

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAVOR C. SPARKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37727

FILED

APR 24 2002

ORDER OF AFFIRMANCE

JANET M. BLOOM
CLERK OF SUPREME COURT
BY *Richard*
CHIEF DEPUTY CLERK

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 April 14, 1998, the district court convicted appellant, pursuant to a jury verdict, of one count of first degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life with the possibility of parole in the Nevada State Prison. This court dismissed appellant's direct appeal.¹

On October 25, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On February 9, 2001, the district court denied appellant's petition. This appeal followed.

¹Sparks v. State, Docket No. 32192 (Order Dismissing Appeal, July 7, 2000).

In his petition, appellant raised several claims of ineffective assistance of trial counsel.² To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner 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.³ Furthermore, tactical decisions of defense counsel are virtually unchallengeable absent extraordinary circumstances.⁴

First, appellant argued that he was denied his Sixth Amendment right to effective assistance of counsel by his trial counsel's failure to object and argue that the jury instructions erroneously defined "reasonable doubt" as a lower standard than is constitutionally permissible. After reviewing the jury instructions given at trial, we determine that the jury was properly instructed on reasonable doubt

²Appellant raises the same issues underlying his ineffective assistance of counsel claims as independent constitutional violations. To the extent that these issues could have been raised on direct appeal, but were not, they are waived. Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). We nevertheless address these issues in connection with appellant's contention that he received ineffective assistance of counsel.

³See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

pursuant to NRS 175.211.⁵ Therefore, we are unable to conclude appellant's counsel was ineffective in this regard.

Second, appellant argued that he was denied his Sixth Amendment right to effective assistance of counsel by his trial counsel's failure to object and argue that the jury instructions blurred the distinction between first and second degree murder by confusing "malice," "premeditation," and "deliberation." Appellant's contention touches upon issues addressed in his direct appeal. The doctrine of the law of the case prevents relitigation of these issues.⁶ Further, "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."⁷ The jury was properly instructed on the distinction between first and second degree murder.⁸ Therefore, we are unable to conclude that appellant's counsel was ineffective in this regard.

⁵See Bolin v. State, 114 Nev. 503, 529-30, 960 P.2d 784, 801 (1998).

⁶See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975) (stating that the law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same).

⁷Id. at 316, 535 P. 2d at 799.

⁸Jury Instruction Number 12 reads in relevant part:

"A Murder which is not Murder of the First Degree is Murder of the Second Degree.

The distinguishing feature between first and second degree murder is the presence or absence of premeditation and deliberation. If the killing is done with malice, but without deliberation and

continued on next page . . .

Third, appellant argued that he was denied his Sixth Amendment right to effective assistance of counsel by his trial counsel's failure to object and argue that the jury instructions vaguely defined "implied malice" in terms of an "abandoned and malignant heart." Appellant challenged this instruction in his direct appeal and therefore this claim is barred by the doctrine of the law of the case.⁹ The jury was properly instructed on implied malice pursuant to NRS 200.020.¹⁰ Therefore, we are unable to conclude that appellant's counsel was ineffective in this regard.

Fourth, appellant argued that he was denied his Sixth Amendment right to effective assistance of counsel by his trial counsel's failure to object and argue that (1) the jury instructions did not properly define the elements of first degree murder because they failed to define "deliberation" independently from "premeditation," and (2) the jury

... continued

premeditation, that is, without the willful, deliberate and premeditated intent to take life which is an essential element of First Degree Murder, then the offense is Murder of the Second Degree.

In practical application this means that the unlawful killing of a human being with malice aforethought, but without a deliberately formed and premeditated intent to kill, is Murder of the Second Degree."

⁹Hall, 91 Nev. 314, 535 P.2d 797.

¹⁰See Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

instruction defining "implied malice" created a presumption that improperly shifted to the defense the burden of disproving malice. As noted above, these jury instructions were previously challenged in appellant's direct appeal and appellant's challenge was rejected by this court as meritless.¹¹ Thus, we cannot conclude that appellant's counsel was ineffective in this regard.

Next, appellant claimed that he was denied his Sixth Amendment right to effective assistance of counsel because his appellate counsel failed to successfully raise all of the above issues on direct appeal. We conclude that the district court did not err in denying this claim. Appellant failed to demonstrate that his counsel's performance was unreasonable or that he was prejudiced by appellate counsel's performance.¹² Furthermore, appellate counsel is not required to raise every non-frivolous issue on appeal and is most effective when every conceivable issue is not raised on direct appeal.¹³ Moreover, appellant's claims that appellate counsel failed to argue (1) that the jury instruction defining "implied malice" created a presumption that improperly shifted to

¹¹To the extent that appellant re-raised these issues as independent constitutional violations in his petition, the doctrine of the law of the case prevents further relitigation of these issues. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).


¹²See Strickland, 466 U.S. at 687; Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-1114 (1996).

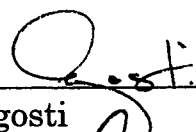
¹³See Jones v. Barnes, 463 U.S. 745 (1983); Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).


the defense the burden of disproving malice, and (2) that the jury instructions did not properly define the elements of first degree murder because they failed to define "deliberation" independently from "premeditation" are belied by the record. Appellate counsel thoroughly argued these contentions on direct appeal, but they were ultimately rejected by this court as meritless. Therefore, we are unable to conclude that appellant's counsel was ineffective in this regard.

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.¹⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Mark W. Gibbons, District Judge
Attorney General/Carson City
Clark County District Attorney
Lavor C. Sparks
Clark County Clerk

¹⁴See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).