IN THE SUPREME COURT OF THE STATE OF NEVADA

MIGUEL CRUZ SARINANA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36600

FILED

MAY 30 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
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 March 16, 1998, the district court convicted appellant, pursuant to a jury verdict, of one count of second 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 after a minimum term of ten years. This court dismissed appellant's direct appeal.[1]

On March 28, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On July 17, 2000, pursuant to NRS 34.770, the district court conducted a hearing on the petition. On August 28, 2000, the district court denied appellant's petition. This appeal followed.

[1]Sarinana v. State, Docket No. 32174 (Order Dismissing Appeal, March 11, 1999).

In his petition, appellant initially raised numerous claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.[2] Furthermore, tactical decisions of defense counsel are virtually unchallengeable absent extraordinary circumstances.[3] Finally, this 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 giving appellant defective and insufficient consultation. Specifically, appellant claimed that his counsel (1) failed to secure an interpreter at client-counsel conferences, (2) failed to advise appellant that he had a right to continuing disclosure of material discovery, (3) failed to report the results of any investigation or provide disclosure and discovery to appellant, (4) failed to take appellant's phone calls, (5) told appellant that he had no defense or hope to prevail at trial, and advised appellant to accept the prosecution's plea bargain despite appellant's claim that he was actually innocent and did not want to accept a plea bargain, (6) informed the court without appellant's consent that a plea bargain was being

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[2]See Strickland v. Washington, 466 U.S. 668 (1984).

[3]See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

[4]Strickland, 466 U.S. at 697.

negotiated, and (7) failed to form any kind of "working relationship" with appellant. We conclude appellant failed to demonstrate his counsel was ineffective in this regard. There is no indication from the record that appellant requested an interpreter be present at client-counsel consultations or that appellant did not understand the proceedings. Further, other than appellant's general, unsubstantiated assertion at the evidentiary hearing that counsel did not keep him informed, there is no indication that appellant's counsel did not consult with appellant throughout the proceedings. Appellant affirmed to the trial judge that his counsel had explained to him the plea bargain offered by the State, the risks of going to trial, the potential sentences, and his right to appeal. Appellant's counsel informed the court that he had counseled appellant and engaged in plea negotiations with the State, but ultimately, counsel abided by appellant's decision to go to trial and to testify on his own behalf. At trial, substantial evidence of appellant guilt, including appellant's own testimony, was produced. Appellant testified that he became upset during an argument with his wife and stabbed her to death with an ice pick. Immediately after the stabbing, appellant had his daughter call police, and when they arrived, appellant admitted that he had repeatedly stabbed his wife, and subsequently gave police a tape-recorded confession. Thus, appellant failed to demonstrate that his counsel was ineffective or that he suffered any prejudice.

Second, appellant claimed his trial counsel was ineffective for (1) failing to file a motion in limine to exclude any items seized before and after the murder, and (2) filing only one pre-trial motion, thus showing counsel's "advocacy to the prosecution and the state." Appellant failed to

support these claims with any specific facts and has not demonstrated any prejudice resulting from counsel's failure to file additional motions.[5]

Third, appellant claimed that his trial counsel was ineffective in conducting discovery. Specifically, appellant claimed that his counsel failed to (1) formalize discovery by filing pre-trial motions demanding that the State produce all exculpatory evidence for inspection by the defense, (2) file a motion for a court-appointed investigator for the defense, (3) obtain the citizenship papers of State's witness Luz Elena Espinosa, and (4) obtain the affidavits of witnesses Brenda Lopez and Evelyn Lopez. We conclude that appellant failed to demonstrate that his counsel was ineffective in this regard because appellant failed to provide sufficient facts, that if true, would entitle him to relief.[6] In particular, appellant failed to provide specific facts as to what exculpatory evidence or information would have been revealed as a result of additional discovery or investigation, or how the defense was prejudiced. Thus, appellant failed to demonstrate that his counsel was ineffective or that he suffered any prejudice.

Fourth, appellant claimed that his trial counsel was ineffective for failing to challenge the State's presentation of illegally-obtained incriminating statements made by appellant. Specifically, appellant claimed that his counsel (1) failed to file a pre-trial motion to suppress the

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[5]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

[6]See id.; Strickland, 466 U.S. 668 (1984); Kirksey, 112 Nev. 980, 923 P.2d 1102.

testimony of Officer Reyes, (2) failed to interview and investigate officers "C. Mary, S. Rodd, A. Bragg and Lt. Pascoe of LVMPD" to cast doubt on the testimony of Officer Reyes regarding appellant's statements and whether appellant had been read his Miranda[7] rights, (3) failed to object to the introduction of the transcript of the police interview allegedly conducted in violation of appellant's Miranda rights, and (4) stipulated to the presence of the jury on January 21, 1998, while the audio tape of appellant's confession was played. We conclude that appellant failed to demonstrate that counsel was ineffective in this regard. As stated above, at trial, appellant testified that he stabbed his wife multiple times with an ice pick because she had aroused his emotions. Appellant's own testimony corroborates the testimony of Officers Jerry MacDonald and Raymond Reyes, the audio tape, and the interview transcript. Thus, appellant failed to demonstrate that his counsel was ineffective or that he suffered any prejudice.

Fifth, appellant claimed that his trial counsel was ineffective for failing to challenge the State's presentation of photographs of the victim. Specifically, appellant claimed that his counsel failed to (1) file a pre-trial motion in limine to exclude the photographs and (2) object to the introduction of the photographs at trial. We conclude that appellant failed to demonstrate that counsel was ineffective in this regard. Appellant did not show that any of the photographs were duplicative, or that they were not relevant to the cause of death and manner of injury. Additionally, appellant's counsel relied on some of these photographs to support

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[7]See Miranda v. Arizona, 384 U.S. 436 (1966).

appellant's defense as to the manner in which the wounds were inflicted. Therefore, it is apparent that defense counsel made a strategic decision not to object to these photographs.[8] Thus, appellant failed to demonstrate that his counsel was ineffective or that he suffered any prejudice.

Sixth, appellant claimed that his trial counsel was ineffective for stipulating to (1) appellant being bound-over to the district court, (2) a sentence of life without the possibility of parole if appellant was convicted of first degree murder, (3) and the fact that the State's witness, Dr. Giles Sheldon Green, was an expert in the field of forensic pathology. We conclude that appellant failed to demonstrate that counsel was ineffective in this regard. There is no indication from the record on appeal that appellant's counsel stipulated to appellant being bound-over to the district court or to the length of his sentence. Additionally, it was not unreasonable for appellant's counsel to stipulate that Dr. Green, was an expert because Dr. Green was the current chief medical examiner for Clark County, had been declared an expert many times in the past, and testified that he had performed close to eleven thousand autopsies, including the autopsy he performed on the victim. Thus, appellant failed to demonstrate that counsel's performance fell below an objective standard of reasonableness or that he suffered any prejudice.[9]

Seventh, appellant claimed that his trial counsel was ineffective for failing to develop a theory of defense. Specifically, appellant claimed that his counsel failed to (1) investigate, pursue, prepare, or

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[8]See Doyle v. State, 116 Nev. 148, 995 P.2d 465 (2000).

[9]See Strickland, 466 U.S. 668.

assert "extreme emotional distress (EDD)" and "heat of passion" in tandem as alternate defenses, (2) file pre-trial motions and subpoenas for the discovery of evidence relevant to appellant's state of mind including phone bills, a telephone and cord from the Sarinana residence, an audio recording of the 911 call, and dispatch logs from LVMPD, (3) file a motion for a psychiatric evaluation of appellant, (4) subpoena mental health experts, (5) file a motion to secure an expert specializing in the effects of extreme emotional distress/disturbance syndrome and alcohol, (6) file a motion to be permitted to present jury instructions on the defense's theory of the case. We conclude that appellant failed to demonstrate that counsel was ineffective in this regard. The record indicates that appellant's counsel did argue that the crime was committed in the "heat of passion" while appellant was "angry," "aroused," "nervous," "infuriated," and "distraught." Additionally, appellant's counsel argued that appellant was intoxicated when the crime was committed. The jury was instructed with regard to "heat of passion" and voluntary intoxication. Although counsel did not specifically argue "extreme emotional distress (EDD)," or have appellant undergo a psychiatric evaluation, we conclude that appellant failed to demonstrate that he suffered any prejudice.[10]

Eighth, appellant claimed that his trial counsel was ineffective for failing to investigate, interview, prepare, and use compulsory process to subpoena certain witnesses. Specifically, appellant claimed that his counsel failed to (1) interview Mark Alan Young and Loretta Wilson "Next door neighbor, to the theory of the defense," (2) interview or investigate

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[10]See id.

Luz Elena Espinosa "as to credibility and truthfulness," and (3) interview "Alleged boyfriend of decedent (Tom) as to character and to culpability of bruises sustained, to the face of the decedent 24 hrs. prior to the instant offense." We conclude that appellant failed to demonstrate that counsel was ineffective in this regard. Appellant did not provide sufficiently specific facts indicating how such action would have assisted the defense and appellant failed to establish any resulting prejudice.[11]

Ninth, appellant claimed that his trial counsel was ineffective at sentencing. Specifically, appellant claimed that his counsel failed to (1) raise any objections, (2) prepare or present mitigating circumstances, and (3) argue "lesser included Penalitys [sic]" at sentencing. We conclude that appellant failed to demonstrate that counsel was ineffective in this regard. To establish prejudice based on deficient performance at sentencing, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the sentence imposed would have been different.[12] Appellant's claims were without specific factual allegations and appellant failed to establish any resulting prejudice.[13] The State's argument at sentencing was extremely brief and simply asked the court to follow the recommendation from the Division of Parole and Probation. Appellant's counsel did argue for a term of years, stating that the appellant acted out

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[11]See Hargrove, 100 Nev. 498, 686 P.2d 222; Strickland, 466 U.S. 668.

[12]See Strickland, 466 U.S. 694.

[13]See Hargrove, 100 Nev. 498, 686 P.2d 222; Strickland, 466 U.S. 668.

of emotion, was cooperative to police, admitted to the crime, and was genuinely remorseful. Additionally, the trial judge acknowledged that appellant's children were supportive of appellant and considered a letter from appellant's son. Therefore, appellant failed to demonstrate that counsel's performance fell below an objective standard of reasonableness or that he suffered any prejudice.[14]

Next, appellant raised multiple claims of ineffective assistance of appellate counsel. The standard for ineffective assistance of appellate counsel is the same as the standard for ineffective assistance of trial counsel, that is, the "reasonably effective" test set forth in Strickland.[15] Effective counsel need not raise every non-frivolous issue on appeal.[16] Rather, counsel will often be most effective when every conceivable issue is not raised.[17] "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."[18]

First, appellant claimed that his appellate counsel was ineffective for failing to raise many of the same issues underlying his ineffective assistance of trial counsel claims as independent constitutional

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[14]See Strickland, 466 U.S. 668.

[15]See Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

[16]Id. (citing Jones v. Barnes, 463 U.S. 745, 751-54 (1983)).

[17]See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953.

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

violations in his direct appeal.[19] As noted above, since there is no merit to these underlying issues, we conclude that they would not have a reasonable probability of success on direct appeal if raised as independent constitutional violations. Therefore, counsel was not ineffective in failing to raise these issues on direct appeal.

Second, appellant claimed that his appellate counsel was ineffective for failing to specifically raise the claims that (1) the incriminating statements appellant made while being interrogated by Officers MacDonald and Reyes were illegally obtained in violation of appellant's Fifth Amendment rights, (2) the State failed to disclose material evidence favorable to the defense in violation of appellant's Fourteenth Amendment rights, (3) the prosecution knowingly allowed State's witness Officer Raymond Reyes to present false testimony to the jury in violation of appellant's Fourteenth Amendment rights, and (4) trial Judge Joseph Bonaventure abused his discretion by allowing "irrelevant evidence" of an audio-taped confession in Spanish to be played for the jury and allowing an "ambiguous reconstructed, reproduction" of the tape transcript, translated in English, to be viewed by the jury in violation of appellant's Fourteenth Amendment rights.[20] We conclude these claims

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[19]In his petition, appellant generally claimed "Ineffective Assistance of Appellate Counsel in Violation of Sixth and Fourteenth Amendment[s] of the United States Constitution," and attempted to incorporate by reference virtually all of the same facts and issues underlying his ineffective assistance of trial counsel claims.

[20]Appellant also raised these four issues as constitutional violations independent of his ineffective assistance of counsel claims. Appellant waived these claims by failing to raise them in his direct appeal and by

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lack merit. Testimony from multiple witnesses indicates that after the murder, appellant instructed his daughter to call police to the house and voluntarily made incriminating statements to police after being Mirandized in Spanish and indicating he understood the warnings. With regard to discovery, appellant's counsel indicated to the trial judge that the State had been "most cooperative," and appellant fails to state what specific evidence the State failed to disclose or how that evidence would have changed the outcome at trial. Additionally, our review of the record reveals nothing to indicate that Officer Reyes presented false testimony or that the prosecution knowingly encouraged him to do so. Further, both the State and the defense agreed that the audio-taped confession and the certified translation of the transcript would be presented to the jury. In light of the substantial evidence against him, appellant has failed to demonstrate that counsel's performance fell below an objective standard of

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failing to plead specific facts that demonstrate good cause for failing to raise them in the earlier proceeding. See NRS 34.810(1)(b)(2), (3) (providing that the district court shall dismiss a petition, absent a demonstration of good cause and prejudice, if the claims raised in the petition could have been raised on direct appeal); see also Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) (holding claims that are appropriate on direct appeal must be pursued on direct appeal, or they are waived), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). We nevertheless address appellant's claims in connection with his contention that appellate counsel should have raised them on direct appeal.

reasonableness, or that appellant was prejudiced by counsel's representation.[21]

Third, appellant claimed that his appellate counsel was ineffective for failing to discuss the appeal process with him and abide by appellant's decisions concerning the case on appeal. Appellant failed to provide sufficient facts to support this claim.[22] There is no indication from the record, other than the general, unsubstantiated assertion by appellant at the evidentiary hearing that his counsel did not keep appellant informed throughout the proceedings, that appellate counsel failed to sufficiently communicate with appellant or abide by appellant's decisions. Further, appellant has failed to allege sufficient facts demonstrating that the result of the direct appeal would have been different had appellant consulted with his counsel with respect to how to proceed.[23] Thus, this claim fails for lack of prejudice.

Finally, appellant claimed that his appellate counsel was ineffective for failing to provide competent representation pursuant to the rules of professional conduct. Appellant's claims were not supported by specific factual allegations which, if true, would entitle him to relief.[24] Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

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[21]See Strickland, 466 U.S. 668.

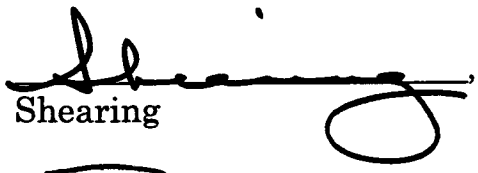
[22]See Hargrove, 100 Nev. 498, 686 P.2d 222.

[23]See McNelton v. State, 115 Nev. 396, 411, 990 P.2d 1263, 1273 (1999) (citing Strickland, 466 U.S. at 687).

[24]See Hargrove, 100 Nev. 498, 686 P.2d 222.

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.[25] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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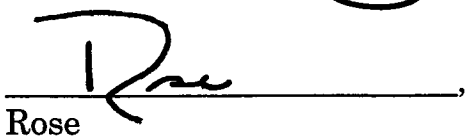

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cc: Hon. Sally L. Loehrer, District Judge
Attorney General/Carson City
Clark County District Attorney
Miguel Cruz Sarinana
Clark County Clerk

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