

IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERICK L. STEESE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35404 **FILED**

JAN 21 2003

SHARON L. BLOOM
CLERK OF SUPREME COURT
J. Richard
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

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

On April 20, 1995, the district court convicted appellant, Frederick L. Steese, pursuant to a jury verdict, of murder with the use of a deadly weapon, robbery with the use of a deadly weapon, burglary, and grand larceny auto. Steese stipulated to two consecutive life sentences without the possibility of parole in exchange for the State agreeing not to seek the death penalty. Pursuant to the stipulation, the district court sentenced Steese to serve the following terms in the Nevada State Prison: two consecutive sentences of life without the possibility of parole for the murder count, ten years for the burglary, fifteen years for the robbery with an additional fifteen years for using a deadly weapon, and ten years for grand larceny; the burglary, robbery and larceny sentences to run consecutive to the murder sentence. This court affirmed the judgment of the district court.¹

¹Steese v. State, 114 Nev. 479, 960 P.2d 321 (1998).

On October 28, 1999, Steese filed a proper person post-conviction petition for a writ of habeas corpus in the district court.² The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Steese or to conduct an evidentiary hearing. On December 16, 1999, the district court denied Steese's petition. This appeal followed.

In his petition, Steese claimed that he was denied his sixth amendment right to a speedy trial. Steese waived this claim by failing to raise it on direct appeal.³

Steese also claimed that his confession was coerced, and that the State failed to gather evidence. Steese raised these claims in his direct appeal, thus further consideration of these issues is prohibited by the doctrine of the law of the case.⁴

Next, Steese claimed that he received ineffective assistance of counsel. To establish ineffective assistance of counsel, a petitioner must show both that counsel's performance fell below an objective standard of

²Steese had previously filed a proper person post-conviction petition for a writ of habeas corpus on May 21, 1999. The State opposed the petition on the grounds that it failed to comply with the format required pursuant to NRS 34.735, and on its merits. On July 26, 1999, Steese filed a motion to amend his habeas petition to correct errors. On September 7, 1999, the district court granted Steese additional time to refile his petition. Steese then refiled the petition in the proper format on October 28, 1999. The State contended that appellant had improperly raised two additional claims. Because the district court addressed all of the issues raised in both petitions in its findings of fact, conclusions of law and order, we will do so as well.

³See NRS 34.810(1)(b)(2); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) disapproved of on other grounds by Thomas v. State, 115 Nev. 148, 979 9.2d 222 (1999).

⁴See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

reasonableness and that the deficient performance prejudiced the defense.⁵ To show prejudice, a petitioner must show a reasonable probability that but for counsel's errors the result of the trial would have been different.⁶ "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."⁷ A court may consider the two test elements in any order and need not consider both prongs if an insufficient showing is made on either one.⁸

First, Steese claimed that his pretrial counsel was ineffective for failing to call any witnesses at the preliminary hearing.⁹ Among the witnesses called by the State at the preliminary hearing were: a prisoner held in detention with Steese who testified that he overheard Steese bragging he had killed the victim by stabbing him, and describing other details of the incident; the two Las Vegas Metropolitan Police Department detectives to whom Steese confessed; and the victim's employer who testified that Steese had worked for the victim for approximately one week shortly before the murder. Based on the fact that the State produced more than enough evidence to establish probable cause for the purpose of

⁵Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁶Strickland, 466 U.S. at 694.

⁷Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691) abrogation on other grounds recognized by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

⁸Strickland, 466 U.S. at 697.

⁹Prior to trial Steese was represented by Scott L. Bindrip. Mr. Bindrip was replaced as the attorney of record by James W. Erbeck on September 20, 1994.

binding Steese over for trial,¹⁰ Steese failed to show that the defense was prejudiced.¹¹ Therefore, Steese failed to demonstrate that counsel was ineffective in this regard.

Second, Steese claimed that his pretrial counsel was ineffective for failing to conduct an investigation which resulted in "several documents lost and witness memory were clouded [sic]." Steese did not specify which documents were lost and which witnesses suffered from clouded memory.¹² The record does reflect that some of the documents relied upon at trial were destroyed and copies were admitted into evidence in place of the originals. However, assuming these are the documents to which Steese was referring, he did not explain how this prejudiced the defense.¹³ Therefore, Steese failed to demonstrate that counsel was ineffective in this regard.

Third, Steese claimed that his pretrial counsel was ineffective because he tried to "force" him to enter into a plea agreement with the State. This claim is unsupported by any specific factual allegation.¹⁴ Moreover, Steese did not enter into a plea agreement; he went to trial and was eventually found guilty by a jury. Accordingly, even if his pretrial counsel tried to "force" Steese to enter into a plea agreement, he cannot

¹⁰See Sheriff v. Middleton, 112 Nev. 956, 961, 921 P.2d 282, 285-86 (1996) (quoting Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (citations omitted)) ("probable cause to bind a defendant over for trial 'may be based on 'slight,' even 'marginal' evidence because it does not involve a determination of guilt or innocence of an accused").

¹¹See Strickland, 466 U.S. at 694.

¹²See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

¹³See Strickland, 466 U.S. at 694.

¹⁴See Hargrove, 100 Nev. 498, 686 P.2d 222.

show that he was prejudiced. Therefore, Steese failed to demonstrate that counsel was ineffective in this regard.

Fourth, Steese claimed that his trial counsel was ineffective for "refusing" to allow him to accept an offer by the State under which he would plead guilty to second degree murder. Specifically, Steese claimed that counsel threatened to withdraw as his attorney if he accepted the offer, promised Steese he would win the case, and failed to explain the State's offer. These claims are belied by the record.¹⁵ The State made the offer to Steese during the trial. The district court questioned Steese on the record as to whether he had rejected the offer. Steese stated that he had. The court then stated, "All right, so just in case they come back with first degree and death, I don't want you blaming your lawyers that they didn't do a good job for you." Steese replied that "for the record I think they are doing an outstanding job." The court again asked Steese if he was formally rejecting the offer. Steese stated he was. Accordingly, we conclude that Steese failed to demonstrate that counsel was ineffective in advising him on the plea agreement.

Fifth, Steese claimed his trial counsel was ineffective for failing to investigate potential witness Richard Rock. Specifically, Steese argued that if counsel had investigated Rock he would have discovered Rock possessed phone records showing that Steese had called Rock from Idaho on the day of the murder. On direct appeal this court noted that Steese himself "certainly had knowledge of the collect calls he allegedly made to Rock."¹⁶ Steese did not claim that he informed his counsel of the phone calls and counsel failed to follow up, but that counsel should have discovered the existence of the phone records through investigation.

¹⁵See id.

¹⁶Steese, 114 Nev. at 495, 960 P.2d at 331.

Moreover, this court has previously held that the phone records did not place Steese in Idaho the day of the murder.¹⁷ The doctrine of the law of the case prohibits further litigation on this issue.¹⁸

Sixth, Steese claimed that his trial counsel was ineffective for failing to investigate State's witness Michael Moore. Specifically, Steese argued that the failure to investigate this witness resulted in counsel's inability to effectively conduct cross-examination. This claim is unsupported by any specific factual allegation as to how counsel's cross-examination of this witness was inadequate, and how an investigation would have cured any alleged inadequacies.¹⁹ Therefore, Steese failed to demonstrate that counsel was ineffective in this regard.

Finally, Steese claimed that he was not properly informed by either the district court or his trial counsel regarding the terms of the sentencing stipulation. After the jury found him guilty, Steese entered into a sentencing agreement under which he stipulated to two consecutive sentences of life without the possibility of parole in exchange for the State agreeing not to seek the death penalty. As characterized by Steese, the State offered him two options; he could either stipulate to two life sentences with the possibility of parole and give up the right to appeal his waiver of the penalty phase, or stipulate to two life sentences without the possibility of parole and retain the right to appeal his waiver of the penalty phase. According to Steese, under either option he would retain his right to file a direct appeal regarding the guilt phase of the trial. However, Steese maintained that he was misinformed regarding this fact,

¹⁷See id. at 494, 960 P.2d at 331.

¹⁸Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

¹⁹See Hargrove, 100 Nev. 498, 686 P.2d 222.

and believed that depending on which option he chose, he would either maintain all of his appeal rights or none of them. According to Steese, he therefore stipulated to life without the possibility of parole in the mistaken belief that it was the only way he would be able to file a direct appeal.

The record on appeal does not contain a copy of the stipulation or a transcript of the penalty hearing status check at which the stipulation was discussed.²⁰ Accordingly, on August 9, 2002, this court ordered the clerk of the district court to transmit as a supplemental record on appeal a certified copy of the transcript of the hearing. In response, this court received a copy of the district court minutes, which were already contained in the record on appeal. On October 15, 2002, and again on December 3, 2002, this court issued an order to the court reporter, Laurie Webb & Associates, to file with this court a certified copy of the transcript or notify this court in writing that the transcript could not be produced. On December 10, 2002, Laurie Webb & Associates filed with this court a letter stating that the transcript could not be produced and the original notes had been lost.

We therefore cannot conclude whether Steese's assertions regarding the sentencing stipulation are accurate, nor whether his claim that he did not understand the sentencing options available pursuant to the stipulation lacked merit. Steese's claim was not belied or repelled by the record, and if true, would have entitled him to relief.²¹ Accordingly, we conclude that the district court improperly denied the petition without first conducting an evidentiary hearing.²²

²⁰The record does contain the district court minutes of the hearing, but they are not conclusive regarding Steese's claim.

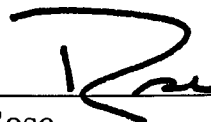
²¹See Hargrove, 100 Nev. 498, 686 P.2d 222.

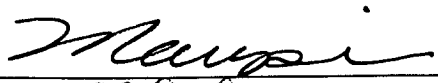
²²See id.

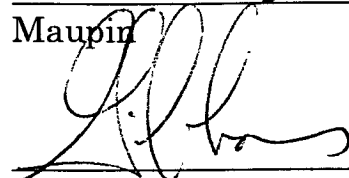
We therefore reverse the district court's order in part and remand the matter for an evidentiary hearing on the sole issue of whether Steese was adequately informed regarding his options under the sentencing stipulation.²³ The district court shall then enter a final order resolving the issue.

Accordingly, 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.²⁴


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General/Carson City
Clark County District Attorney
Frederick L. Steese
Clark County Clerk

²³The district court may exercise its discretion to appoint post-conviction counsel. See NRS 34.750.

²⁴We have considered all proper person documents filed or received in this matter. We conclude that Steese is entitled only to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.