IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT T. BARFIELD,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36642

FILED

NOV 14 2001

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

ORDER OF AFFIRMANCE

Robert Barfield appeals the district court's denial of his post-conviction petition for a writ of habeas corpus. Barfield contends that his former counsel provided ineffective assistance in several respects, and he alleges other instances of error. We conclude that all of his contentions lack merit and affirm the district court's judgment.

The standards articulated in Strickland v. Washington[1] guide the bulk of our analysis. For Barfield to prevail, Strickland requires that he show (1) that counsel's performance was deficient, i.e., it fell below an objective standard of reasonableness, and (2) that the deficient assistance prejudiced the defense, i.e., but for counsel's errors, the result of trial would probably have been different.[2] Courts indulge a strong presumption that counsel's representation falls within the broad range of reasonable assistance.[3]

Barfield first contends that he did not give his attorneys permission to pursue the "police-assisted suicide" defense or to concede certain facts that he asserts were tantamount to an admission of guilt. For support, Barfield cites Jones v. State, in which we required that defense counsel obtain the consent of the defendant before undertaking an

[1]466 U.S. 668, 687-88 (1984); see also Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992) (noting that we use the Strickland standards to review claims of ineffective assistance).

[2]See Strickland, 466 U.S. at 687-88.

[3]See id. at 689.

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"honest approach" defense strategy that involves conceding incriminating facts to the jury.[4]

We reaffirm Jones here, but we conclude that Barfield cannot take advantage of the rule it provides. We first note that Barfield did not protest his attorneys' defense strategy at any time during his trial. Nonetheless, at the post-conviction evidentiary hearing, Barfield adamantly testified that his attorneys did not obtain his permission to concede the facts that they did. Contrary to this, however, Barfield's defense attorney, Sharon Claassen, testified that although she could not remember the specific facts relating to her defense of Barfield, she nevertheless maintained, "to the best of my knowledge, I had never surprised a defendant by putting on a defense, especially like that, without discussing it with him first."[5] In addition, Barfield acknowledged that the theory of defense was consistent with the version of the events that he gave to his attorneys. Faced with conflicting testimony, the district court apparently believed Ms. Claassen's version of the facts and rejected Barfield's on this issue. This, the district court was entitled to do.[6]

Barfield next contends that his counsel provided ineffective assistance by failing to file a motion to sever the ex-felon in possession charge. The general rule is that the joinder of charges is within the district court's discretion,[7] and the joinder of offenses is proper where the activity charged was part of the same transaction or comprised a common scheme or plan.[8] On appeal, errors resulting from misjoinder will be

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[4]110 Nev. 730, 737, 877 P.2d 1052, 1056 (1994).

[5]Defense attorney James Jackson did not recall specific details, explaining "I don't know if that [the suicide-based defense theory] came directly from Mr. Barfield or if it came from him through Ms. Claassen to me."

[6]See Cunningham v. State, 113 Nev. 897, 909, 944 P.2d 261, 268 (1997) (noting that the factfinder is "at liberty to reject the defendant's version of events" when faced with conflicting testimony (quoting Porter v. State, 94 Nev. 142, 146, 576 P.2d 275, 278 (1978))).

[7]See Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990).

[8]See Gibson v. State, 96 Nev. 48, 51, 604 P.2d 814, 816 (1980).

reversed "only if the error ha[d] a 'substantial and injurious effect or influence in determining the jury's verdict.'"[9]

Following those standards in Brown v. State, we upheld a district court's decision not to sever an ex-felon in possession charge.[10] We reasoned that the charge was "intricately related" to the other charges because substantial evidence indicated that the weapon in question was the weapon used to commit the other crimes charged.[11] We held, however, that we would require severance in the future.[12] But Barfield cannot avail himself of Brown, which was decided in 1998, because it has no retroactive effect.[13] Further, based on the general rule as stated in Brown, the trial court would likely have refused to sever Barfield's ex-felon in possession charge considering that the weapon for which he received the charge was the weapon he used to commit the other offenses. Thus, we conclude that Barfield's attorneys did not act unreasonably by failing to seek a motion to sever because it was highly doubtful that the motion would have been granted.

Barfield next contends that his attorneys provided ineffective assistance when they failed to move to suppress his statements made at the hospital. Barfield asserts that there were valid questions regarding whether he gave his statements voluntarily because he was under the

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[9]Robins, 106 Nev. at 619, 798 P.2d at 563 (quoting United States v. Lane, 474 U.S. 438, 450 (1985)).

[10]114 Nev. 1118, 1124-25, 967 P.2d 1126, 1130-31 (1998).

[11]Id. at 1124-25, 967 P.2d at 1130.

[12]Id. at 1126, 967 P.2d at 1131.

[13]Schoels v. State, 115 Nev. 33, 36, 975 P.2d 1275, 1277 (1999).

Barfield also cites Manley v. State for support. 115 Nev. 114, 124-25, 979 P.2d 703, 709 (1999). In Manley, as in Brown, this court concluded that the district court did not abuse its discretion by refusing to sever an ex-felon in possession charge, but acknowledging Brown and reversing on other grounds, this court instructed the district court to sever on remand.

Barfield also cites United States v. Lewis, a pre-1994 case in which the Ninth Circuit required an ex-felon charge to be severed, as binding the outcome here. 787 F.2d 1318, 1321 (9th Cir. 1986). The precedent of the federal circuit courts of appeals, however, does not bind this court. See Blanton v. North Las Vegas Mun. Ct., 103 Nev. 623, 633, 748 P.2d 494, 500 (1987).

influence of pain medication. After reviewing the evidence in context, we conclude that the decision to allow the statements to come in was a valid tactical decision; as Barfield's attorney stated, the statements "went for and against" Barfield because they related to the police-assisted suicide theory.[14]

Barfield next contends that his defense counsel provided ineffective assistance by stipulating that he tested positive for methamphetamine just after committing the crimes in question and then failing to tell the jury how to use the information. Barfield's attorneys testified that the drug-test results were relevant to intent, and they had no grounds for disputing the results. Further, they did not offer an instruction or explain the evidence to the jury because they felt that the jury would look on Barfield's drug use with disfavor, and they did not wish to place additional emphasis on the issue. We conclude that Barfield's counsels' handling of this issue constituted reasonable defense strategy.

Barfield next contends that his attorneys provided ineffective assistance by failing to seek a change of venue, which they should have done because the community where the trial was held had been saturated with prejudicial media coverage of Barfield's case. The standard for change of venue is whether the ambience of the place of the forum has been so thoroughly perverted that the constitutional imperative of a fair and impartial panel of jurors becomes unattainable.[15] A motion for change of venue cannot "be granted by the court until after the voir dire examination has been conducted."[16] In this case, the trial court confirmed that the prospective jurors had not formed preconceived notions regarding Barfield's guilt. Counsel for both sides then explored potential media influence further with each venireperson. Based on voir dire, Barfield's attorneys saw nothing during voir dire indicating that a fair and impartial

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[14]See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances."), abrogated on other grounds by Harte v. State, 116 Nev. ___, ___ n.6, 13 P.3d 420, 432 n.6 (2000).

[15]Ford v. State, 102 Nev. 126, 129, 717 P.2d 27, 29 (1986); NRS 174.455.

[16]NRS 174.455(2).

jury could not be seated. Based on this, we conclude that it was reasonable for Barfield's attorneys not to seek a change of venue.

In a related argument, Barfield contends that his attorneys provided ineffective assistance by failing to question each potential juror regarding media-caused bias outside of the presence of the others in the jury pool. Barfield, however, provides no authority supporting his assertion that individual voir dire was required under the circumstance of this case.[17] In any event, we conclude that the voir dire conducted was sufficient to alleviate Barfield's concerns regarding media-caused prejudice.

Barfield next contends that his counsel provided ineffective assistance by failing to seek additional peremptory challenges to remove prospective jurors who had ties to law enforcement. Nevada law allows the defense four peremptory challenges,[18] and Barfield's counsel used all four. Barfield's counsel did not act unreasonably in this instance because, as the district court noted, it was highly unlikely that additional peremptory challenges would have been allowed under any circumstances. Furthermore, the specific jurors that Barfield is concerned about did not have such strong connections to law enforcement that bias should have been presumed.

Barfield next contends that his constitutional right to a trial before a jury selected from a representative cross-section of the community was violated and that his counsel should have raised this point to the trial court. Even assuming this contention is properly raised in this post-conviction proceeding, we conclude that this contention lacks merit because – as Barfield concedes – he has not shown systematic exclusion of the group of concern, the third requirement under Duren v. Missouri,[19] and he offers no reason why we should expand the rule beyond Duren.

