IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER QUINN ELVIK,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
E.K. MCDANIEL,
Respondent.

No. 37333

FILED

NOV 05 2002

CLERK OF SUPREME COURT
J. Richards

ORDER OF AFFIRMANCE

This is an appeal from the district court's denial of Peter Elvik's petition for a writ of habeas corpus in which Elvik contends that he was provided ineffective assistance of counsel in various instances at trial. We conclude that Elvik's trial counsel's performance did not fall below an objective standard of reasonableness, and thus we affirm the district court's order denying Elvik's writ of habeas corpus.

Under Strickland v. Washington,[1] to prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and (2) that the deficient assistance prejudiced the defense, i.e., that but for counsel's error, the result of trial would probably have been different.[2]

Elvik first argues that his trial counsel provided ineffective assistance by failing to conduct an adequate investigation into the possibility of Elvik's drug use on the night of the murder and presenting to

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[1]466 U.S. 668 (1984).

[2]Doyle v. State, 116 Nev. 148, 154, 995 P.2d 465, 469 (2000) (citing Strickland, 466 U.S. at 687-88, 694).

the jury how his alleged drug use may have affected his mental state at the time of the shooting. We conclude that trial counsel's exclusion of facts relating to Elvik's purported drug use was a valid trial tactic that is not subject to retrospective attack.[3]

Elvik next contends that trial counsel provided ineffective assistance by failing to demonstrate to the district court that Dr. Daniel Dugan's testimony was admissible at the suppression hearing and for failing to call Dr. Dugan to testify during the guilt phase of the trial. We conclude that trial counsel's performance did not fall below an objective standard of reasonableness because trial counsel made a reasonable attempt to get Dr. Dugan qualified to testify. Moreover, it is unlikely that the district court would have suppressed Elvik's confession had Dr. Dugan testified because the court indicated that the doctor's testimony would not have helped Elvik under the circumstances. Additionally, we conclude that trial counsel made a sufficient inquiry into the information pertinent to Elvik's defense before making the tactical decision to use Dr. Dugan's testimony during the sentencing phase instead of the guilt phase of the trial, thus precluding the ineffective-assistance challenge.[4]

Elvik next contends that trial counsel should have called his mother to testify at the suppression hearing. Once again, we conclude that this was a tactical decision, which cannot provide the grounds for an ineffective-assistance claim because the decision of whom to call as a

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[3]See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (noting that a strategy decision, such as who should be called as a witness, is a tactical decision that is "virtually unchallengeable absent extraordinary circumstances") (quoting Strickland, 466 U.S. at 691).

[4]See Strickland, 466 U.S. at 691.

witness is "virtually unchallengeable" unless there are "extraordinary circumstances," which are not present here.[5]

Elvik next contends that trial counsel provided ineffective assistance by failing to object to Elvik being in shackles in front of the jury during the last day of the guilt phase of trial. We disagree. We previously concluded, on direct appeal, that Elvik was not shackled on the last day of trial.[6]

Elvik next contends that trial counsel provided ineffective assistance by choosing not to seek a change of venue. We conclude that trial counsel's tactical considerations for not seeking a change of venue were valid and preclude Elvik's ineffective-assistance challenge.[7]

Elvik next contends that trial counsel provided ineffective assistance in choosing to pursue a self-defense theory. We again conclude that trial counsel's choice of a defense strategy is a valid trial tactic that is not subject to retrospective attack.[8]

Finally, Elvik contends that a conflict of interest existed between trial counsel and the prosecuting attorney such that the prosecutor should have declared a conflict and withdrawn. We need not address this issue as it was raised for the first time in Elvik's reply brief.[9]

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[5]Strickland, 466 U.S. at 691.

[6]Elvik v. State, 114 Nev. 883, 888-889, 965 P.2d 281, 285 (1998).

[7]Strickland, 466 U.S. at 691.

[8]See Howard, 106 Nev. at 722, 800 P.2d at 180.

[9]See Schatz v. Devitte, 75 Nev. 124, 127 n.6, 335 P.2d 783, 785 n.6 (1959) (disregarding an argument made for the first time in an answering

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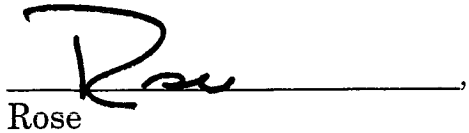
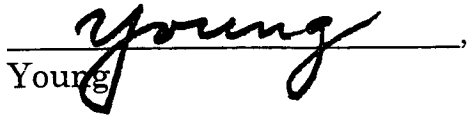
Accordingly we,

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



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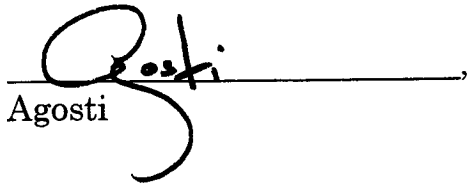

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cc: Hon. Michael R. Griffin, District Judge
Law Office of Thomas C. Michaelides
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk

. . . *continued*
supplemental brief because the party had ample opportunity to raise the issue before).