

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY GLEN SHORTS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37330

FILED

FEB 13 2002

JANE T. M. BLOOM
CLERK OF SUPREME COURT
BY *J. Rehak*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying appellant Terry Glen Shorts' post-conviction petition for a writ of habeas corpus.

On February 27, 1997, the district court convicted Shorts, pursuant to a jury verdict, of one count of trafficking in a controlled substance. The district court sentenced Shorts to a term of life with the possibility of parole after ten years in the Nevada State Prison. We dismissed Shorts' direct appeal.¹ The remittitur issued on July 7, 1999.

On May 24, 2000, Shorts filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. After the district court appointed counsel, Shorts filed two supplements to the petition. The district court then conducted an evidentiary hearing. On January 10, 2001, the district court denied Shorts' petition. This appeal followed.

While Shorts initially asserted many bases for relief, by the time of the evidentiary hearing he had narrowed his claims to two. First,

¹Shorts v. State, Docket No. 30207 (Order Dismissing Appeal, June 10, 1999).

Shorts claimed that he received constitutionally ineffective assistance of counsel because his attorney failed to adequately rebut the State's fingerprint expert, Michael Hall. Second, Shorts claimed that a life sentence with the possibility of parole is excessive for the crime of trafficking.

Ineffective assistance

Claims of ineffective assistance of counsel are evaluated under the two-part test set forth in Strickland v. Washington.² Under Strickland, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.³ To establish prejudice based on trial counsel's deficient performance, a petitioner must show that but for counsel's errors there is a reasonable probability that the verdict would have been different.⁴ In essence, a defendant must show that "counsel's errors were so severe that they rendered the jury's verdict unreliable."⁵ We defer to the district court's factual findings made after an evidentiary hearing so long as they are supported by substantial evidence and not clearly wrong.⁶

²466 U.S. 668 (1984).

³Id. at 687.

⁴Id. at 694.

⁵Pertgen v. State, 110 Nev. 554, 558, 875 P.2d 361, 363 (1994), abrogated on other grounds by Pellegrini v. State, 117 Nev. ___, 34 P.3d 519 (2001).

⁶Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Shorts claims that trial counsel was ineffective because he should have conducted a more thorough pretrial investigation, presented an independent fingerprint expert, and challenged Hall's credibility. According to Shorts, Hall's testimony was critical to the State's case against him; thus, Shorts claims that his counsel's failure to discredit Hall prejudiced him. The record does not support Shorts' claims.

First, we conclude that Shorts disputes his attorney's strategic decisions instead of demonstrating objective error. Decisions on the optimal extent of pretrial investigation, the vigorousness of cross-examination, and whether to present a witness are tactical decisions and "virtually unchallengeable absent extraordinary circumstances."⁷ Extraordinary circumstances are not present here. The record reflects that defense counsel was adequately prepared for trial and extensively cross-examined Hall. Moreover, in its order denying Shorts' petition, the district court concluded that it had "no reason to believe that there was anything that counsel could have done to call the fingerprint evidence into question." The district court correctly concluded that Shorts did not demonstrate that trial counsel's representation fell below an objective standard of reasonableness.

Further, Shorts failed to demonstrate that trial counsel's alleged errors prejudiced him. Shorts did not claim that the fingerprint on the book containing the cocaine was not his. Shorts did not claim that an independent expert would have contradicted Hall's testimony. Shorts did not claim that he did not possess the cocaine. What Shorts did claim is

⁷Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)). See also Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000).

that the State presented no eyewitness testimony that shows that either he possessed or discarded the cocaine. These facts were clearly established by defense counsel at trial; thus, Shorts was not prejudiced in this regard.

After reviewing the record on appeal, we cannot say that the jury's verdict is unreliable. Because Shorts has failed to establish a reasonable probability that, but for defense counsel's failures, the outcome of the trial would have been different, we conclude that the district court did not err in denying his petition.

Excessive sentence

Shorts next contends that a life sentence with the possibility of parole for possessing cocaine is excessive and amounts to cruel and unusual punishment.

Our review of the record on appeal reveals that the district court did not err in denying this claim. Absent good cause for not raising them before, a petitioner waives all challenges that could have been raised on direct appeal.⁸ Because Shorts did not raise this issue on direct appeal, it is waived. Moreover, Shorts' claim is without merit. The district court enjoys wide discretion in sentencing, and we will not disturb a sentence that is within statutory limits and that is not based on impalpable or highly suspect evidence.⁹ At the time Shorts committed his offense in October of 1995, NRS 453.3385(3) provided for a sentence of life in prison with the possibility of parole or for a definite term of not less than twenty-

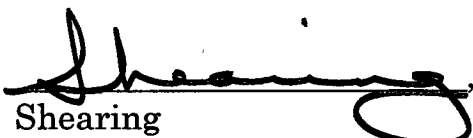
⁸NRS 34.810(1)(b)(2).

⁹Lloyd v. State, 94 Nev. 167, 576 P.2d 740 (1978); Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976).

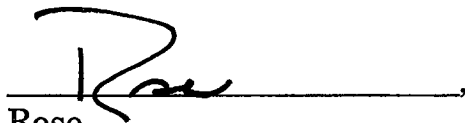
five years.¹⁰ Shorts' life sentence is within the statutory limits. In addition, Shorts did not assert that the district court relied on any improper evidence in sentencing him. And our review of the record does not reveal the use of any suspect evidence during the sentencing proceedings. We therefore conclude that the district court did not abuse its discretion in sentencing appellant to life with the possibility of parole in the Nevada State Prison. We also conclude that appellant's sentence was not cruel and unusual or disproportionate to his offense.¹¹

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.¹² Accordingly, we

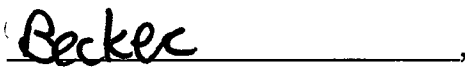
ORDER the judgment of the district court AFFIRMED.¹³



Shearing J.



Rose J.



Becker J.

¹⁰1995 Nev. Stat., ch. 443, § 296 at 1288.

¹¹See Harmelin v. Michigan, 501 U.S. 957 (1991).

¹²See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹³We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Steven P. Elliott, District Judge
Attorney General/Carson City
Washoe County District Attorney
Terry Glen Shorts
Washoe District Court Clerk