

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER LAWRENCE
DEYERLE,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
E.K. MCDANIEL,
Respondent.

No. 57147

FILED

FEB 08 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
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. Third Judicial District Court, Lyon County; David A. Huff, Judge.

On appeal, appellant claims that the district court erred by denying three of his claims of ineffective assistance of counsel. 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 claims that the district court erred by denying his claim that counsel was ineffective for failing to interview a witness. At a hearing the day before trial began, the witness offered new testimony from what he told police shortly after the murder. Appellant claims that had counsel interviewed this witness prior to trial, counsel would have discovered that the witness was going to testify contrary to his police statement. Appellant claims had trial counsel known this was going to be the witness' testimony, counsel's strategy at trial would have been different.

Appellant fails to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant fails to demonstrate that counsel should have further investigated this witness. There was no indication that the witness was going to change his statement. The witness testified at the pretrial hearing that he did not want to tell anyone what appellant actually said. Further, counsel was able to use his prior statement to impeach him at trial. Finally, appellant failed to demonstrate that there was a reasonable probability of a different outcome at trial had trial counsel investigated further. There was overwhelming evidence presented at trial that appellant premeditated the murder, Deyerle v. State, Docket No. 50617 (Order of Affirmance, February 4, 2009), and appellant failed to explain what different strategy counsel would have employed had he known about this statement that would have had a reasonable probability

of changing the outcome at trial. Therefore, the district court did not err in denying this claim.

Second, appellant claims that the district court erred in denying his claim that counsel was ineffective for failing to employ a mental health expert. Specifically, appellant claims that a mental health expert could have testified regarding a heat of passion defense and how much the pending divorce affected appellant. Appellant fails to demonstrate that counsel was deficient. At the evidentiary hearing on appellant's post-conviction petition, counsel testified that he did not believe that an expert was necessary. He testified that he discussed with appellant whether he was stressed by the divorce and appellant indicated that he was not stressed by the divorce and he understood what was happening. Further, counsel testified that he discussed hiring a mental health expert with appellant and he and appellant decided against hiring an expert. The district court found this testimony to be credible, and substantial evidence supports this determination. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Further, appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel hired a mental health expert given the overwhelming evidence of premeditation presented at trial. Deyerle v. State, Docket No. 50617 (Order of Affirmance, February 4, 2009). Therefore, the district court did not err in denying this claim.

Third, appellant claims that the district court erred in denying his claim that trial counsel was ineffective for failing to employ a ballistics expert. Specifically, appellant claims that a ballistics expert would have been able to testify regarding an apparent conflict between the testimony

of the forensic pathologist and a criminalist for the Washoe County Crime Lab about whether the victim was shot at close range. The forensic pathologist testified that there was black soot in the victim's head wound indicating a close range shot whereas the criminalist testified that no gunshot residue was found on the clothing of the victim. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Trial counsel testified at the evidentiary hearing that he believed that it was sufficient to impeach the forensic pathologist with her other findings and with the criminalist's trial testimony. This strategy was not unreasonable given the forensic pathologist's own testimony that there was no stippling around the head wound which would indicate that the shot was not made at close range. See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1998) ("Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances"). Further, appellant fails to demonstrate a reasonable probability of a different outcome at trial had trial counsel retained a ballistics expert given the overwhelming evidence of premeditation and eyewitness testimony. Deyerle v. State, Docket No. 50617 (Order of Affirmance, February 4, 2009). Therefore, the district court did not err in denying this claim.

Finally, appellant claims that the district court erred by denying his motion for the appointment of expert witnesses. Appellant requested \$11,000 in order to retain a mental health expert and ballistics expert to testify at the evidentiary hearing. Appellant fails to demonstrate that the district court abused its discretion. As stated above, counsel was not deficient for failing to retain these types of experts at

trial, and therefore, the district court did not err in denying this request.
Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. David A. Huff, District Judge
Kay Ellen Armstrong
Attorney General/Carson City
Lyon County District Attorney
Lyon County Clerk