IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE LAFAYETTE GARNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39203

FILED

MAR 21 2003

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

On August 16, 1999, the district court convicted appellant, Tyrone Lafayette Garner, pursuant to a jury verdict, of conspiracy to commit robbery (count I), burglary while in possession of a firearm (count II), robbery with the use of a deadly weapon (count III), first-degree kidnapping with the use of a deadly weapon (count IV), and first-degree murder with the use of a deadly weapon (count V). The district court sentenced Garner to serve in the Nevada State Prison a term of 16 to 72 months on count I; 40 to 180 months on count II, concurrent to count I; 72 to 180 months plus a consecutive term of 72 to 180 months on count III, concurrent to counts I and II; life with the possibility of parole after five years plus a consecutive term of life with the possibility of parole after five years on count IV, consecutive to counts III and V; and twenty to fifty

years plus a consecutive term of twenty to fifty years on count V, consecutive to count IV. This court affirmed Garner's conviction.[1]

On December 11, 2001, Garner filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Garner or to conduct an evidentiary hearing. On February 6, 2002, the district court denied Garner's petition. This appeal followed.

In his petition Garner claimed that there was insufficient evidence to establish a conspiracy and therefore he is "actually innocent," and that NRS 199.480 is unconstitutionally vague because it does not expressly define conspiracy. This court has previously determined that "the evidence was sufficient to prove the conspiracy charge,"[2] and that though "[t]here appears to be no comprehensive statutory definition of conspiracy" conspiracy is defined by this court's case law.[3] Garner cannot avoid the doctrine of the law of the case "by a more detailed and precisely

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[1]Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000), overruled by Sharma v. State, 118 Nev. ___, 56 P.3d 868 (2002).

[2]See Garner, 116 Nev. at 782, 6 P.3d at 1021, overruled by Sharma, 118 Nev. ___, 56 P.3d 868.

[3]See id. at 780, 6 P.3d at 1020.

focused argument subsequently made after reflection upon the previous proceedings."[4]

Garner also claimed that the indictment by which he was charged was "fatally flawed" because it did not list "conspiracy" as a separate count. Garner relies on NRS 199.480(1) which states that when two or more persons conspire to commit murder, robbery or kidnapping "each person is guilty of a category B felony." Garner seems to be under the impression this language supports his argument that no such offense as conspiracy to commit robbery exists. Garner contended that the indictment should have listed "Conspiracy . . . as a Count to which the prescribed fact of his innocence and/or guilt must be expressly made by a trier of fact." From this Garner concludes that the jury never found beyond a reasonable doubt that he conspired to commit robbery. This argument is without merit. Moreover, Garner waived this claim by failing to raise it on direct appeal.[5]

Next, Garner raised six claims of ineffective assistance of trial counsel. To establish ineffective assistance of counsel, a petitioner must show both that counsel's performance fell below an objective standard of

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[4]See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

[5]See Franklin v. State, 110 Nev. 750, 753, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

reasonableness and that the deficient performance prejudiced the defense.[6] To show prejudice, a petitioner must show a reasonable probability that but for counsel's errors the result of the trial would have been different.[7] "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."[8] A court may consider the two test elements in any order and need not consider both prongs if an insufficient showing is made on either one.[9]

First, Garner claimed that counsel was ineffective for failing to "move to have all convictions set aside." Garner theorized that because the conspiracy to commit robbery charge was "unconstitutionally duplicitous," his conviction on all the charges was illegal. Garner relies on his argument that NRS 199.480 is unconstitutionally vague. As discussed, the conspiracy to commit robbery charge was not improper. Therefore, Garner failed to establish that counsel was ineffective in this regard.

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[6]Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 431, 683 P.2d 504, 505 (1984).

[7]Strickland, 466 U.S. at 694.

[8]Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691) (abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000)).

[9]Strickland, 466 U.S. at 697.

Second, Garner claimed that counsel was ineffective for failing to challenge what he characterizes as the racially selective prosecution by the State. In support of this claim, Garner discussed two cases in which he claimed charges were not brought "against similarly situated white and/or prominent persons," Christopher Brady and David Cash, Jr. The facts of these cases as recounted by Garner are dissimilar to this case. Brady, a Las Vegas Metropolitan Police officer was with another officer who committed a murder. Cash was a "rich kid . . . college student" who witnessed the sexual assault by his companion of a child in a casino restroom; the child was then murdered. Garner argues that Brady and Cash could "very well have been" the getaway driver and lookout, respectively. Garner's claim that because these two men were not prosecuted as conspirators does not establish a prima facie case of unconstitutional selective prosecution.[10] Therefore, Garner failed to establish that counsel was ineffective in this regard.

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[10]See Salaiscooper v. Eighth Judicial District Court, 117 Nev. ___, ___, 34 P.3d 509, 516-17 (2001) ("The requisite analysis for a claim of unconstitutional selective prosecution is two-fold. First, the defendant has the burden to prove a prima facie case of discriminatory prosecution. To establish a prima facie case, the defendant must show that a public officer enforced a law or policy in a manner that had a discriminatory effect, and that such enforcement was motivated by a discriminatory purpose.") (citations omitted).

Third, Garner claimed that counsel was ineffective for failing to investigate and/or interview his co-defendant, Charles Randolph. Garner argued that such an investigation and/or interview "may have" resulted in: (1) a "liquor store witness" who "may have heard" Randolph say that Garner was giving him a ride to work; (2) Randolph "may have admitted" having gone to the residence of someone named Chester, who "may have critical information" and knowledge of Randolph's plans that day; (3) Randolph "may have" provided the name of another witness who could have testified as to Randolph's actions and "possible intentions" on the day in question; and (4) Randoph's uncle who "may very well have" provided the murder weapon. These claims are all based on speculation and are unsupported by any specific factual allegations that would, if true, have entitled Garner to relief.[11] Therefore, Garner failed to establish that counsel was ineffective in this regard.

Fourth, Garner claimed that counsel was ineffective for failing to interview potential witnesses "Moose," "Jay," "Chicago," "Jackson" and "Dave." According to Garner, these potential witnesses "could have and/or would have" refuted the testimony of State's witness Joanne McCarty, and undermined her credibility by informing the jury that she "was basically one of the so-called crack-hoes" [sic]. According to Garner these witnesses could have contradicted McCarty's testimony that after the murder took

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[11]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

place Garner changed his clothes, repeatedly removed and replaced money from his pocket "'like he had never had money before,'" told McCarty there was "heat" in the car, and removed the gun from the car and placed it behind a toilet in a hotel room. Even assuming that counsel could have located any of these people despite the fact that Garner "could not convey the complete identities of said individuals" and only provided his counsel with "their approximate locations and/or hangouts," Garner failed to show a reasonable probability that result of the trial would have been different had these people been interviewed. Therefore, Garner failed to show that counsel was ineffective in this regard.

Fifth, Garner claimed that counsel was ineffective for advising Garner to testify at trial when he knew that Garner had made prior statements to the police that could be used by the State to subject him to a "horrific impeachment attack." Garner obviously was aware that he had made prior statements to the police. Before Garner took the stand, the district court asked him if he understood that he could not be compelled to testify, that if he chose to give up his right not to testify and took the stand he would be subject to cross-examination by the State, and that the State would not be allowed to comment on his failure to take the stand if he chose not to testify. Garner answered "yes, sir" to each of these inquiries. Garner also confirmed that he had discussed his right not to testify with his attorney. Therefore, Garner failed to show that counsel was ineffective in this regard.

Sixth, Garner claimed that counsel was ineffective for failing to request a "cautionary" jury instruction regarding the credibility of State witness McCarty. Garner contended that he was entitled to such an instruction because McCarty was "an admitted crack-cocaine-addict, compound-admitted marijuana-user, compound-admitted alcoholic." McCarty's addiction was not established. McCarty stated on cross-examination that she had not used crack cocaine in almost one year, and that when she did she was not addicted. McCarty never stated that she was an alcoholic. She did however, state that she had used marijuana as recently as two weeks prior to her testifying.[12] The defense thoroughly cross-examined McCarty regarding her drug and alcohol use.[13] Jury instruction number seventeen cautioned the jury that "[t]he credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his

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[12]See U.S. v. Ochoa-Sanchez, 676 F.2d 1283, 1289 (9th Cir. 1982) ("An addict instruction is appropriate when a witness is a heroin addict, but is unnecessary in several situations, including: (1) when the addiction is disputed, [2] when the defense adequately cross-examines the witness about the addiction, and (3) when another cautionary instruction is given.") (citations omitted).

[13]See id.

recollections."[14] Therefore, Garner failed to show that counsel was ineffective in this regard.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Garner is not entitled to relief and that briefing and oral argument are unwarranted.[15] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[16]

Shearing, J.

Leavitt, J.

Becker, J.

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[14]See id.

[15]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[16]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Michael L. Douglas, District Judge
Tyrone Lafayette Garner
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk