

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE ANTONIO GOMEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86659-COA

FILED

MAY 28 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING*

Jose Antonio Gomez appeals from a district court order granting a motion to dismiss a postconviction petition for a writ of habeas corpus filed on August 26, 2021, and a supplement filed on August 23, 2022. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Gomez contends the district court erred by dismissing his claims of ineffective assistance of trial-level counsel without conducting an evidentiary hearing.¹ To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting

¹Gomez was represented by multiple attorneys at the trial level. One attorney represented Gomez at the preliminary hearing stage, a second at the trial stage, and a third at the sentencing stage.

the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687.

We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). A petitioner alleging that an attorney should have conducted a better investigation must demonstrate what the results of a better investigation would have been and how it would have affected the outcome of the proceedings. *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

First, Gomez claimed that preliminary-hearing counsel was ineffective because he failed to investigate the details of the crime and thus could not adequately cross-examine the victim at the preliminary hearing. Gomez alleged that the victim's testimony put Gomez in two different places at the Conex container at the time the fire was started and appeared to allege that counsel should have investigated the ignition source. Gomez failed to allege what counsel should have done to investigate these details of the crime. Further, Gomez failed to explain how the investigation of these details would have affected the outcome of the preliminary hearing or that counsel had reason to believe that the victim's preliminary hearing testimony would be admitted at trial. See *Sheriff v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (explaining the State need only present slight or marginal evidence to demonstrate probable cause to support a criminal

charge). In light of these circumstances, Gomez failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel acted differently. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Second, Gomez claimed that counsel was ineffective for failing to retain an investigator to locate the victim, resulting in the victim's preliminary hearing testimony being presented at trial instead of his live testimony. Gomez alleged the victim was in the Reno area and could have been brought to trial. Gomez failed to allege why counsel should have suspected the victim was in Reno or why objectively reasonable counsel would have investigated the victim's alleged presence in the Reno area, especially in light of the State's having filed an affidavit stating that the victim was in the San Francisco area. Accordingly, Gomez failed to demonstrate that counsel was deficient. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Third, Gomez claimed that counsel was ineffective for failing to challenge the admission of the victim's preliminary hearing testimony at trial as violative of his right to confrontation. Gomez also claimed that counsel should have investigated "the service of the subpoena to testify at trial." The transcript of a witness's preliminary hearing testimony may be admitted into evidence at trial without violating the defendant's right to confrontation if the defendant was represented by counsel at the preliminary hearing, the defendant had an opportunity to cross-examine the witness, and the witness is shown to be actually unavailable at the time of trial. *See State v. Eighth Jud. Dist. Ct. (Baker)*, 134 Nev. 104, 107-08, 108 n.1, 412 P.3d 18, 22 & n.1 (2018). A witness is unavailable when the

State “has exercised reasonable diligence but has been unable to procure the declarant’s attendance.” NRS 51.055(1)(d).

The district court found that Gomez was represented by counsel at the preliminary hearing and counsel cross-examined the victim. These findings are supported by the record. The district court also found that the victim was unavailable because he failed to appear for trial despite the State serving the victim with subpoenas for trial, providing the victim with dates for a pretrial conference, and keeping in regular contact with the victim. These findings are also supported by the record. In addition, Gomez failed to allege why objectively reasonable counsel would have investigated the service of the subpoenas or what the results of any investigation would have been. Accordingly, Gomez failed to demonstrate counsel was deficient or a reasonable probability of a different outcome had counsel acted differently. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Fourth, Gomez claimed that counsel was ineffective for failing to challenge the statutory scheme allowing the admission of the victim’s preliminary hearing testimony at trial. Gomez’s bare claim failed to allege the grounds on which counsel should have challenged the statutory scheme. Accordingly, Gomez failed to demonstrate counsel was deficient or a reasonable probability of a different outcome had counsel acted differently. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Fifth, Gomez claimed that counsel was ineffective for failing to adequately cross-examine the fire investigator. Gomez alleged that (1) the fire investigator testified that the fire started in the center of the Conex container and (2) this testimony conflicted with the victim’s preliminary

hearing testimony that he saw a trail of fire coming into the Conex container. The victim also testified that gas was thrown on him and that it came from above his head. Gomez alleged that counsel should have asked the fire investigator if there was a hole in the top of the Conex container and access to the top of it.

