IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD WILLIAM SHERMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37191

FILED

JUL 09 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus in a death penalty case.

The district court convicted appellant, Donald William Sherman, of first-degree murder, burglary and robbery. Appellant received a death sentence for the murder. This court affirmed appellant's conviction and sentence.[1] Appellant subsequently filed a timely petition for habeas relief in the district court. The district court appointed counsel to represent appellant and subsequently denied the petition without conducting an evidentiary hearing. This appeal followed.

Appellant alleges several instances of ineffective assistance of trial and appellate counsel. Claims of ineffective assistance of counsel are properly presented in a timely, first post-conviction petition for a writ of habeas corpus because such claims are generally not appropriate for review on direct appeal.[2] A claim of ineffective assistance of counsel

[1]Sherman v. State, 114 Nev. 998, 965 P.2d 903 (1998).

[2]See, e.g., Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

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presents a mixed question of law and fact, subject to independent review.[3] To establish ineffective assistance of counsel, a claimant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense.[4] To show prejudice, the claimant must show a reasonable probability that but for counsel's errors the result of the proceedings would have been different.[5] Further, a petitioner is not entitled to an evidentiary hearing on claims that are belied or repelled by the record or are not sufficiently supported by specific factual allegations that would, if true, entitle the petitioner to relief.[6]

Appellant first contends that his trial counsel improperly conceded his guilt during closing argument at the guilt phase of the trial. Specifically, lead defense counsel, David Schieck, said, "The defense in this case has put forth . . . that [appellant] was intoxicated by drugs and alcohol [and] therefore could not form or did not form the specific intent to commit these crimes." Appellant complains that this argument conceded his guilt and constituted ineffective assistance of counsel under Jones v. State.[7] Appellant further contends that this problem was exacerbated by co-counsel's inconsistent defense that the State had failed to prove that appellant committed the instant crimes. Finally, appellant contends that

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[3]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[4]Id. (citing Strickland v. Washington, 466 U.S. 668 (1984)).

[5]Id. at 988, 923 P.2d at 1107.

[6]Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

[7]110 Nev. 730, 877 P.2d 1052 (1994).

counsel conceded appellant's guilt in arguing "diminished capacity" while failing to prove "this theory" as demonstrated by the State's argument that "[t]here is no evidence of drug use on [the day of the crimes]."

This claim lacks merit. First, appellant's reliance on Jones is inapposite. In Jones, defense counsel conceded in closing argument that Jones was guilty of second-degree murder; he did so without Jones's consent and after Jones had testified that he did not kill the victim.[8] Here, Mr. Schieck's argument did not constitute a concession of appellant's guilt. In contending that appellant did not or could not form specific intent, counsel contended appellant was not guilty of first-degree premeditated murder or of felony murder where burglary provided the underlying predicate felony. Similarly, an alleged failure to present sufficient evidence of intoxication is not a concession of guilt. We note that appellant cites no authority for these legal arguments.[9] Further, the record repels appellant's claim that trial counsel propounded an intoxication defense without appellant's consent. At trial, several witnesses testified to appellant's drug use, and several jury instructions addressed a defense of intoxication. Also, in his opening brief, appellant chronicles his history of drug use in his statement of facts, and he complains that his trial counsel failed to adequately investigate witnesses regarding appellant's substance abuse. Second, appellant

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[8]Id. at 736, 877 P.2d at 1056.

[9]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

mischaracterizes Mr. Schieck and co-counsel Nancy Lemcke as presenting contradictory defenses. Both defense attorneys argued in the alternative that appellant was not the perpetrator or, assuming he did commit the crimes, that his intoxication precluded the formation of specific intent. Mr. Schieck first pointed out that appellant's fingerprints were not recovered from inside the victim's house; that the State had only presented substantial evidence of appellant's possession of the stolen property, not that he had stolen it from the victim; that appellant's fingerprint on the outside of the victim's house did not indicate when it was placed or the circumstances surrounding its placement; and that unidentified prints were recovered from the crime scene. Alternatively, Mr. Schieck contended that appellant's intoxication precluded the formation of specific intent. Co-counsel Nancy Lemcke also argued that the State had not established that appellant committed the crimes, and, alternatively, that his use of methamphetamine compromised his ability for rational thought. In light of the substantial circumstantial evidence suggesting appellant committed the crimes, defense counsel acted reasonably in arguing not only that appellant was not the perpetrator but also, alternatively, that if jurors did find appellant committed the crimes, they should find him not guilty for lack of specific intent. We conclude that defense counsel did not concede appellant's guilt or argue contradictory defenses to appellant's detriment.

Appellant next alleges that his trial counsel "failed to properly investigate the case prior to trial." Specifically, appellant contends that his trial attorneys were made aware of two potential witnesses who could testify to appellant's drug use on the day of the crimes. Appellant asserts

that he advised trial counsel that the potential witnesses were "Wes" and "Eddie."

Appellant's claim does not entitle him to relief. First, appellant's providing trial counsel with the names "Wes" and "Eddie" was insufficient identification of the potential witnesses to render counsel's alleged failure to investigate objectively unreasonable. Second, appellant has failed to demonstrate that he was prejudiced by trial counsel's performance. Appellant's trial attorneys cross-examined State witnesses regarding their knowledge of appellant's substance abuse, elicited information confirming appellant's abuse of methamphetamine and established that appellant's blood was not tested subsequent to his arrest. Thereafter, appellant's trial counsel called several defense witnesses for purposes of establishing appellant's history of drug abuse and the effect of methamphetamine on a user. Further, it was established that appellant was arrested when he was discovered asleep at the wheel of the victim's car while the engine was running and the radio on. Defense counsel presented testimony that such behavior was consistent with "crashing" after prolonged use of methamphetamine. And a witness testified that appellant appeared to be under the influence of drugs within hours of the crimes. Thus, defense counsel acted effectively in presenting the case that appellant was intoxicated at the time of the crimes. We conclude that appellant has failed to demonstrate that his counsel's performance was deficient or that he was prejudiced.

Appellant next complains that he was deprived of his right to conflict-free counsel at every stage of the proceedings. On July 3, 1996, appellant's original trial counsel, Deputy Public Defender Rebecca

Blaskey, filed a motion to withdraw as counsel of record. In an accompanying declaration, Ms. Blaskey stated that she had a conflict of interest in representing appellant due to her simultaneous representation of Christine Kalter in an unrelated case. Ms. Blaskey explained that she learned Ms. Kalter had, pursuant to her plea bargain, provided the Las Vegas Metropolitan Police Department (LVMPD) with information regarding appellant's plot to escape from custody. Ms. Kalter also testified at appellant's penalty hearing respecting appellant's planned escape. Appellant contends that he "anticipated establishing" at an evidentiary hearing that Ms. Blaskey "was essentially an agent of the State in helping the authorities set a sting against [appellant] which was used against [him] in his penalty phase."

This claim warrants no relief. First, appellant presents no basis for his very serious allegation that Ms. Blaskey assisted the prosecution's receipt of information incriminating appellant.[10] Second, in her sworn declaration, Ms. Blaskey stated that she was "advised" of Kalter's cooperation with LVMPD officers. Thus, the record belies appellant's claim that Ms. Blaskey might have assisted Kalter in providing the prosecution with information adverse to appellant. Finally, while it is true that "an actual conflict of interest which adversely affects a lawyer's performance will result in a presumption of prejudice,"[11] Ms.

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[10]See Hargrove, 100 Nev. at 502, 686 P.2d at 225 (holding that bare claims unsupported by any specific factual allegations will not entitle defendant to relief).

[11]Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992).

Blaskey's withdrawal avoided any adverse effect.[12] Appellant was thereafter represented at trial and on appeal by counsel untainted by any conflict of interest. We therefore conclude that appellant's claim regarding Ms. Blaskey's conflict of interest lacks merit.

Appellant next contends that his trial and appellate counsel should have challenged comments made by the trial judge during voir dire. During collective voir dire, a potential juror indicated that she would have difficulty imposing a death sentence due to her religious convictions. The trial judge advised the juror, "in the Bible, it was very common to have this form of punishment. As a matter of fact, the Book of Judges . . . this is the way this form of punishment was carried out." The juror reiterated that she would feel uncomfortable imposing a death sentence. The trial judge then commented that everyone involved in the proceedings felt uncomfortable and stated that he had "done it on a few occasions," and he "always felt uncomfortable. That isn't the question." Appellant argues that the trial judge improperly opined that the Bible "specifically permits the death penalty" and, even more improperly, that he believed a death sentence "was a correct avenue for punishment pursuant to the Bible," from which the judge was able to quote. Appellant concludes that he was prejudiced because jurors would afford more weight to the judge's comments and less weight, if any, to the instructions. At oral argument on this issue, appellant characterized the trial judge as stating, "you can

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[12]See SCR 166(1)(a) (providing that "a lawyer shall not represent a client or . . . shall withdraw from the representation of a client" when "[t]he representation will result in violation of the rules of professional conduct or other law").

execute [appellant], and if you feel bad about it under Nevada Law, under the Book of Judges you can do it too." Appellant acknowledges that this is an issue of first impression in Nevada, but cites Ginnis v. Mapes Hotel Corp.,[13] Sandoval v. Calderon[14] and Agee v. Laughlin[15] in support of this claim.

While the judge's reference to religious authority for capital punishment was inappropriate,[16] we conclude that appellant was not prejudiced. First, it was clear at voir dire that the judge's comments were limited to determining whether the juror could consider the death penalty as a possible form of punishment.[17] For example, after the judge commented that everyone involved "felt uncomfortable" but that was not the question, he continued, "The question is: Will you consider the forms of punishment or not?" Nor did the judge encourage the juror to return a death sentence, as appellant implies. When the juror said, "The death penalty would be a difficult choice for me," the judge responded, "Absolutely. It should be; it should be." Second, the record belies

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[13]86 Nev. 408, 470 P.2d 135 (1970).

