

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN ANDRES REYES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39458

FILED

DEC 03 2003

ORDER OF AFFIRMANCE

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

This is an appeal from the district court's order denying Juan Andres Reyes's petition for a writ of habeas corpus. Reyes was convicted by a jury of first-degree murder, with the use of a deadly weapon. He was sentenced to two consecutive terms of life with the possibility of parole. Reyes appealed his conviction, which we dismissed,¹ and then brought a petition for writ of habeas corpus. The district court denied his petition without appointing counsel for Reyes or holding an evidentiary hearing. Reyes appealed the denial, and we ordered the district court to appoint counsel and to hold an evidentiary hearing. After the hearing, at which both Reyes and his trial counsel, Ralph Baker, testified, the district court again denied the writ petition. Reyes now appeals.

Although a claim of ineffective assistance of counsel is subject to independent review, the district court's factual findings as to the claim are entitled to deference.² To prove that his counsel was ineffective, the petitioner must show (1) that his "counsel's performance was deficient, i.e.,

¹Reyes v. State, Docket No. 25889 (Order Dismissing Appeal, November 30, 1995).

²Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001); see also McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999).

counsel's representation fell below an objective standard of reasonableness,"³ and (2) that prejudice was caused by the deficient performance, such that "there is a reasonable probability that, but for counsel's 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 This court does not need to consider both prongs if the petitioner cannot prove either one.⁵ To overcome the presumption that counsel was effective, the petitioner must show, by "strong and convincing proof,"⁶ that counsel's representation fell below "prevailing professional norms and that the challenged action was not sound strategy."⁷ Additionally, we measure counsel's performance by an objective standard of reasonableness in light of prevailing professional norms and the entire circumstances at the time of counsel's decision.⁸

Reyes contends that his trial counsel provided ineffective assistance because his attorney, Ralph Baker, asserted a self-defense theory when Reyes had denied that he was even in the state on the

³McNelson, 115 Nev. at 403, 990 P.2d at 1268 (citing Strickland v. Washington, 466 U.S. 668, 687-89 (1984)).

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

⁵Id. (citing Strickland, 466 U.S. at 697).

⁶Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996) (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))).

⁷Kimmelman v. Morrison, 477 U.S. 365, 381 (1986).

⁸Homick, 112 Nev. at 310, 913 P.2d at 1285.

evening of the killing. Reyes argues that his counsel had no right to argue against his defense strategy⁹ and that affidavits by Ernesto Gonzalez and Jafet Castellanos, stating that they were in Reyes's presence in Newark, New Jersey, on July 2, 1993, the date of the crime, support Reyes's defense theory. Reyes argues that if Baker could not find a viable alibi witness, he should have argued that the State failed to prove its case and that Reyes was not the killer because he was not present at the scene of the crime.

We conclude that Reyes's argument lacks merit. The record reflects that Reyes did not reveal these alibi witnesses to Baker at the time of trial. Baker testified at the evidentiary hearing that although Reyes maintained that he was not present in Nevada at the time of the killing, Reyes had never told him about Ernesto Gonzalez and Jafet Castellanos as potential alibi witnesses, and that the first time he had heard about them was when Reyes, with the help of newly appointed counsel, filed the petition for a writ of habeas corpus. Baker further testified that Reyes told him that a woman from New Jersey would contact him to verify that Reyes had been in New Jersey at the time of the shooting. Baker testified that he interviewed two women in his office on November 12, 1993. Although neither of the two women had personal knowledge that Reyes had gone to New Jersey, one of the women said that she gave Reyes \$250.00 to go to New Jersey in early June. Baker said the women gave him rent receipts and a letter from Shirley Ware, showing that Reyes was in New Jersey at the time of the killing. However, when Baker contacted Shirley Ware, she told him that the rent receipts were

⁹See Johnson v. State, 117 Nev. 153, 160, 17 P.3d 1008, 1013 (2001) (concluding that "trial counsel's presentation of the insanity defense against [the defendant's] express objections was per se improper").

falsified, that she had provided them to help Reyes secure an apartment in Las Vegas and that if she were called to testify at Reyes's trial, she would write the district court a letter stating that the receipts were false.

Baker further testified that he contacted Reyes's aunt, who confirmed that she had picked Reyes up in New Jersey two weeks before he began to work at Pride Products in New Jersey. The employment records at Pride Products indicated that Reyes was hired and began working there on July 26, 1993. Therefore, even if Reyes arrived in New Jersey two weeks before he began his job at Pride Products, he would have arrived after July 2, 1993, the date of the killing.

Baker also testified that two of Reyes's co-workers at Pride Products confirmed that Reyes had worked there, but they could not remember particular dates. Baker testified that, before the preliminary hearing, he informed Reyes that Shirley Ware had stated the rental receipts were false. Because Reyes still insisted that he was in New Jersey at the time, Baker continued to investigate possible alibi witnesses but failed to find a single viable alibi witness. Baker testified that some of the people who Reyes claimed were alibi witnesses indicated that Reyes was lying when he said he was in New Jersey on July 2, 1993.

Baker testified that he discussed defense theories with Reyes and indicated that he could not find a viable alibi witness. He further testified that, before closing arguments, he discussed the alibi defense with Reyes and indicated that if Reyes testified that he was not in Nevada on the date of the killing, Baker would not be able to argue credibly that Reyes acted in self-defense. Baker stated that Reyes then decided not to testify at trial.

Reyes testified at the evidentiary hearing that he told Baker about Ernesto Gonzalez and Jafet Castellanos. Reyes further testified that he told Baker that the victim's girlfriend's sister knew the identity of the victim's real killer. Reyes further testified that, at trial, Baker told him there was no need to testify because he had witnesses to testify on Reyes's behalf, but that the defense subsequently called no witnesses. Finally, he testified that when the district court judge canvassed him at trial as to whether he wished to testify on his own behalf, Reyes told him that his attorney instructed him not to testify.

The record reveals that the district court did not err by denying Reyes's writ petition. The evidence regarding Baker's failure to present an alibi defense was largely a credibility determination between Baker's testimony and Reyes's testimony. Determining the weight and credibility to give conflicting testimony is within the province of the trier of fact,¹⁰ and this determination will not be reversed absent clear error.¹¹ Evidence in the record bolstered Baker's testimony and contradicted Reyes's testimony. The transcript of Reyes's criminal trial shows that Reyes was extensively canvassed on his desire to testify. His responses to the judge's questions indicate that he voluntarily chose not to testify, not that he was instructed not to do so. Additionally, five witnesses, including a police officer, testified at trial that they saw Reyes at the party where the victim was shot on the night of the killing.

¹⁰Mulder v. State, 116 Nev. 1, 15, 992 P.2d 845, 853 (2000).

¹¹Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogation on other grounds recognized by Harte v. State, 116 Nev. 1054, 1072, n.6, 13 P.3d 420, 432, n.6 (2000).

Reyes's assertion that Baker's failure to follow Reyes's defense theory was per se reversible error is also without merit. Reyes argues that under Johnson v. State,¹² the presentation of a defense inconsistent with Reyes's assertion that he was not in Nevada on the date of the killing is per se improper. However, Johnson is distinguishable from Reyes's situation. In Johnson, the criminal defendant was initially allowed to represent himself as co-counsel, but because his competency became more tenuous as the trial date approached, the district court revoked its previous order allowing Johnson to represent himself as co-counsel and ordered defense counsel to serve as the sole legal representative.¹³ Defense counsel then put forth two defense theories: (1) self-defense, as Johnson wished; and (2) not guilty by reason of insanity.¹⁴ During several pre-trial hearings, Johnson strongly objected on the record to the insanity theory, arguing that it was inconsistent with his theory of self-defense.¹⁵ After the jury convicted Johnson of second-degree murder with the use of a deadly weapon, Johnson moved for a new trial.¹⁶ The district court denied his motion, and Johnson appealed, arguing that he had been deprived of his Sixth Amendment right to the meaningful assistance of counsel.¹⁷ This court reversed the district court's order, holding that "trial counsel's

¹²117 Nev. 153, 160, 17 P.3d 1008, 1013 (2001).

¹³Id. at 157-59, 17 P.3d at 1011-12.

¹⁴Id. at 160, 17 P.3d at 1013.

¹⁵Id. at 157-59, 17 P.3d at 1011-13.

¹⁶Id. at 160, 17 P.3d at 1013.

¹⁷Id.

presentation of the insanity defense against Johnson's express objections was per se improper" and that "such an error is not subject to harmless error analysis because it is a 'structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'"¹⁸

Here, in contrast, nothing in the record suggests that Reyes objected to Baker's failure to present an alibi defense. Reyes was informed all throughout the investigation that no alibi witnesses could be found. The district court's canvass of Reyes at trial shows that he voluntarily chose not to testify. Reyes's counsel's conduct was not per se reversible error because Reyes never objected to the defense put forth. We conclude that the record supports the district court's determination that Reyes received effective assistance in this regard.