Barfield next contends that his attorneys provided ineffective assistance by failing to move for a new trial after one of the jurors saw him

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[17]See Allen v. State, 91 Nev. 78, 83, 530 P.2d 1195, 1198 (1975) (noting that we need not consider arguments that are not supported by authority).

[18]See NRS 16.040.

[19]439 U.S. 357, 364 (1979).

in shackles. Although we have held that "[a] criminal defendant clearly has the right to appear before his jurors clad in the apparel of an innocent person," we have also held that any incidental viewing of the defendant in restraints may be cured by the district judge ensuring that the jurors were not influenced by the incident.[20] In this case, the district court took appropriate action to ensure that seeing Barfield in shackles did not improperly influence the juror.

Barfield next contends that his counsel provided ineffective assistance by discouraging him from testifying. We disagree and conclude that Barfield's defense attorneys had legitimate strategic reasons for encouraging Barfield not to testify, that Barfield was properly advised of his right to testify, and that he knowingly waived that right.

Barfield next contends that his attorneys provided ineffective assistance by failing to appeal the issue of merger or double jeopardy. Barfield raises this issue both as an ineffective assistance challenge. Barfield complains that he was charged with and convicted of three distinct crimes – shooting into a vehicle,[21] shooting out of a vehicle,[22] and attempted murder[23] – based on his act of firing one bullet into Officer Guirlani's vehicle. We conclude that Barfield cannot show ineffective assistance or plain error in this instance. Each of these crimes has a distinct element that the others do not, and thus under the Blockburger test, there is no double-jeopardy or merger problem because each crime "requires proof of a fact which the other does not."[24]

Barfield next contends that his attorneys provided ineffective assistance on appeal by failing to challenge the jury verdict on grounds that it was not supported by sufficient evidence. On this contention,

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[20]See Grooms v. State, 96 Nev. 142, 144-45, 605 P.2d 1145, 1146-47 (1980).

[21]NRS 202.285.

[22]NRS 202.287.

[23]NRS 200.010 (defining "murder"); NRS 193.330 (defining and setting forth the punishment for attempts).

[24]Blockburger v. United States, 284 U.S. 299, 304 (1932); see also McIntosh v. State, 113 Nev. 224, 932 P.2d 1072, 1073 (1997) (noting that "Nevada has long followed the double jeopardy test set forth in Blockburger").

Barfield hypothesizes that substantial evidence did not support the jury's conclusion that Barfield intended to kill Officer Smith because the facts indicated that Barfield was lying down on the backseat of his friend's car and therefore could not have been aiming when he shot at Officer Smith. After reviewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[25]

Barfield next contends that his attorneys provided ineffective assistance by failing to seek to exclude photographs of Barfield's injuries that depicted his gang-related tattoos. Barfield already raised this argument on direct appeal, but Barfield distinguishes his current argument from the previous by asserting that the photographs the judge reviewed were not the same as those actually admitted. We conclude that this distinction is of no avail because we previously concluded that the photographs actually admitted were admissible. That decision constitutes the law of the case.[26] Thus, we conclude that Barfield's appellate counsel did not provide ineffective assistance by failing to raise this particular point on direct appeal.

Barfield finally contends that his attorneys failed to provide effective assistance in these and various other instances, the effect of which, if not prejudicial individually, caused substantial prejudice cumulatively. We disagree and conclude that the quality of Barfield's attorneys' representation was not unreasonable in any instance. Accordingly, because none of the alleged instances constitute ineffective assistance individually, we need not consider the cumulative effect of the asserted errors.

Finally, Barfield contends that his sentence constitutes cruel and unusual punishment prohibited by the Eighth Amendment because it is excessive. Barfield failed, however, to make this challenge on direct appeal. Accordingly, Barfield has waived his right to raise the issue in these post-conviction proceedings.[27]

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[25]See Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984); see also NRS 34.810(1)(b).

[26]See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

[27]Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (holding that the defendant may not raise a "challenge to the sentence

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Having concluded that the representation provided by Barfield's former counsel did not fall below an objective standard of reasonableness in any respect, and having concluded that all of Barfield's other contentions lack merit, we

ORDER the judgment of the district court AFFIRMED.

Shearing, J.

Rose, J.

Becker, J.

cc: Hon. William A. Maddox, District Judge
Barbara A. Wall
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk

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imposed on constitutional or other grounds" in post-conviction proceedings when the party failed to raise the issue on direct appeal), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).