Counsel cross-examined the fire investigator about the origin of the fire. The investigator explained that he was quite certain ignition took place inside the container, there was no indication that the fire started outside the container, and he found no evidence of a gas trail or that gas was thrown from a distance. Gomez did not allege what additional questions counsel should have asked. Gomez also failed to allege what the fire investigator's responses to the questions about the hole and access would have been. Further, counsel argued during closing argument that the fire investigator's testimony regarding where the fire started was inconsistent with the victim's testimony. In light of these circumstances, Gomez failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel acted differently. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Sixth, Gomez claimed that counsel was ineffective during his cross-examination of the fire investigator when he allowed the witness to testify about whether the element of malice, which is required to support an arson conviction, was satisfied. Gomez alleged this testimony invaded the province of the jury. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." NRS 50.295. In *Pundyk v. State*, the Nevada Supreme Court clarified the permissible scope of expert

testimony regarding ultimate issues where an expert witness sought to testify about the defendant's ability to form the requisite intent at the time of the offenses. 136 Nev. 373, 377, 467 P.3d 605, 608 (2020). The court held that the district court improperly limited the expert testimony by not allowing the expert to opine about the defendant's mental state at the time of the offense. *Id.* at 377, 467 P.3d at 608-09. However, the court also held that an expert witness may not offer testimony that amounts to a legal conclusion, such as whether a defendant is not guilty by reason of insanity. *Id.* at 376, 467 P.3d at 608.

Counsel asked the fire investigator how he concluded the fire was arson as opposed to an accident. The fire investigator explained in order for him to conclude that a fire is arson, the setting of the fire would need to be a "malicious act," which he defined as "means, opportunity, and motive." The fire investigator explained that based on the totality of his investigation, including his review of statements made by Gomez and the victim, he concluded the fire was arson because "the defendant . . . met the means, the opportunity, and the motive in this, in this incident." When asked by counsel about the standard of proof he applied in reaching his conclusion, the fire investigator testified that he applied the "most probable" standard set out in the National Fire Protection Association guidelines for conducting fire and explosion investigations (NFPA 921) which meant "greater than 50 percent." When counsel asked how this standard compared to the legal standard of "preponderance," the investigator explained that he could not speak to anything that NFPA 921 does not address.

Here, the fire investigator's testimony did not invade the province of the jury. The testimony did not opine that Gomez acted with malice sufficient to convict him of arson beyond a reasonable doubt but

rather opined that there was a more than 50 percent chance the fire was the result of arson after considering information that Gomez possessed the means, motive, and opportunity to set the fire. In light of these circumstances, Gomez failed to demonstrate counsel was deficient or a reasonable probability of a different outcome had counsel acted differently. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Seventh, Gomez claimed that counsel was ineffective for failing to have the jury instructed on the State's burden to prove beyond a reasonable doubt that the fire was not accidental. This court determined on direct appeal that the trial court "impliedly instructed the jury that it must find that the fire was not an accident because Gomez must have had the requisite evil intent to start the fire to be found guilty." *Gomez v. State*, No. 78917-COA, 2021 WL 409435, at *4 (Nev. Ct. App. Feb. 4, 2021) (Order of Affirmance). Jurors are presumed to follow the instructions. *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). Accordingly, Gomez failed to demonstrate a reasonable probability of a different outcome had counsel acted differently. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Eighth, Gomez claimed that counsel was ineffective for failing to have the jury instructed on the lesser-included offense of second-degree arson or to question the fire investigator about whether the Conex container was a "class one" structure because the Conex container was not a structure for purposes of the first-degree arson statute. This court determined on direct appeal that the Conex container was a structure within the meaning of the first-degree arson statute. *Gomez*, No. 78917-COA, 2021 WL 409435, at *3; *see also* NRS 205.010(1) (defining first-degree arson as setting fire,

burning, or causing to burn a “[d]welling house or other structure or mobile home, whether occupied or vacant”). Accordingly, Gomez failed to demonstrate a reasonable probability of a different outcome had counsel acted differently. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Ninth, Gomez claimed that counsel was ineffective for failing to have the jury instructed “further” on the issue of arson of occupied personal property. Gomez’s bare claim failed to explain the instruction counsel should have sought. Accordingly, Gomez failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel acted differently. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Tenth, Gomez claimed that counsel was ineffective for failing to object to the jury seeing his unredacted videotaped interview. During a pretrial hearing, counsel stated that he did not oppose the State’s motion seeking to introduce Gomez’s videotaped police interview at trial on grounds that counsel believed the video helped the defense. This amounted to a strategic decision and Gomez failed to allege specific facts demonstrating extraordinary circumstances that would warrant challenging counsel’s strategic decision. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (stating “trial counsel’s strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances” (internal quotation marks omitted)). Accordingly, Gomez failed to demonstrate counsel was deficient or a reasonable probability of a different outcome had counsel acted differently. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Eleventh, Gomez claimed that counsel was ineffective for failing to investigate statements the victim made regarding who the perpetrator was. Gomez claimed that the victim told police that “Mason” threatened to light the victim on fire and told medical personnel that “he didn’t know who did this to him.” Gomez alleged that these inconsistencies in the victim’s story could have been used to challenge his credibility.

The district court concluded Gomez was not prejudiced because the victim identified Gomez as the perpetrator and Gomez was the only person who bought gas in a container from a nearby gas station around the time of the offense. While these findings are supported by the record, they do not support a conclusion that Gomez was not prejudiced. The victim’s credibility was key to the State’s case, and Gomez alleged the victim’s conflicting statements about the possible identity of the perpetrator could have been used to challenge the victim’s credibility. In light of these circumstances, we cannot conclude that the district court did not err by dismissing this claim without conducting an evidentiary hearing. Therefore, we reverse the district court’s dismissal of this claim and remand for the district court to conduct an evidentiary hearing on this claim.

