Varela's criminal histories are not supported by sufficient factual allegations.[35] We further conclude that the record belies the allegations regarding Lakel's aliases, the Secret Witness payments, and the outstanding Las Vegas warrants. Finally, we conclude that the allegations involving the dispositions of Lakel's outstanding warrants are insufficient to demonstrate a Brady violation or, as we concluded in D'Agostino II, to warrant a new trial.

Discovery

D'Agostino finally argues that the district court erred in denying the petition without permitting him to conduct discovery. We

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[34]373 U.S. 83 (1963).

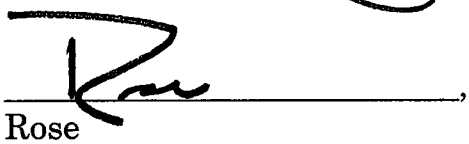
[35]Cf. Jones v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995).

disagree to the extent that D'Agostino's claims did not warrant an evidentiary hearing.[36]

We conclude that the district court properly rejected the remainder of D'Agostino's claims, and, accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing



_____, J.
Rose

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Becker

cc: Hon. Kathy A. Hardcastle, District Judge
Dominic P. Gentile, Ltd.
JoNell Thomas
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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[36]See NRS 34.780(2) (providing that "[a]fter the writ has been granted and a date set for the hearing," the district court may permit the parties to conduct discovery upon a showing of good cause).