IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN SUADE SLOTTO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38984

FILED

DEC 11 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Justin Slotto appeals from a district court order denying his petition for a writ of habeas corpus. We conclude that Slotto's arguments are meritless, and accordingly, we affirm the district court's order.

Slotto argues that he received ineffective assistance of counsel at trial. "'[W]hether a defendant has received ineffective assistance of counsel at trial . . . is a mixed question of law and fact . . . subject to independent review.'"[1] However, the district court's factual findings as to the claim are entitled to deference on review and should be affirmed if supported by substantial evidence.[2] A petitioner must satisfy a two-prong test to obtain relief on a claim for ineffective assistance of counsel. First, a petitioner must show that his "counsel's performance was deficient, i.e., counsel's representation fell below an objective standard of reasonableness."[3] Second, the petitioner must show the deficient performance created "'a reasonable probability that, but for counsel's

[1]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (quoting State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993)).

[2]Id. at 647, 878 P.2d at 278.

[3]McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland v. Washington, 466 U.S. 668, 687-89 (1984)).

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."'[4] Prejudice is presumed if an actual conflict of interest adversely affects a counsel's representation.[5] This court does not need to consider both prongs if the petitioner cannot prove either one.[6] Additionally, "[c]ounsel's performance is measured by an objective standard of reasonableness which takes into consideration prevailing professional norms and the totality of the circumstances."[7] Finally, there is a presumption that counsel was effective, which can only be overcome by "'"strong and convincing proof to the contrary."'"[8]

First, Slotto argues that he received ineffective assistance of counsel due to the divided loyalties of his attorney, Gene Drakulich. A conflict exists when an attorney is placed in a position creating divided loyalties.[9] Slotto maintains that Drakulich had divided loyalties between the preservation of his relationship with his cousin, who Slotto asserts was the victim's lover, and his representation of Slotto.

Substantial evidence supports the district court's determination that Drakulich had no actual conflict of interest regarding

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[4]Id. (quoting Strickland, 466 U.S. at 687-89).

[5]Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992).

[6]McNelton, 115 Nev. at 403, 990 P.2d at 1268 (citing Strickland, 466 U.S. at 697).

[7]Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996).

[8]Id. (quoting Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991) (quoting Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981))).

[9]Clark, 108 Nev. at 326, 831 P.2d at 1376 (1992); see also SCR 157(2).

his cousin's relationship with the victim, and therefore, satisfied the first prong of the test for ineffective assistance of counsel. When a trier of fact is presented with conflicting testimony, it is for the trier of fact to determine the weight and credibility to be given to the testimony.[10] The district court's findings will not be disturbed if they are supported by substantial evidence.[11] The district court found to be credible Drakulich's testimony that he disclosed to Slotto his cousin's relationship with the victim and that Slotto consented to Drakulich's continued representation. Likewise, the district court found Slotto's testimony that the relationship was not disclosed to him until after sentencing to be implausible. Miner testified that Drakulich had informed him of his cousin's relationship with the victim. Since Miner and Slotto's mother were extremely involved in Slotto's defense, the district court found Slotto's mother's testimony that she was never informed of the relationship by Miner to be incredible.

Furthermore, John Drakulich himself testified that he was merely a friend, albeit a close friend, of the victim. John Drakulich did not have any relevant testimony for the State's presentation, and, in fact, Drakulich was informed by the State that his cousin would not be a witness at trial. Slotto has not presented any evidence, other than his and his mother's testimony, that supports his contention that Drakulich was influenced by his cousin and that he encouraged Slotto to plead guilty so that Drakulich could maintain familial relationships. Therefore, substantial evidence supports the district court's determination that Drakulich had no actual conflict of interest regarding his cousin's relationship with the victim.

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[10]Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

[11]Id.

Second, Slotto asserts that his guilty plea was induced by an unrealistic threat concerning the possibility of the death penalty. The test for determining the validity of a guilty plea is "'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'"[12] The two-prong test for claims of ineffective assistance of counsel is applicable to claims arising out of the plea process.[13] While the first prong, the standard for attorney competence, remains the same, the second prong requires the petitioner to demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[14]

Slotto asserts that Drakulich coerced him into pleading guilty solely on the erroneous conclusion that the State was going to instate the death penalty against him. However, Slotto contends that the State was precluded from pursuing the death penalty pursuant to SCR 250, since at the arraignment the State informed the district court that it would not seek the death penalty. SCR 250(4)(c) requires the State to file a notice of intent to seek the death penalty within thirty days of filing the indictment or information. A late notice may be filed for good cause.[15] Before SCR 250 was amended, effective January 20, 2000, SCR 250(4)(a) required the State to declare at the defendant's first appearance before a magistrate whether it reserved the right to seek the death penalty.

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[12]Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

[13]Id. at 57.

[14]Id. at 59.

[15]See SCR 250(4)(d).

Regardless of whether Drakulich's advice regarding the death penalty was reasonably competent, we conclude that Slotto failed to show that his attorney's deficient performance caused a reasonable probability of a different result. Substantial evidence does not support Slotto's contention that the "fear" of the death penalty was his only reason for pleading guilty.

This court will not second-guess an attorney's tactics and trial strategies, even if hindsight provides the suggestion of better tactics.[16] Drakulich testified that he based his recommendation to plead guilty on many considerations, of which the possible instatement of the death penalty was but one. First, Drakulich recommended foregoing a trial because Slotto had confessed to the crime. After investigating Slotto's case, Drakulich saw no viable defense for the charges against Slotto. Although Slotto raised the possible defenses of heat of passion killing or self-defense, Drakulich did not believe that those defenses were justified. Second, Drakulich stated his opinion that Judge Mills Lane would be more "jaded" than a jury would be upon hearing the details surrounding the heinous nature of the crime, and therefore, less shocked by the circumstances of the crime. Third, Drakulich thought that by pleading guilty, Slotto would posture himself in a remorseful manner before the court, in an attempt to receive a sentence with the possibility of parole. Finally, Drakulich concluded that the law in 1994 permitted the State to reinstate the death penalty prior to trial. In that event, Drakulich felt that the prior bad act that the State was investigating would be an aggravating circumstance for sentence enhancement purposes. Drakulich

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[16]Wilson v. State, 99 Nev. 362, 372, 664 P.2d 328, 334 (1983).

wanted to avoid this scenario, and therefore, recommended that Slotto plead guilty before the State's investigation proceeded any further.

The district court found Slotto's testimony that Drakulich coerced him into pleading guilty with threats of the death penalty to be incredible. In contrast, the district court found Drakulich's and Miner's testimony that Drakulich merely mentioned the possibility that the State may consider revisiting the death penalty to be credible. Further, the district court found Drakulich's testimony that his plea recommendation was a consequence of several factors to be credible and legitimate. Therefore, the district court found that Drakulich acted reasonably and that Slotto's guilty plea was the product of many considerations. The district court decided that Slotto would have pleaded guilty even if the death penalty was not an issue, and substantial evidence supports that decision.

Accordingly, we ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Young

_____, J.
Rose

_____, J.
Agosti

cc: Hon. James W. Hardesty, District Judge
Scott W. Edwards
Attorney General
Washoe County District Attorney
Washoe District Court Clerk