IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD ROY SANTOS,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
E.K. MCDANIEL,
Respondent.

No. 39037

FILED

OCT 14 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Ronald Santos's post-conviction petition for a writ of habeas corpus. Appellant pled guilty to first-degree murder with the use of a deadly weapon for the shooting death of Judy Chappelle and was sentenced to two consecutive terms of imprisonment for life without the possibility of parole. This court affirmed appellant's conviction and sentence.[1] Appellant subsequently filed a timely first petition for a writ of habeas corpus. Counsel was appointed and filed a supplement to the petition. The district court denied appellant's petition following an evidentiary hearing. This appeal followed.

Appellant raises several claims of ineffective assistance of trial counsel. A claim of ineffective assistance of counsel is a mixed question of law and fact subject to independent review.[2] Nevertheless, the factual findings of a district court regarding a claim of ineffective assistance of counsel are entitled to deference on subsequent review so long as they are

[1]Santos v. State, Docket No. 27075 (Order Dismissing Appeal, December 17, 1997).

[2]State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

supported by substantial evidence and are not clearly wrong.[3] To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.[4] A petitioner must also demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pled guilty and would have insisted on going to trial.[5] Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound trial strategy.[6] A guilty plea is presumptively valid, and a petitioner has the burden of establishing that the plea was not entered knowingly and intelligently.[7]

Appellant first argues that "[r]easonable counsel would have verified [appellant's] accident theory of the shooting by employing a ballistics expert to testify that the gun automatically cocked and fired at the same time." In support of this claim, appellant apparently contends that his counsel should have recognized the need for a ballistics expert because two witnesses at different proceedings allegedly presented conflicting testimony as to whether appellant's gun required one or two motions of the hand to fire. Appellant concludes that if the weapon fired

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[3]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[4]Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

[5]Id. at 988, 923 P.2d at 1107; see also Hill v. Lockhart, 474 U.S. 52 (1985).

[6]Strickland v. Washington, 466 U.S. 668, 689 (1984).

[7]Paine v. State, 110 Nev. 609, 619, 877 P.2d 1025, 1031 (1994) (citing Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986)).

upon a single motion of the hand, an accidental shooting becomes more feasible and that appellant would have received a lesser sentence than life without the possibility of parole.

Appellant has failed to demonstrate that his trial counsel's failure to introduce the testimony of a ballistics expert was either objectively unreasonable or that he was prejudiced. The record belies appellant's claim. Both State witness Detective Larry Canfield and defense witness Mason Thatcher, III, testified that the gun was a "double-action" revolver, meaning that the gun both cocked and fired when the trigger is pulled. Thus, it was uncontested that the gun fired with one motion of the hand. Further, appellant's contention that the presentation of lay testimony on this matter "was damaging to [appellant]" is insufficient to demonstrate prejudice.[8] Thus, we conclude that appellant has failed to demonstrate that his trial counsel's failure to introduce the testimony of a ballistics expert constituted ineffective assistance.

Second, appellant claims that his trial counsel was ineffective for failing to investigate the scene of the victim's death. Appellant argues that such an investigation would have discovered the broken glass from the driver's-side window of the victim's vehicle by a tree. Appellant concludes that evidence of the broken window would have corroborated his version of events: that the window was shattered when the gun discharged in a struggle between appellant and the victim during which the victim drove her car into a tree. Appellant again contends that had evidence of an accidental shooting been obtained, he would have received a lesser sentence.

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[8]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that bare claims unsupported by any specific factual allegations will not entitle defendant to relief).

Even assuming that evidence of the broken window was discoverable, such evidence is not probative of whether the shot that shattered the window was intentional or accidental. Moreover, at the evidentiary hearing, appellant testified to his version of the incident. In its findings of fact and conclusions of law, the district court determined that appellant's account that the gun "malfunctioned or misfired [was] not credible." "On matters of credibility this court will not reverse a trial court's finding absent a clear showing that the court reached the wrong conclusion."[9] Appellant has failed to demonstrate that the court ruled incorrectly. We therefore conclude that appellant's claim of ineffective assistance of trial counsel is without merit.

Third, appellant contends that it was error for counsel to encourage him to plead guilty to first-degree murder "given the overwhelming evidence of the voluntary intoxication defense." In support, appellant asserts that he was taking Valium, Soma, Placidyl, Vicodin, and Talwin NX at the time of the shooting. Appellant also alleges that the testimony of his pharmacist, Avak Minassian, at appellant's evidentiary hearing, established that these prescription drugs can induce "irritability, anxiety, hallucinations, bad dreams, drowsiness, agitation, delirium, a mind-altering state, instability, poor judgment, thought process altering, and incapacity to make a decision." Appellant apparently concludes that had he gone to trial, a jury would have found him incapable of forming the specific intent to kill and that he would not have received the death penalty due to his intoxication. We disagree.

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[9]Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), modification on other grounds recognized by Harte v. State, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000).

First, the record belies appellant's characterization of Minassian's testimony. With regard to the prescription medications taken by appellant at the time of the shooting, Minassian testified that in his opinion none of the medications was "mind-altering" and that anxiety and irritability would only result if the medications were withdrawn. Further, Minassian testified that he did not recall appellant raising concerns regarding personality changes incident to his ingestion of his prescription drugs. Nor had he ever personally observed appellant to suffer any adverse effects from his medications. Second, as the district court points out in its findings of fact and conclusions of law, appellant's "own detailed account of the shooting . . . belies any suggestion that he was 'out of it' at the time of the shooting." Thus, we conclude that appellant has failed to establish that his trial counsel was ineffective for advising him to plead guilty to first-degree murder because he has failed to establish that a voluntary intoxication defense would have been viable.

Fourth, appellant argues that it was unreasonable for his trial counsel to allow him to enter a guilty plea "without the benefit of a psychiatric evaluation to determine his competence." Appellant also contends that the district court erred in failing to suspend his change of plea hearing when a doubt allegedly arose regarding appellant's competence. In support, appellant alleges that he was taking Mellaril, Sinequan and Zoloft when he entered his plea and that his trial counsel testified at the evidentiary hearing that appellant "appeared medicated at the entry of plea hearing." He also identifies his own testimony at the evidentiary hearing that when he entered his guilty plea he was "dizzy" and "lightheaded," that he found it difficult to stand up, and that he did not "understand completely and felt drunk." Appellant also alleges that his trial counsel indicated how he should answer the district court's questions by nodding her head. Further, appellant contends that had he

understood at his change of plea hearing that he might receive a sentence of life without the possibility of parole, he would not have entered the plea.

Appellant is not entitled to relief on these claims. To the extent that appellant claims error by the district court, it is beyond the scope of claims cognizable in his habeas petition; where the defendant has pled guilty, the only claims that may be raised thereafter are those involving the voluntariness of the plea itself and the effectiveness of counsel.[10] With regard to appellant's claim of ineffective assistance, it is belied by the record. First, at the evidentiary hearing, appellant's trial counsel acknowledged that she knew appellant was taking prescription medications, but that he appeared to understand what was going on when he pled guilty. She described him as "quiet," "respectful," "serious" and as "paying attention." She admitted that he seemed tired and depressed, but noted that "he was in a terrible situation." Appellant's trial counsel also testified that she perceived no grounds to petition the district court for a competency evaluation, although she had done so in the past with regard to other defendants she had represented. Second, following the evidentiary hearing, the district court concluded that appellant's "medication did not affect his understanding of the plea bargain or his decision to accept it," and that appellant's testimony to the contrary was not credible. Third, at appellant's change of plea hearing, after being asked whether anybody had threatened him or made promises to him to induce his plea, he responded, "Just what's been stated in the record." Appellant's response belies his claim that his trial counsel prompted all of appellant's answers by nods of her head because appellant was in a drug-induced haze and incapable of answering without such assistance.

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[10]NRS 34.810(1); Kirksey v. State, 112 Nev. 980, 999, 923 P.2d 1102, 1114 (1996).

Finally, appellant was fully aware that a sentence of life without the possibility of parole means precisely that. At the evidentiary hearing, appellant's trial counsel testified that she and appellant discussed whether life without "really meant what it said." Appellant's counsel then stated that she "told him that it did mean what it said." She also stated that appellant was "particularly frustrated by recent legislation" prohibiting the Pardons Board from commuting life-without sentences. And once again, the district court in its findings of fact and conclusions of law determined that appellant's testimony regarding his impairment at the time he entered his plea was not credible. Because we conclude that appellant has failed to establish that he was incompetent when he entered his plea, his claim of ineffective assistance lacks merit.[11]

Fifth, appellant claims that his counsel threatened and coerced him into pleading guilty to first-degree murder by advising him that only by pleading guilty could he prevent his two young sons from testifying at his trial because "the District Attorney would call them to testify." Appellant appears to argue that his counsel's advice was erroneous because one of his children was not competent to testify and the other child's testimony would have been "favorable" and in "keeping with his defense that the shooting was an accident."

Appellant's claim does not warrant relief. First, it is belied by the record. At appellant's change of plea hearing, the district court asked appellant whether anybody had threatened him or induced his plea with

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[11]Riker v. State, 111 Nev. 1316, 1325, 905 P.2d 706, 711 (1995) (holding that a defendant is competent if he has sufficient "'ability to consult with his lawyer with a reasonable degree of rational understanding' and a 'rational as well as factual understanding of the proceedings against him'") (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)).

"any promises." Appellant indicated that he entered his plea as a result of the plea bargain he had negotiated with the State. In his signed guilty plea agreement, appellant similarly affirmed that his plea was "freely, voluntarily [and] knowingly" entered and that it was "not the result of any threats, coercion or promises of leniency." Further, by pleading guilty appellant avoided prosecution for first-degree kidnapping and capital murder. Second, appellant has failed to demonstrate that his counsel's advice was erroneous. While a Washoe County Sheriff's detective testified at appellant's evidentiary hearing that he had interviewed appellant's children and believed the younger son was not competent to testify, the boy's competence was never formally determined. And it is far from clear that the older boy's testimony would have been favorable. In a transcript from an interview read into the record by the State at the evidentiary hearing, appellant's older son stated that appellant "shot his gun in the car" and that his "dad was the Terminator." Appellant's contention that this description "could be explained in an exculpatory way, for example, that [the victim] drove into a tree" is absurd. Finally, the record shows that appellant expected his sons to testify for the defense if he went to trial. As trial counsel explained at the evidentiary hearing, because only appellant and his sons were witnesses to the incident, "either he had to testify or they did." Because appellant "had some prior convictions," his trial counsel concluded that if either of appellant's children "could be competent, we would need them." Appellant testified at the evidentiary hearing that his counsel "was aware of how much [he] didn't want [his] little boys being put on the witness stand for fear of the traumatization that it would cause." Thus, the record shows that appellant was aware of his sons' possible testimony and chose to plead guilty.

Appellant next alleges that his post-conviction counsel should have requested a continuance of the evidentiary hearing to verify the

levels of appellant's prescription medications at the time he entered his plea. Appellant also claims that the district court erred in failing to suspend his evidentiary hearing to permit post-conviction counsel to so provide verification. We decline to review these issues, which were not properly raised in the district court.[12]

In sum, we conclude that the district court did not err in denying appellant's habeas petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Shearing, J.

Leavitt, J.

Becker, J.

cc: Hon. James W. Hardesty, District Judge
Attorney General/Carson City
Washoe County District Attorney
Mary Lou Wilson
Ronald Roy Santos
Washoe District Court Clerk

[12]See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).