IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK M. PECK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38835

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Frank M. Peck appeals the district court's dismissal of his petition for a writ of habeas corpus. In his petition, Peck alleged that he received ineffective assistance from his counsel at trial and on direct appeal. We conclude that the district court erred by dismissing Peck's petition without an evidentiary hearing because Peck's petition contained allegations pertaining to his counsel's failure to poll the jury at his first trial that, when taken as true, would entitle Peck to relief. However, Peck's remaining allegations are without merit. Accordingly, we conclude that the district court's dismissal of Peck's petition for a writ of habeas corpus should be affirmed in part, reversed in part and remanded for further proceedings.

A claim for ineffective assistance of counsel arises when: (1) the "counsel's performance was deficient"; and (2) the "deficient performance prejudiced the defense."[1] When reviewing a district court's decision to dismiss a post-conviction petition that raised claims of ineffective assistance, the question facing this court is not whether the appellant proved that his counsel was ineffective, but whether the

[1]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

appellant was entitled to an evidentiary hearing based upon the allegations in his petition.[2] A petitioner is entitled to an evidentiary hearing on a petition for post-conviction relief if: (1) he makes specific factual allegations that are not repelled by the record; and (2) his allegations, when taken as true, entitle him to relief.[3]

The district court erred when it concluded that Peck was not entitled to an evidentiary hearing. First, Peck's direct appeal did not address whether his counsel should have polled the jury before the mistrial was declared; and second, Peck's petition set forth specific factual allegations of ineffective assistance that, if true, would entitle him to relief. We conclude that this issue is properly brought via petition for post conviction writ of habeas corpus. Peck has essentially alleged that his trial counsel threw away a valid not guilty verdict on the digital assault count by failing to poll the jury. In support of this allegation, Peck has offered to elicit admissible testimony from his former trial counsel, the bailiff and the jurors.[4] Peck asserts that his trial counsel was aware that

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[2]Drake v. State, 108 Nev. 523, 525, 836 P.2d 52, 53 (1992).

[3]Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994).

[4]While the State contends that Peck is prohibited from offering evidence that the jury would have acquitted Peck, NRS 50.065 merely prohibits a juror from testifying as to what caused her or another juror to reach a particular verdict, not from testifying about what verdict the jury reached. Additionally, the rules of professional conduct do not prohibit Peck's trial counsel from testifying about the nature of the legal services he rendered to Peck. See SCR 156(3)(b) (permitting an attorney to reveal information "to respond to allegations in any proceeding concerning the lawyer's representation of the client"); SCR 178(1)(b) (permitting a lawyer to testify as to the nature and value of the legal services rendered to a client).

the jury had reached a verdict on both of the assault counts and was deadlocked over the voluntariness verdict form. While the State posits that Peck's trial counsel may have made a tactical decision not to poll the jury, under the circumstances, there was nothing to be lost by abiding by the common practice of polling the jury. Therefore, we conclude that the district court erred when it dismissed Peck's petition for a writ of habeas corpus because Peck's allegations warranted an evidentiary hearing.

Peck also asserts that there were several other instances of ineffective assistance by his trial and appellate counsel that warranted an evidentiary hearing. However, these allegations do not warrant an evidentiary hearing because, unlike Peck's claim concerning his counsel's failure to poll the jury, Peck has failed to demonstrate how he was prejudiced by these other instances of alleged ineffective assistance.[5] Accordingly, the district court did not err when it concluded that these other alleged instances of ineffective assistance did not warrant an evidentiary hearing.

Peck further asserts that the district court erred when it dismissed his petition for a writ of habeas corpus because the district court in his first trial committed fundamental judicial misconduct by failing to poll the jury. However, Peck is not entitled to an evidentiary hearing on this issue because it was addressed on direct appeal within the context of his double jeopardy claim, and accordingly, Peck is bound by that

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[5]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that a petitioner was not entitled to post-conviction relief to the extent that his petition relied upon bare allegations).

determination.[6] Furthermore, even if we viewed this allegation as being distinct from the double jeopardy claim, Peck would still be barred from raising the claim because it could have been raised on direct appeal.[7] Accordingly, the district court did not err when it concluded that Peck was not entitled to an evidentiary hearing with regard to the district court's failure to poll the jury in his first trial.

Based on the above, we conclude that this case should be remanded for an evidentiary hearing with regard to the alleged ineffective assistance of Peck's trial counsel in failing to poll the jury at his first trial. Since the district court judge from Peck's first trial may be called as a witness, we further direct that this case be assigned to a different district court judge on remand. Accordingly, we

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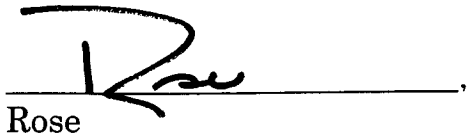
[6]See Hogan v. Warden, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993) (noting that a petitioner cannot circumvent the doctrine of the law of the case by merely recasting the arguments he made on his direct appeal); Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (noting that "'[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same'") (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)).

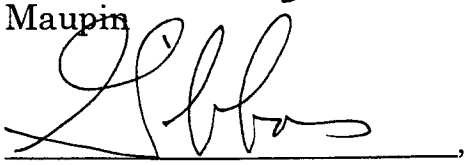
[7]See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (noting that "claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings"), overruled in part on other grounds in Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223-24 (1999).

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.



_____, J.
Rose

_____, J.
Maupin



_____, J.
Gibbons

cc: Hon. Steven R. Kosach, District Judge
Robert E. Glennen III
Attorney General Brian Sandoval
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk