

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRENCE DELANY BROTHERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36360

FILED

JUL 10 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

Facts and procedural history

The State charged Brothers with first-degree murder and numerous other crimes arising out of two separate incidents occurring in September and October 1992, at Brink's Crazy Cantina in Las Vegas ("Brink's"). Specifically, the State alleged that on September 20, 1992, Brothers accosted a Brink's employee at gunpoint outside the rear entrance of the restaurant, forced the employee inside, and then, while brandishing the gun, robbed the establishment and patrons seated at the bar. The State also alleged that on October 2, 1992, Brothers returned to Brink's, this time armed with two guns — one in each hand. Brothers entered the restaurant through the same back door as before and motioned for a nearby waitress to come towards him. The waitress initially complied, but after discerning that Brothers was armed, she ran in the opposite direction. Brothers then began firing into the crowded restaurant, killing one customer and wounding an employee.

The State sought the death penalty in connection with the first-degree murder charge stemming from the second incident. Eyewitness testimony presented at trial identified Brothers as the perpetrator of both incidents. At the conclusion of the jury's deliberations, the district court clerk read aloud the jury's verdicts, finding Brothers guilty of one count of first-degree murder with the use of a deadly weapon, one count of attempted murder with the use of a deadly weapon, one count of first-degree kidnapping with the use of a deadly weapon, two counts of burglary, three counts of robbery with the use of a deadly weapon, one count of possession of a firearm by an ex-felon, and one count of possession of stolen property. The jury found Brothers not guilty of one count of attempted murder with the use of a deadly weapon and one count of attempted robbery with the use of a deadly weapon.

At the request of defense counsel, the district court polled the jury to confirm the verdict. Eleven jurors stated they agreed with the verdict as read. The remaining juror was unresponsive when questioned in open court if the verdict as read by the clerk was, in fact, her verdict. The district court judge then called a recess and met privately with defense counsel, the prosecutor, and the unresponsive juror in chambers.

During this meeting, the juror disclosed that she did not believe that Brothers was guilty of three counts arising out of the incident of October 2, 1992, i.e., murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and burglary. Therefore, after polling the juror one-on-one in chambers as to the counts charged, the district court declared a mistrial on those three counts.

The district court proceeded to convict Brothers of the counts upon which the jury unanimously found him guilty and sentenced him to serve two consecutive terms of life in the Nevada State Prison with the

possibility of parole, and various other terms totaling an additional consecutive forty years in prison. The district court also ordered Brothers to pay restitution in the amount of \$4,360.00, and he was given credit for 520 days time served. This court affirmed Brothers' judgment of conviction and dismissed his direct appeal.¹ The remittitur issued on June 18, 1996.

The State tried Brothers again on the counts upon which the jury was unable to reach a verdict in the first trial. The second trial, as well, resulted in a mistrial. While awaiting a third trial, Brothers entered into negotiations with the State and agreed to enter an Alford² plea to first-degree murder with the use of a deadly weapon. In exchange, the State agreed not to seek the death penalty and to dismiss the remaining charges in this case and in another unrelated case. As part of the plea agreement, Brothers expressly waived his right to appeal the conviction entered pursuant to the guilty plea. The district court sentenced Brothers to serve a term of life in the Nevada State Prison without the possibility of parole. The judgment of conviction was filed on February 15, 1995.

In May of 1997, Brothers filed a proper person post-conviction petition for a writ of habeas corpus in the district court raising issues pertaining to both the convictions entered pursuant to the jury's verdict in the first trial and the guilty plea. The State opposed the petition.³ The

¹Brothers v. State, Docket No. 26150 (Order Dismissing Appeal, May 30, 1996).

²North Carolina v. Alford, 400 U.S. 25 (1970).

³Brothers filed a proper person reply to the State's opposition and a proper person supplemental brief in support of his petition. Subsequently, counsel eventually appointed to represent Brothers filed a second
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district court appointed counsel to represent Brothers and conducted an evidentiary hearing. On August 22, 2000, the district court entered an order denying the petition except as to the issue surrounding Brothers' conviction on the kidnapping count; the district court held that the kidnapping was not separable from the robberies, and therefore vacated that conviction. This appeal followed.⁴

Discussion

First, Brothers contends that he received ineffective assistance of counsel at trial and on direct appeal. We disagree.

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 To establish prejudice based on the deficient performance of counsel at trial, a petitioner must show that but for counsel's deficient performance, there is a reasonable probability that the verdict would have been different.⁷ Appellate counsel is not required

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supplemental brief and an amended supplemental brief in support of the petition.

⁴An amended judgment of conviction was filed on July 18, 2000. The State has not appealed from that portion of the district court's decision vacating the kidnapping conviction.

⁵466 U.S. 668 (1984); accord Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁶Strickland, 466 U.S. at 687.

⁷Id. at 694.

to raise every nonfrivolous issue; thus, to establish prejudice based on the deficient performance of counsel on appeal, a petitioner must show that any omitted appellate issues would have had a reasonable probability of success on appeal.⁸ This court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁹

Furthermore, this court must “consider . . . in its context and under all circumstances of this case,” whether a trial judge’s comments impermissibly pressured or coerced a hold-out juror.¹⁰ And in the event that there is a hold-out juror, “the most extreme care and caution [is] necessary in order that the legal rights of the defendant should be preserved.”

Brothers contends that his counsel were ineffective for failing to argue that the district court judge improperly acted as a thirteenth juror in his first trial.¹¹ Specifically, Brothers argues that his trial and

⁸Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

⁹Strickland, 466 U.S. at 697.

¹⁰Jenkins v. United States, 380 U.S. 445, 446 (1965); Lowenfield v. Phelps, 484 U.S. 231 (1988) (expanding upon the totality of circumstances test for judicial coercion created by Jenkins); Packer v. Hill, No. 00-57051, 2002 WL 850822, at *6-7 (9th Cir. May 6, 2002) (applying the test set forth in Jenkins and Lowenfield), petition for cert. filed, __ U.S.L.W. __ (U.S. May 28, 2002) (No. 01-1765); see also White v. State, 95 Nev. 881, 885, 603 P.2d 1063, 1065 (1979).

¹¹Brothers also appears to argue that one of his trial counsel was ineffective because “trial counsel stated in open court that it was his opinion that there was ‘overwhelming evidence of guilt.’” The transcript clearly establishes that the remark at issue was made during an in-chambers discussion that occurred before the jury returned its verdict and that only the trial judge, counsel for the State, and defense counsel were

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appellate counsel should have challenged the propriety of the judge's actions during the in-chambers meeting with the juror discussed above in a motion for a mistrial in the district court and in the briefs filed in this court on direct appeal. In particular, Brothers contends that the district court judge acted improperly by: (1) discussing the facts and circumstances of the case with the juror; (2) demeaning Brothers' alibi defense and explaining to the juror how the other eleven jurors could have disregarded Brothers' alibi; and (3) questioning the juror about her contact with another individual who was in custody in another department after she had already been empanelled in the instant case.

Our review of the record on appeal reveals that the district court did not err in rejecting Brothers' argument. Brothers has not demonstrated that his counsels' performance was deficient or that he was prejudiced as a result of any alleged deficiency. In our view, the district court judge's questions and comments during the in-chambers meeting were an attempt to discover what the juror's actual verdicts were and cannot be deemed an improper attempt to pressure the juror into finding Brothers guilty. The juror stated to the judge in chambers, with counsel for both sides present, that she believed Brothers was not guilty of the charges pertaining to the second incident at Brink's. Therefore, as to

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present at that discussion. Moreover, defense counsel made the remark out of the presence of the jury in response to questions from the judge about which one of Brothers' two defense attorneys was serving as lead counsel for the purposes of SCR 250. Counsel was explaining how and why the two defense attorneys had apportioned their duties with respect to the guilt and penalty phases of the trial. Thus, the record belies Brothers' claim that counsel's remark was made in "open court," and that the remark constituted ineffective assistance of counsel.

those charges, the judge declared a mistrial. Although the juror initially stated in chambers that she believed Brothers was not guilty of the kidnapping charge arising out of the first incident, when she was later questioned by the judge, the following exchange took place:

THE COURT: Now, we've got to go back over the [first incident] ones. You have to do them individually. I'm sorry we have to do them individually.

Count I was the first degree kidnapping with use of a deadly weapon on Bobby Delacruz. The jury verdict returned guilty on that. Is that your verdict?

THE JUROR: I said guilty because they said that if he's moved like one step, he's kidnapping.

THE COURT: That is the definition.

THE JUROR: If that's the definition, I voted guilty.

The juror then stated that she found Brothers guilty on all of the charges related to the first incident, as well as on the charges alleging possession of a firearm by an ex-felon and possession of stolen property. The record belies Brothers' allegation that the district court judge improperly pressured the juror. Brothers has not demonstrated that, but for counsels' alleged error, there was a reasonable probability that the verdict would have been different, or that the omitted issue would have had a reasonable probability of success on appeal. Further, as noted above, the district court vacated Brothers' conviction on the kidnapping charge for other reasons in the instant habeas proceeding.¹² Therefore,

¹²The juror in question was present at Brothers' sentencing hearing with an affidavit stating that she actually believed that Brothers was not guilty of all of the charges. Brothers, however, concedes that "[a]s a general rule, jurors may not impeach their own verdict" once the jury has

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based on the totality of the circumstances, we conclude that Brothers cannot demonstrate prejudice as a result of trial counsel's failure to move for a mistrial, or appellate counsel's failure to raise this issue on direct appeal.¹³

Second, Brothers contends that he should be permitted to withdraw his guilty plea to first-degree murder because his plea was not made freely and voluntarily and was the result of ineffective assistance of counsel. We conclude that Brothers is not entitled to relief. Brothers filed his habeas petition more than two years after the entry of the judgment of conviction based upon his guilty plea to first-degree murder. Brothers' petition was untimely as to any of the issues he raised below pertaining to that conviction, and he failed to offer any excuse for this delay.¹⁴ Therefore, we conclude that the district court did not err in rejecting

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been polled and a verdict reached. Tinch v. State, 113 Nev. 1170, 1174-75, 946 P.2d 1061, 1064 (1997). Brothers further agrees with the State that the juror's affidavit has no legal consequence. See Pinana v. State, 76 Nev. 274, 288, 352 P.2d 824, 832 (1960).

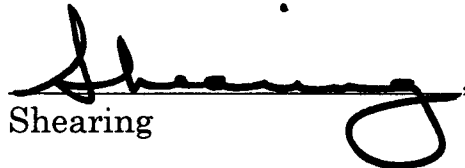
¹³See Quercia v. United States, 289 U.S. 466, 469-70 (1933) (holding that trial judge may assist juror in reaching a verdict "by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear . . . that all matters of fact are submitted to their determination"); Remmer v. United States, 347 U.S. 227, 230 (1954) (holding that trial judge must investigate juror possibly exposed to any extraneous influence to determine its prejudicial impact).

¹⁴See NRS 34.726(1) ("Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur."); see also Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).


Brothers' claims concerning the conviction entered pursuant to his guilty plea.

Having considered Brothers' contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.¹⁵


_____, J.
Shearing


_____, J.
Rose


_____, J.
Becker

cc: Hon. John S. McGroarty, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

¹⁵The State argues in its answering brief that this court should strike portions of Brothers' opening brief. We remind counsel for the State that such requests for relief are not properly included in the argument section of the answering brief on appeal. Rather, the State should have filed a separate motion to strike the portions of Brothers' opening brief at issue. We note, however, that this court has not considered any arguments or facts included in Brothers' briefs which are not properly part of the record previously made and considered in the instant case.