

IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY LEE FOGGY,

No. 35464

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

NOV 16 2001

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

ORDER OF AFFIRMANCE

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

On April 11, 1996, the district court convicted appellant Henry Lee Foggy, pursuant to a jury verdict, of one count each of first-degree murder with the use of a deadly weapon and ex-felon in possession of a firearm. The district court sentenced Foggy to serve two consecutive terms of life in prison with the possibility of parole and a concurrent term of 28 to 72 months in prison. On appeal, Foggy raised eleven claims of error at the trial court level. This court dismissed the appeal, concluding that all of the claims lacked merit.¹ The remittitur issued on October 13, 1998.

¹Foggy v. State, Docket No. 28324 (Order Dismissing Appeal, September 24, 1998).

On September 15, 1999, Foggy filed in the district court a proper person post-conviction petition for a writ of habeas corpus. Foggy filed a supplemental petition on September 22, 1999.² The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Foggy or to conduct an evidentiary hearing. On December 17, 1999, the district court denied the petition.³

In his petition, Foggy claimed that trial and appellate counsel provided ineffective assistance in numerous respects.⁴ We conclude that

²The district court's order does not mention the petition filed on September 22, 1999. Nor has the district court entered a separate order denying that petition. It is clear, however, that the second petition merely supplemented the petition filed on September 15, 1999. Accordingly, we conclude that it was a supplemental pleading, not a separate petition.

³We note that the written order denying the petition indicates that an attorney from the Special Public Defender's Office represented Foggy in the post-conviction proceedings. This appears to be a clerical error. The district court did not appoint counsel to represent Foggy in the post-conviction proceedings and the attorney named in the order never made an appearance in district court on behalf of Foggy.

⁴To the extent that Foggy raised the claims underlying the ineffective assistance claims as independent claims of error, they were waived as a result of his failure to raise them on direct appeal. See NRS 34.810(1)(b). The one claim that was previously raised on direct appeal—that joinder of the charges was prejudicial—is also barred by the doctrine of law of the case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). We address the merits of these claims only to the extent necessary to resolve the related ineffective assistance of counsel claims.

Foggy further claimed that he was arrested without probable cause and detained for more than 48 hours. This claim was waived because it was not raised on direct appeal. See NRS 34.810(1)(b). Foggy did not raise this claim in the context of an ineffective assistance claim.

these contentions lack merit and that the district court did not err in denying the petition.

Claims of ineffective assistance of counsel are analyzed under the two-part test set forth in Strickland v. Washington.⁵ To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced the defense.⁶ The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁷

Foggy's first two ineffective assistance claims involve the same underlying contention: that a coroner's inquest was required in this case to establish proof of the corpus delicti and to confirm jurisdiction over the homicide. We conclude that these contentions lack merit. Even assuming that the county coroner was required to conduct an inquest⁸ and that he failed to do so, we conclude that that failure does not undermine the judgment of conviction in this case. A coroner's inquest is an investigative tool and, while it may provide the basis for an arrest warrant,⁹ there is no provision in Nevada law requiring a coroner's inquest as a jurisdictional

⁵466 U.S. 668 (1984); accord Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁶Strickland, 466 U.S. at 697.

⁷Id.

⁸See Clark County Code § 2.12.080(b) (setting forth circumstances in which coroner's inquest should be conducted).

⁹See NRS 259.130.

prerequisite in a homicide case.¹⁰ The district court had jurisdiction over the charged homicide because it was committed in Clark County.¹¹ Moreover, the State presented sufficient evidence at trial to establish the corpus delicti, i.e. that a criminal agency caused the victim's death.¹² Accordingly, we conclude that trial and appellate counsel were not deficient for failing to challenge the corpus delicti for the murder charge or the district court's jurisdiction on the ground that there was no coroner's inquest.

Foggy next alleged that trial and appellate counsel provided ineffective assistance by failing to challenge the district court's jurisdiction over the ex-felon in possession charge on the ground that the amended information did not allege the date or nature of the prior convictions. We conclude that this contention is patently without merit. The record reveals that the parties stipulated to file an amended information deleting the nature of the prior convictions to avoid any prejudice to Foggy.¹³

Foggy also alleged that trial and appellate counsel provided ineffective assistance by failing to challenge the district court's alleged violation of his constitutional and statutory rights to a speedy trial.¹⁴ We

¹⁰Accord Holmes v. State, 715 P.2d 196, 198 (Wyo. 1986), overruled on other grounds by Vaughn v. State, 962 P.2d 149 (Wyo. 1998); Raigosa v. State, 562 P.2d 1009, 1015 (Wyo. 1977).

¹¹See NRS 171.010.

¹²See Sheriff v. Middleton, 112 Nev. 956, 961, 921 P.2d 282, 285 (1996) (defining corpus delicti).

¹³The prior convictions were for rape and second-degree murder.

¹⁴U.S. Const. amend. VI; NRS 178.556(1).

disagree. After balancing the factors set forth in Barker v. Wingo,¹⁵ we conclude that trial and appellate counsel were not ineffective in failing to argue that Foggy was deprived of his constitutional right to a speedy trial. We further conclude trial and appellate counsel were not ineffective in failing to argue that dismissal was required under NRS 178.556(1) because the district court had good cause to grant the defense motion for a continuance.¹⁶

Foggy further alleged that trial and appellate counsel provided ineffective assistance by failing to challenge the joinder of the murder and ex-felon in possession charges. This claim is also patently without merit. Appellate counsel raised this issue on direct appeal. This court concluded that given the overwhelming evidence against Foggy and the fact that the jury was not prejudiced with information about the nature of the prior convictions, it was neither manifestly prejudicial nor plain error for the district court not to bifurcate the charges for trial. That decision constitutes the law of the case.¹⁷

Finally, Foggy claimed that trial and appellate counsel should have challenged the constitutional validity of the prior convictions offered in support of the ex-felon in possession charge. We again disagree. The claims raised by Foggy do not implicate the constitutional validity of the prior convictions. We perceive no grounds upon which counsel could have

¹⁵407 U.S. 514, 530 (1972).

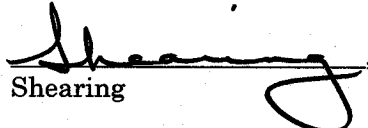
¹⁶See Huebner v. State, 103 Nev. 29, 31, 731 P.2d 1330, 1332 (1987) (dismissal is not mandatory under NRS 178.556(1) where there is good cause for delay).

¹⁷See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).


successfully challenged the prior convictions and avoided the conviction for ex-felon in possession of a firearm.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹⁸ Accordingly, we


ORDER the judgment of the district court AFFIRMED.¹⁹



Shearing J.



Rose J.



Becker J.

cc: Hon. John S. McGroarty, District Judge
Attorney General
Clark County District Attorney
Henry Lee Foggy
Clark County Clerk

¹⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁹We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.