Next, Reyes contends that he is entitled to a new trial based on ineffective assistance of counsel because Baker failed to adequately investigate possible alibi witnesses. Reyes contends that Baker's failure to adequately investigate the case is shown by Baker's admission that he did not send an investigator to New Jersey, or go to New Jersey himself, to interview possible witnesses. He further contends that Baker failed to investigate witnesses who would have impeached the testimony of Lisa Killen, the victim's girlfriend. Reyes contends that Killen's siblings indicated that she had identified someone else as the killer and that they have no motive to lie. Reyes asserts that Baker did not know about Killen's siblings because he only did a limited background investigation on

¹⁸Id. (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)).

Killen and did not even interview her. Reyes argues that this evidence would have devastated the State's case and warrants reversal.

"[D]efense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'"¹⁹ Counsel's performance is reviewed in light of the professional norms and totality of the circumstances at the time, not with the 20-20 vision of hindsight.²⁰ Baker testified that he did not know about Killen's siblings and that they did not come forward before trial. The record further shows that Baker undermined Killen's credibility by eliciting inconsistencies in her testimony, from her statements to police on the evening of the shooting, to the preliminary hearing, to her trial testimony.

Even if Baker had interviewed Killen and her family members prior to trial, it is far from certain that he would have uncovered evidence that Killen had identified someone other than Reyes as the killer. The affidavits by Killen's siblings, Phillip and Romona Killen, were made five years after the shooting and occurred after Phillip and Reyes met each other in prison. The affidavits are inconsistent with one another, as Phillip states he was present with Killen and a friend, "Mona," and Romona's affidavit states she was there with her sister, Lisa Killen, and

¹⁹State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (quoting Strickland, 466 U.S. at 691).

²⁰Evans, 117 Nev. at 622, 28 P.3d at 508 (stating that, when reviewing a habeas corpus writ petition claiming ineffective assistance of counsel, "[t]he reviewing court must try to avoid the distorting effects of hindsight and evaluate the conduct under the circumstances and from counsel's perspective at the time").

brother Phillip. It seems strange that Phillip would not know that "Mona" was his sister.

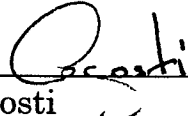
Finally, the record reveals that Baker's investigative efforts regarding potential alibi witnesses were adequate. Reyes's reliance on this court's holding in Love²¹ is misplaced. In Love, this court upheld the district court's order granting Love's petition for post-conviction relief based upon ineffective assistance of counsel because: (1) Love had provided a list of potential alibi witnesses to defense counsel; (2) defense counsel were inexperienced; (3) they failed to personally contact any of the potential alibi witnesses; (4) at least one of the alibi witnesses was credible; and (5) Love's conviction was based solely upon circumstantial evidence.²² Reyes attempts to analogize his case to that of Love by arguing that Baker never personally contacted the alibi witnesses Reyes named. However, Reyes's situation is very distinguishable from that presented in Love. While there were no eye-witnesses to the shooting in Love, here, three people witnessed the shooting and testified that Reyes killed the victim. Furthermore, while the defense counsel in Love failed to personally contact any of the alibi witnesses and relied solely upon their investigator, Baker testified that he personally talked to Reyes's potential alibi witnesses, both in his office and telephonically. Although Baker never personally went to Newark, New Jersey, nor sent his investigator there, he testified that there was no need to do so because he had exhausted all his leads on the search for an alibi witness. Baker testified that Reyes did not tell him about Ernesto Gonzalez or Jafet Castellanos;


²¹109 Nev. 1136, 865 P.2d 322 (1993).


²²Id. at 1138-39, 865 P.2d at 323-24.

that Shirley Ware, the person who wrote the rental receipts for June and July 1993 for Reyes, told him those receipts were false; and that an examination of the receipts showed inconsistent numbers and amounts for June 1993 and July 1993. Baker further noted that the receipt for June 1993 was from June 20, 1993, for ten days, and the payment was \$150.00, while the July 1993 receipt was for the same amount but covered thirty-one days. Because neither the money nor the numbers matched up, Baker did not think that he would uncover more information by going to New Jersey to talk to Shirley Ware. Baker further testified that an attempt to drive around a city as large as Newark with a photograph of Reyes, asking strangers if they knew him, would not have been a successful tactic. We conclude that the district court did not err in denying Reyes's writ petition, and, accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Agosti


_____, J.
Rose


_____, J.
Maupin

cc: Hon. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk