IN THE SUPREME COURT OF THE STATE OF NEVADA

CLIFFORD STUBBS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39401

FILED

NOV 08 2002

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Clifford Stubbs'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 stabbing death of Jacqueline Marshall. The district court sentenced appellant to two consecutive terms of imprisonment for life without the possibility of parole. On direct appeal, having concluded that the State breached the plea agreement at appellant's sentencing hearing, this court vacated appellant's sentence and remanded for a new sentencing hearing.[1] On remand, a different district court judge sentenced appellant to two consecutive terms of imprisonment for life without the possibility of parole. This court affirmed appellant's sentence.[2]

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[1]Stubbs v. State, 114 Nev. 1412, 1415, 972 P.2d 843, 845 (1998).

[2]Stubbs v. State, Docket No. 34482 (Order of Affirmance, November 14, 2001).

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Appellant subsequently filed a timely first post-conviction petition for habeas relief in the district court. Counsel was appointed and filed a supplement. The State filed a motion to dismiss the petition in part, and appellant opposed the motion. At the evidentiary hearing on appellant's habeas petition, the district court initially granted in part the State's motion. Following the hearing on the remaining claims, the district court denied appellant's petition. This appeal followed.

Appellant alleges numerous instances of ineffective assistance of his trial and appellate counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness.[3] Further, a petitioner must demonstrate a reasonable probability that, but for trial counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.[4] The court need not consider both prongs if the defendant fails to make a showing on either prong.[5] "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668

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[3]See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

[4]See Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

[5]See Strickland v. Washington, 466 U.S. 668, 697 (1984).

(1984)."[6] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[7]

Appellant first contends that his appellate counsel should have argued that the district court judge erred in failing to conduct a Faretta[8] canvass when appellant moved before his resentencing to withdraw his plea. He alleges that he was required to prosecute his motion in proper person. The record belies appellant's claim. Having found that the Public Defender had a conflict in assisting appellant with his motion, the district court ordered appointment of new counsel. Further, at the hearing on appellant's motion to withdraw plea, conflict counsel Jack Alian conducted direct examination of all of the witnesses, successfully objected to the introduction of hearsay evidence by the State and repeatedly consulted with appellant throughout the proceeding. While appellant did elect to participate in the proceedings by questioning witnesses, appellant's characterization of Mr. Alian as "standby counsel" is not accurate.[9] We therefore conclude that appellate counsel did not err in

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[6]Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

[7]Id. at 998, 923 P.2d at 1114.

[8]Faretta v. California, 422 U.S. 806, 835 (1974) (providing that a criminal defendant who waives the right to counsel "should be made aware of the dangers and disadvantages of self-representation").

[9]Cf. People v. Jones, 811 P.2d 757, 773 (Cal. 1991) (holding that where a defendant "chooses to be represented by counsel and the trial

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failing to argue that appellant was improperly denied a Faretta canvass because appellant was represented by counsel at the hearing on his motion to withdraw plea.

Next, appellant argues that his appellate counsel failed to contend that the district court erred in "allowing counsel to testify directly adversely to [appellant] while the matter was pending" without canvassing him "about the voluntary waiver of attorney client privilege." Ostensibly appellant refers to his counsel's testimony at the hearing on his motion to withdraw plea. In support of this claim, appellant contends that "[e]ach of the public defenders that testified were duty bound to keep [appellant's] information to himself or herself and not to disclose it without [appellant's] consent." He further alleges that "[t]he simple filing of a motion to withdraw a guilty plea does not automatically waive the attorney-client privilege."

This claim does not warrant relief. First, appellant opened the door to his attorneys' testimony by alleging ineffective assistance of counsel as the basis for his motion. A lawyer may reveal information relating to representation of a client that "the lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client."[10] Second, appellant failed to

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court allows the defendant a limited role as cocounsel, the defendant has not waived the right to counsel").

[10]SCR 156(3)(b) (emphasis added).

support his assertion that the mere filing of his motion to withdraw plea did not "automatically waive the attorney-client privilege" with citation to any relevant authority.[11] Finally, appellant pursued his motion despite the opposition of his attorney, Deputy Public Defender Jennifer Lunt, and notwithstanding the district court's warnings that appellant carefully consider whether, in light of Ms. Lunt's concerns, he really wanted to withdraw his plea. A defendant who invites district court action perceived as favorable to him is estopped from claiming it as error on appeal.[12] Because we conclude that appellant's underlying claim regarding breach of the duty of confidentiality by his attorneys lacks merit, appellant's claim of ineffective assistance of appellate counsel must fail. Moreover, appellant will not be heard to complain of actions that he insisted upon taking in opposition to the advice of his counsel and the admonitions of the district court.

Next, appellant contends that his appellate counsel should have argued that his sentence is disproportionate to his crime. In support, appellant contends that the district court was improperly influenced by (1)

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[11]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

[12]See, e.g., Rhyne v. State, 118 Nev. ___, ___, 38 P.3d 163, 168 (2002) (holding that a defendant was estopped from claiming that the district court erred in allowing him to call a witness where the defendant asked the court for permission to call the witness after his attorney refused to do so).

the adverse testimony of his former counsel at the hearing on his motion to withdraw plea and (2) the State's "out and out attack" on appellant's credibility at the hearing. Appellant also contends that his being "clearly suicidal" after fatally stabbing the victim also establishes that his sentence is excessive and that his conduct "is not similar to those murder cases which normally result in consecutive life without sentences."

First, to the extent that appellant argues that the district court improperly sentenced him in reliance on evidence presented at the hearing on his motion to withdraw plea, appellant's claim is barred by the doctrine of the law of the case. On direct appeal after his second sentencing, appellant contended, among other things, that the district court "improperly heard other evidence before sentencing him." This court rejected appellant's claim, presuming that the district court "was able to disregard any improper argument by the State," noting that appellant had opened the door to the complained of evidence and concluding that appellant "ha[d] not shown that the district court considered any information that was irrelevant to his sentence or supported only by impalpable or highly suspect evidence."[13] The law of a first appeal is the law of the case in all subsequent appeals in which the facts are substantially the same.[14] Further, "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument

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[13]Stubbs v. State, Docket No. 34482 at p. 3.

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

subsequently made after reflection upon the previous proceedings."[15] Thus, appellant's claim, although now presented in the form of ineffective assistance of counsel, remains barred under the doctrine. Second, we perceive no basis for finding appellant's "attempted suicide" mitigating. Third, at the preliminary hearing, one witness testified that she saw the victim "dragging herself" in an effort to escape from appellant who "was pulling her in by the legs." On these facts alone appellant's sentence is not disproportionate to the crime. And a fortiori it is not disproportionate where, as here, a psychological evaluation found appellant extremely dangerous; appellant continued to excuse his conduct at his motion to withdraw plea and at his sentencing hearing; a representative of the Division of Parole and Probation informed the district court that appellant had been twice convicted for battering the victim and recommended two consecutive sentences of imprisonment for life without the possibility of parole; and where appellant murdered the victim in front of his and the victim's four-year-old child. Thus, we conclude that appellant has failed to demonstrate that his appellate counsel was ineffective in failing to argue that appellant's sentence "did not fit the crime."

Appellant next claims that his appellate counsel erred in failing to argue that following the State's breach of the plea agreement, appellant should have been allowed to elect his remedy and withdraw his plea. Appellant argues that "upon proving a breach of a plea bargain, [the

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[15]Id. at 316, 535 P.2d at 799.

defendant] has the ability to withdraw his plea, or ask for resentencing and specific performance of the plea bargain." Appellant further contends that "[a]bsent some hardship on the State, the election of remedies should belong to [appellant], as he was the victim of the breach of contract." Appellant cites a number of cases in support of this claim.

This claim lacks merit. The cases cited by appellant do not provide, as he implies, that upon breach of a plea agreement by the State, the aggrieved defendant may elect the remedy. This court did not address this issue in either Wolf v. State[16] or Cook v. Warden,[17] rendering appellant's reliance on these cases inapposite. And to the extent that other cases cited by appellant explicitly address this issue, they provide that the court has discretion to select the appropriate remedy upon a state's breach of a plea bargain.[18]

Appellant next contends that his trial counsel erred in advising him to plead guilty to first-degree murder for a number of reasons. First, appellant appears to argue that because he was sentenced

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[16]106 Nev. 426, 794 P.2d 721 (1990).

[17]91 Nev. 636, 541 P.2d 642 (1975).

[18]See Santobello v. New York, 404 U.S. 257, 263 (1971) (leaving "[t]he ultimate relief to which petitioner is entitled . . . to the discretion of the state court"); United States v. Taylor, 77 F.3d 368, 372 (11th Cir. 1996) (providing that upon breach of a plea agreement, "the choice between remedies is within our discretion"); United States v. Greenwood, 812 F.2d 632, 637 (10th Cir. 1987) (remanding and instructing the district judge to "determine the remedy which is appropriate in the circumstances").

to consecutive terms of imprisonment for life without the possibility of parole at his first sentencing hearing, the same sentence would necessarily result upon remand for a second sentencing hearing. Appellant thus concludes that he derived no benefit from remaining in the plea agreement. Second, appellant alleges that "the evidence supporting a manslaughter or second degree murder conviction was overwhelming." In support, appellant points to (1) his self-mutilation during the course of the murder; (2) his allegation that the victim was the initial aggressor and that she "caused [appellant] to go into a rage"; (3) an alleged lack of time in which to form the intent to kill; and (4) available testimony that appellant's "thought process was affected by pain medication, alcohol consumption and ingestion of cocaine." Appellant also appears to contend that trial counsel improperly advised him to plead guilty to avoid prosecution for capital murder.

Appellant is not entitled to relief on this claim. First, as discussed above, appellant and his counsel had no grounds to withdraw from the plea agreement after this court ordered a second sentencing. Second, ample, if not overwhelming evidence supported a finding of willful, deliberate and premeditated first-degree murder.[19] Evidence existed that when the victim attempted to escape from appellant, he pulled her back and continued to stab her. The victim sustained some

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[19]See NRS 200.030(1)(a) (providing that any kind of willful, deliberate and premeditated killing is murder of the first degree).

fourteen stab wounds. Dr. Jerry P. Nims, who testified for the defense at the evidentiary hearing on appellant's petition, failed to conclude that appellant was unable to form the intent to kill despite his alleged ingestion of drugs and alcohol or that he suffered from any major mental illness at the time of the killing. Appellant's testimony at the evidentiary hearing that the victim was the initial aggressor was not supported by the evidence recovered from the crime scene and was therefore not credible.[20] Thus, appellant has failed to establish any provocation on the part of the victim sufficient to mitigate the homicide to second-degree murder, much less manslaughter.[21] Finally, the record belies appellant's claim that his trial counsel erroneously suggested that absent appellant's guilty plea, the State would seek the death penalty. In a sworn affidavit, counsel for appellant stated that while he discussed the death penalty with appellant "during the initial stages of representation . . . the death penalty was not discussed immediately prior to his entry of a guilty plea." Further, at

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[20]Appellant testified at the evidentiary hearing that the victim removed the knife from a shelf. However, videotape of the crime scene showed a paramedic removing the knife's sheath from appellant's back pocket.

[21]Cf. Byford v. State, 116 Nev. 215, 236 n.4, 994 P.2d 700, 714 n.4 (2000) ("A homicide arising from an impulse of passion can be either second-degree murder or voluntary manslaughter depending on the circumstances."); see also NRS 200.040(2) (providing, in relevant part, that manslaughter "must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible").

appellant's plea canvass, appellant's attorney stated that in return for appellant's plea, the State had agreed to stipulate to two consecutive terms of life with the possibility of parole, and the same benefit is recited in appellant's signed written guilty plea agreement. We therefore conclude that trial counsel did not err in advising appellant to plead guilty to first-degree murder subject to the State's stipulation to two consecutive terms of imprisonment for life with the possibility of parole.

Next, appellant argues that his trial counsel conducted an inadequate investigation before advising him to plead guilty. Appellant particularly complains of his counsel's alleged failure to adequately pursue evidence of his psychological instability as demonstrated by the district court's receipt of a "partially written report" of psychiatrist Dr. Edward Lynn.

Appellant has failed to establish that his counsel's performance was deficient or that he was prejudiced. First, other than Dr. Nims's unavailing testimony, appellant offers nothing indicating that additional investigation would have discovered evidence that he suffered from any legally significant psychological disturbance either at the time of the crime or at entry of his plea. Further, at the evidentiary hearing on the instant petition, appellant's original lead counsel testified that he contacted Dr. Lynn and had him do a complete evaluation of appellant. When it became apparent that Dr. Lynn's evaluation did not aid in appellant's defense, however, defense counsel elected to forgo the completed written report. At the evidentiary hearing Jack Alian, who

represented appellant for purposes of his motion to withdraw plea and at his second sentencing hearing, confirmed that the Public Defender's Office had sought Dr. Lynn's earlier evaluation of appellant. Mr. Alian further testified that in light of that damaging evaluation, he feared that another psychiatric evaluation would only provide more detrimental evidence. Thus, we conclude that appellant's claim that his trial counsel conducted inadequate investigation does not warrant relief because appellant has failed to establish that further investigation would have discovered favorable psychological evidence.[22]

Next, we discern no merit to appellant's contention that Deputy Public Defender Jennifer Lunt's refusal to assist him with his motion to withdraw his guilty plea was unreasonable and prejudicial. Appellant was represented by competent counsel at the hearing on his motion to withdraw guilty plea.

Next, appellant argues that the State's "onslaught" upon appellant's credibility at the hearing on his motion to withdraw plea constituted "governmental intrusion into the attorney-client privilege" in violation of the Sixth Amendment. Appellant waived this claim by failing to raise it on direct appeal.[23]

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[22]See Strickland, 466 U.S. at 691 (providing that counsel must make a reasonable investigation in preparation for trial or a reasonable decision not to investigate).

[23]See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) (holding claims that are appropriate on direct appeal must be pursued on direct

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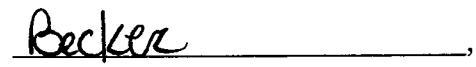
Finally, appellant alleges that the effects of cumulative error warrant reversal. This claim lacks merit because appellant has repeatedly failed to establish that any of his claims entitle him to relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


, J.
Shearing


, J.
Leavitt


, J.
Becker

cc: Hon. James W. Hardesty, District Judge
Attorney General/Carson City
Washoe County District Attorney
Karla K. Butko
Washoe District Court Clerk

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appeal, or they are waived), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).