Twelfth, Gomez claimed that counsel was ineffective for failing to object to hearsay testimony from two responding police officers and a paramedic who all testified that the victim stated to them that “Jose” lit him on fire. The victim’s identification of Gomez as the perpetrator was the most inculpatory piece of evidence in the case. But the victim testified that someone other than Gomez was present prior to the offense and argued about lighting the victim on fire. Gomez also alleged that the victim gave statements that someone other than Gomez may have been the perpetrator. In light of these circumstances, we cannot conclude that counsel was not

objectively unreasonable in failing to challenge the admission of the victim's hearsay statements. Further, the district court failed to make findings of fact and conclusions of law regarding this claim. Accordingly, we cannot conclude that the district court did not err by dismissing this claim without conducting an evidentiary hearing, and we reverse the district court's dismissal of this claim and remand for the district court to conduct an evidentiary hearing on this claim.

Thirteenth, Gomez claimed that counsel was ineffective for failing to object to a jury instruction providing that the jury could consider Gomez's pretrial statements as a circumstance tending to prove consciousness of guilt if it found the statements were false or deliberately misleading. Gomez argued that the instruction advised the jury to consider his trial testimony differently than that of other witnesses. Gomez failed to allege specific facts demonstrating a reasonable probability of a different outcome at trial had the instruction not been given. Accordingly, Gomez failed to demonstrate a reasonable probability of a different outcome had counsel acted differently. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Fourteenth, Gomez claimed that counsel was ineffective for failing to object to a jury instruction regarding the consideration of confessions because Gomez never confessed but maintained his innocence. Gomez's videotaped police interview was played for the jury, the detective who conducted the interview testified that Gomez never admitted to setting the victim on fire, and no other evidence was presented suggesting Gomez

confessed.² Accordingly, Gomez failed to demonstrate a reasonable probability of a different outcome had counsel objected to the instruction. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Fifteenth, Gomez claimed that counsel was ineffective for failing to investigate or question I. King's motive for convincing the victim to testify. Gomez failed to allege what the results of the investigation would have been or how it would have affected the outcome at trial. Accordingly, Gomez failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel acted differently. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Sixteenth, Gomez claimed that counsel was ineffective for failing "to have the lighter tested to see if it even worked." Gomez alleged that testing would show that one of the lighters found inside the Conex container was the ignition source. The lighter in question was found outside the Conex container, and the fire investigator testified that the fire started inside the Conex container. In light of this evidence, Gomez failed to demonstrate a reasonable probability of a different outcome had counsel had the yellow lighter tested. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Seventeenth, Gomez claimed that counsel was ineffective for introducing "bad acts" by telling the jury that Gomez had been released

²Detective D. Allen testified that his contact with Gomez lasted approximately four hours, during which time several breaks were taken. The State did not play the sections of the video in which Gomez was not being interviewed.

from jail before the fire was set. Gomez alleged this gave the jury a bad impression of him. Prior to counsel's statement, the jury heard testimony that Gomez had been released from jail prior to the offense and the trial court gave an instruction at Gomez's request stating that the jury could only consider the evidence of Gomez's prior arrest and release from jail for the limited purpose of establishing a timeline between his release and the commission of the offense. Jurors are presumed to follow the instructions. *Summers*, 122 Nev. at 1333, 148 P.3d at 783. In light of these circumstances, Gomez failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel acted differently. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Eighteenth, Gomez claimed that sentencing counsel was ineffective for failing to present mitigation evidence at sentencing in the form of mental health records and a psychological risk assessment that should show he was not a risk to reoffend. Gomez did not allege that he had mental health issues, what they were, or how the presentation of them would have changed the outcome at sentencing. He also did not allege that a psychological risk assessment had been prepared, why objectively reasonable counsel would have asked for one, or why he believed that an assessment would conclude that he was not a risk to reoffend. Accordingly, Gomez failed to demonstrate that counsel was deficient or a reasonable probability of a different outcome had counsel acted differently. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Gomez also contends the district court erred by dismissing his claims that postconviction counsel was ineffective. Because the

appointment of postconviction counsel was not statutorily or constitutionally required, *see McKague v. Warden*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996), Gomez was not entitled to the effective assistance of postconviction counsel, *see Crump v. Warden*, 113 Nev. 293, 303 n.5, 934 P.2d 247, 253 n.5 (1997); *see also Brown v. McDaniel*, 130 Nev. 565, 571, 331 P.3d 867, 871-72 (2014). Therefore, he is not entitled to relief based on this claim, and we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.³


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Kathleen M. Drakulich, District Judge
Jose Antonio Gomez
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

³In light of this court's disposition, the district court may wish to entertain any requests for the appointment of new postconviction counsel.