IN THE SUPREME COURT OF THE STATE OF NEVADA

CLIFFORD GRAHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35992

FILED

APR 16 2002

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

ORDER OF AFFIRMANCE

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 January 27, 1995, the district court convicted appellant, pursuant to a jury verdict, of first degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole. This court dismissed appellant's direct appeal.[1]

On February 3, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On April 14, 2000, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised two claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel

[1]Graham v. State, Docket No. 26788 (Order Dismissing Appeal, May 13, 1999).

sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.[2] A petitioner must also demonstrate prejudice-- a reasonable probability that but for counsel's errors the results of the proceedings would have been different.[3] The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.[4]

First, appellant claimed that his trial counsel was ineffective for failing to object to highly prejudicial autopsy photographs of the victim.[5] We conclude that appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. The autopsy photographs were properly admitted because the photographs aided the medical examiner in explaining the victim's injuries.[6] Thus, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to use information that defense counsel was allegedly

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[2]Strickland v. Washington, 466 U.S. 668, 688 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[3]Strickland, 466 U.S. at 694.

[4]Id. at 697.

[5]In his petition, appellant referred to the photographs simply as State exhibits 1 and 2. A review of the record reveals that State exhibits 1 and 2 were autopsy photographs.

[6]Thomas v. State, 114 Nev. 1127, 1141, 967 P.2d 1111, 1120 (1998) ("This court has repeatedly held that the district court's decision to admit autopsy photographs, even gruesome ones, will be upheld absent an abuse of discretion.").

aware of to impeach the testimony of State witnesses. Appellant failed to support this claim with any facts.[7] Thus, the district court did not err in determining that appellant failed to demonstrate that his counsel was ineffective in this regard.

Next, appellant claimed that his appellate counsel was ineffective. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."[8] Appellate counsel is not required to raise every non-frivolous issue on appeal.[9] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[10] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[11]

Appellant claimed that his appellate counsel was ineffective for failing to challenge the district court's denial of appellant's motion for mistrial due to juror bias. Alternate juror Salazar claimed that after the jury was selected but before the jury heard opening arguments she heard juror Ferris say the words "gas chamber" or "electric chair" in the presence of other jurors.

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[7]Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[8]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

[9]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[10]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

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

Appellant failed to demonstrate that his appellate counsel's performance was deficient or that this claim had a reasonable probability of success on appeal.[12] The motion for mistrial was properly denied by the district court because there was no proof of juror bias that tainted the jury. The district court questioned juror Salazar outside the presence of the jury. The questioning of juror Salazar revealed that she had heard only two words, that she was not even sure of what two words she had heard, and that she was not sure if the words were spoken in a joking manner. After discussing the matter in chambers with the attorneys, the district court then inquired of the jury panel whether they had heard or seen anything outside the courtroom that had made them believe that another juror had already made a judgment in this case, whether they had heard a juror state that a particular penalty would be appropriate, and whether they had heard a juror state that the death penalty would be appropriate. The jury panel responded in the negative. The district court then questioned juror Ferris, outside the presence of the jury, about whether she had said anything that would indicate that she had already made a judgment about the case. Juror Ferris responded, "Absolutely not." Juror Ferris stated that she had made no judgment at all. Thus, we conclude the district court did not err in denying this claim.

Finally, appellant claimed: (1) false testimony was presented by two state witnesses, (2) the prosecutor committed misconduct during closing arguments, (3) the district court improperly instructed the jury,

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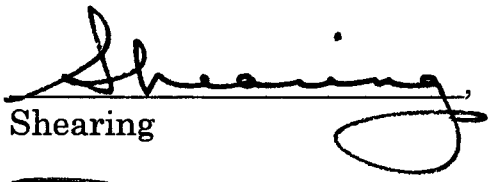
[12]Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996) ("[I]t is within the sound discretion of the trial court to determine whether a mistrial is warranted. Absent a clear showing of abuse of discretion, the trial court's determination will not be disturbed on appeal.").

and (4) the district court pressured the jury into limited deliberations by telling the jury that if they did not finish deliberating that evening by 5:15 p.m. that the jury would have to come back the next day to finish deliberations. The district court denied these claims on the grounds that these claims should have been raised on direct appeal and that appellant failed to demonstrate good cause for his failure to raise them on direct appeal.[13] We conclude that the district court did not err.

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.[14] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[15]



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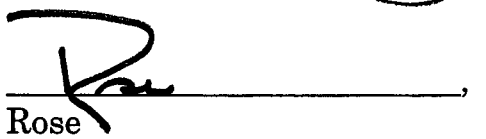

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Rose

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[13]NRS 34.810(1).

[14]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

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

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General/Carson City
Clark County District Attorney
Clifford Graham
Clark County Clerk