[14]241 F.3d 765 (9th Cir. 2001).

[15]287 F.2d 709 (8th Cir. 1961).

[16]Cf. Sandoval, 241 F.3d at 775-76 (holding that the prosecutor's invoking religious authority to justify imposition of a death sentence at the close of the penalty phase was improper).

[17]See Wainwright v. Witt, 469 U.S. 412, 424 (1985) (holding that, in a capital case, jurors must be capable of considering a death sentence); see also Aesoph v. State, 102 Nev. 316, 318, 721 P.2d 379, 380-81 (1986).

appellant's concern that the jury was unduly influenced by the judge's comments. The judge ultimately excused the prospective juror when she acknowledged that she could not impose the death penalty under any circumstances. Further, another prospective juror questioned shortly thereafter stated that she could not consider the death penalty due to her religious beliefs. Finally, none of the cases cited by appellant support his argument. We therefore conclude that appellant is not entitled to relief because he has failed to demonstrate that he was prejudiced by his counsel's failure to challenge the trial judge's remarks.

Finally, appellant raises the following claims challenging the constitutional validity of his sentence: the death penalty is cruel and unusual punishment in all circumstances in violation of the Eighth Amendment; Nevada's death penalty scheme is unconstitutional because it fails to narrow the class of persons eligible for the death penalty; appellant's death sentence is invalid because the murder occurred after the crime of burglary was complete and before any of the elements of robbery had been satisfied; and appellant's death sentence is invalid under international law because it was imposed arbitrarily.

A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner.[18] This court may excuse the failure to show cause where the prejudice from a failure to

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[18]See NRS 34.810(1)(b)(2).

consider the claim amounts to a "fundamental miscarriage of justice."[19] Appellant has not attempted to demonstrate good cause or prejudice. Nor has he presented any argument that he is actually innocent and therefore the victim of a fundamental miscarriage of justice.[20] Thus, the district court properly rejected these claims as procedurally barred. Moreover, as a separate and independent ground for denying appellant relief, we conclude that the barred claims have no substantive merit.[21] This court has repeatedly rejected identical challenges.[22] Finally, we are not

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[19]Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

[20]Cf. Murray v. Carrier, 477 U.S. 478, 496 (1986) (holding that a federal habeas court may grant the writ in the absence of a showing of cause for the procedural default "where a constitutional violation has probably resulted in the conviction of one who is actually innocent").

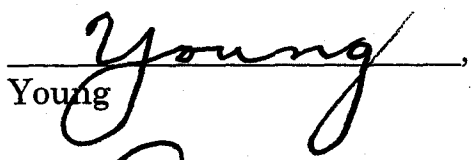
[21]See Harris v. Reed, 489 U.S. 255, 263 (1989) (holding that as long as the state court explicitly invokes a state procedural bar, "a state court need not fear reaching the merits of a federal claim in an alternative holding.").

[22]See e.g., Colwell v. State, 112 Nev. 807, 814-15, 919 P.2d 403, 407-08 (1996) (upholding general constitutionality of the death penalty under the Eighth Amendment); Leonard v. State, 117 Nev. __, __, 17 P.3d 397, 416 (2001) (reaffirming constitutionality of Nevada's death penalty); Bennett v. State, 106 Nev 135, 143, 787 P.2d 797, 801 (1990) (for burglary aggravator to apply it is not necessary that murder occur while defendant is entering a building); Chappell v. State, 114 Nev. 1403, 1407-08, 972 P.2d 838, 841 (1998) (evidence that defendant fled in victim's vehicle and took his social security card after homicide was sufficient to support finding of robbery as aggravating circumstance); Petrocelli v. State, 101 Nev. 46, 52-54, 692 P.2d 503, 508-09 (1985) (underlying felony in felony-murder case does not merge with murder conviction, and it is therefore permissible for State to use underlying felony as an aggravating circumstance in penalty phase of defendant's trial).

persuaded that appellant's death sentence was arbitrarily imposed in violation of international law given the overwhelming evidence supporting its imposition.

In sum, we conclude that the district court did not err in denying appellant's habeas petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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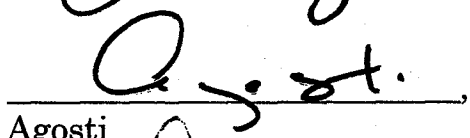

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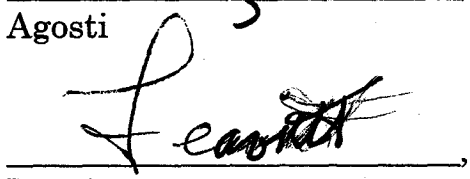

_____, J.
Leavitt

cc: Hon. Sally L. Loehrer, District Judge
Attorney General/Carson City
Clark County District Attorney
Christopher R. Oram
Clark County Clerk