

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 38780

ANTHONY ROSS BLACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

FILED
MAY 6 2003

MAY 6 7 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Rubardt*
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying appellant Anthony Ross Black's post-conviction petition for a writ of habeas corpus.

A jury convicted Black of one count of first degree kidnapping, one count of lewdness with a child under the age of fourteen, and five counts of sexual assault with a minor under the age of sixteen. The proofs at trial depicted various instances of masturbation, oral and digital sexual assault, and urination involving the child victims.

DISCUSSION

Black alleges his counsel was ineffective for failing to (1) investigate the background of the child-victim, (2) request a psychological examination for the child-victim, (3) produce expert witnesses, and (4) object to statements made by officer witnesses. Black also claims (5) his Sixth Amendment right to confront witnesses was violated and (6) the cumulative effect of alleged errors prevented him from receiving a fair trial.

We have stated that "[c]laims of ineffective assistance of counsel are properly presented in a timely, first post-conviction petition for

a writ of habeas corpus."¹ To prevail on a claim for ineffective assistance of counsel, a defendant must show that his counsel's performance was both deficient and prejudicial.²

However, "[a] defendant seeking post-conviction relief cannot rely on conclusory claims" but is required to support his assertions "with specific factual allegations that if true would entitle him" to relief.³ It follows that a defendant does not have a right to an evidentiary hearing concerning claims made in his petition if these claims are repelled or belied by the record.⁴

A thorough review of the record reveals Black's claims of ineffective assistance of counsel are wholly without merit. Black has not shown his counsel to be deficient or that he was prejudiced by his counsel's actions.

First, Black claims his trial counsel was ineffective for failing to properly investigate the child victim's background and refusing to hire Robert Temple, an investigator contacted by Black. We conclude the evidence was overwhelming and the slight benefit that could have been obtained did not affect the trial outcome.

Second, Black alleges trial counsel was ineffective for refusing to seek a psychological examination of the child-victim. A defendant is entitled to have a child-victim psychologically examined if he provides a

¹Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001).

²Id. (citing Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996)) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

³Id. at 621, 28 P.2d at 507.

⁴Id.

compelling reason for the examination.⁵ This court weighs three factors to determine whether a compelling reason existed. The factors are (1) whether the prosecution used a psychological expert; (2) minimal or no corroboration beyond the child victim's testimony; and (3) a reasonable basis for believing the emotional or mental state of the victim might have had an effect on her veracity.⁶ Black's counsel might have thought a request for a psychological examination imprudent without a compelling reason. Evidence of Black's guilt was overwhelming and the prosecution did not present evidence of the child-victim's psychological state of mind. Further, the record does not reflect that the child-victim's veracity was affected by her emotional or mental state. We therefore conclude this claim is without merit.

Third, Black claims trial counsel was ineffective for failing to call witnesses on several matters.

At trial, the State argued the child-victim's bodily fluids were located in Black's vehicle, but could not be recovered due to the vehicle's post-accident condition. Black claims an expert witness should have been retained to rebut the State's theory by stating it was possible to recover evidence from his vehicle. We conclude forensic tests of Black's vehicle would have been useless due to its post-accident condition. Trial counsel cross-examined officers about their failure to perform tests on the vehicle and challenged the State's contention that dirt and debris prevented the officers from finding evidence of the sexual assault. Trial counsel was not ineffective for opting to forego an expert witness to testify that there was a

⁵Koerschner v. State, 116 Nev. 1111, 1116, 13 P.3d 451, 455 (2000).

⁶Id. at 1116-17, 13 P.3d at 455.

remote possibility evidence could have been retrieved from Black's vehicle.

Scripts Black wrote while incarcerated for a prior rape conviction were admitted into evidence. The scripts describe his sexual fetish for coprophilia and uriphilia and sexual fantasies in connection with his fetish. Black asserts an expert witness should have been called to mitigate the damaging effect of the scripts by explaining they were written as part of a relapse prevention program. . This court held it was harmless error to admit the scripts on direct appeal because the evidence of Black's guilt was overwhelming. We conclude counsel made a sufficient effort to minimize the damaging effect of the scripts by having Black explain the reason for the scripts and the circumstances under which they were written. Trial counsel also downplayed the significance of the scripts during closing argument.

Black also argues counsel should have produced character witnesses to dispute the child-victim's good character. NRS 50.085(2) provides that "[e]vidence of the reputation of a witness for truthfulness or untruthfulness is inadmissible." In addition, NRS 48.045(2) prohibits "[e]vidence of other crimes, wrongs or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." We conclude that any prior act committed by the child-victim would have been prohibited for the purpose of tarnishing her character or reputation for truthfulness.

Fourth, Black claims counsel was ineffective for failing to object to statements made by an officer witness from the Oregon Police Department. The officer testified about Black's rape of a frail, elderly woman who lived in Black's apartment complex at a time when Black

lived in Oregon. At the Petrocelli⁷ hearing and trial, the officer testified that the elderly-victim attributed a large wet area on her mattress to a bladder control problem. He also stated his belief that the elderly-victim made up the story about how her mattress became soiled because she was too embarrassed to admit Black made her urinate and defecate on him. This testimony was used to help establish Black's motive, intent and modus operandi. In both cases the State elicited clear and convincing evidence that Black forced the victims to perform deviant acts involving bodily excretion. Black argues counsel was ineffective for failing to object to the officer's belief that Black forced the elderly-victim to urinate and defecate on him. We conclude the evidence was clear and convincing that Black's assault of the elderly-victim involved bodily excretion. An officer testified that the elderly-victim said Black raped her, sodomized her, and forced her to perform fellatio on him. Fecal matter was found on the elderly-victim's body. Further, Black admitted during an interview with Oregon police that he forced the elderly-victim to urinate and defecate on him.

Furthermore, Black is barred from raising a confrontation clause claim regarding prior statements made by the elderly-victim because he did not raise this claim on direct appeal.⁸


⁷See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

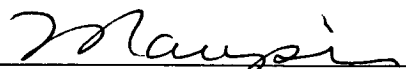
⁸NRS 34.810(1)(b)(2).

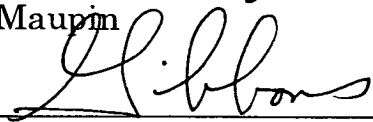
Lastly, the cumulative effect of Black's alleged errors was insufficient to deprive him of a fair trial because his claims of error are meritless.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Michael A. Cherry, District Judge
Law Office of Betsy Allen
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk