IN THE SUPREME COURT OF THE STATE OF NEVADA

LEVENRAL DEMARLO POLK,
Appellent,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39529

FILED

JAN 0 6 2003

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant Levenral Demarlo Polk's post-conviction petition for a writ of habeas corpus.

On August 11, 1999, Polk was convicted, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon (count I) and discharging a firearm out of a motor vehicle (count II). The district court sentenced Polk to serve two consecutive life prison terms for count I and a consecutive prison term of 40 to 180 months for count II. Polk appealed, and this court affirmed his conviction.[1]

On January 25, 2002, Polk 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 NRS 34.770, the district court declined to appoint counsel to represent Polk or to conduct an evidentiary hearing. On March 7, 2002, Polk filed a request for voluntary dismissal of his habeas petition. On March 14, 2002, the

[1]Polk v. State, Docket No. 34816 (Order of Affirmance, May 16, 2001).

district court denied Polk's request for voluntary dismissal of the petition.[2] Thereafter, on March 26, 2002, the district court denied Polk's petition. This appeal followed.

In his petition, Polk raised several claims of ineffective assistance of trial and appellate counsel. To establish ineffective assistance of counsel, a petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.[3] To show prejudice with regard to trial counsel, a petitioner must show a reasonable probability that but for counsel's errors the result of the trial would have been different.[4] To show prejudice with regard to appellate counsel, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.[5]

Polk first contended that trial counsel was ineffective for failing to move to suppress the testimony and, also, the evidence provided to police by Donnette Peach, Polk's ex-girlfriend. Polk claimed that the evidence provided to law enforcement by Peach, as well as Peach's testimony should be suppressed because Peach was not credible. We conclude that the district court did not err in rejecting Polk's contention.

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[2]To the extent that Polk appeals the district court order denying his request for voluntary dismissal, we conclude the district court did not abuse its discretion in denying Polk's request. See NRS 34.780; NRCP 41(a)(2).

[3]Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984).

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

[5]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

At trial, Peach testified that: (1) she heard Polk threaten to shoot the victim; (2) Polk was angry at the victim because he was not paying for the rock cocaine, which Polk was providing him to sell; (3) she had seen Polk with a revolver; (4) after the victim died, Polk told her that people were saying that he was the shooter, but Polk denied committing the crime; and (5) Polk had threatened her about speaking with police detectives. Additionally, Peach turned over a box of ammunition to police that Polk had left at her house, which later was identified as the ammunition used in the shooting and admitted into evidence at trial.

Our review of the record reveals that the district court did not err in rejecting Polk's claim of ineffective assistance of trial counsel with respect to Peach. Peach's testimony was admissible because it was based on her personal knowledge and relevant to the issue of whether Polk shot the victim.[6] Further, there was no legal basis for suppressing the ammunition because Polk had no reasonable expectation of privacy in the bullets,[7] and when Peach voluntarily turned over the bullets to law enforcement she was acting solely as a private citizen.[8] Moreover, there is no indication that Peach or any other individual tampered with the

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[6]See NRS 48.015; NRS 50.025.

[7]See State v. Taylor, 114 Nev. 1071, 968 P.2d 315 (1998) (recognizing that a defendant has no reasonable expectation of privacy in abandoned property).

[8]See State v. Miller, 110 Nev. 690, 696, 877 P.2d 1044, 1048 (1994) ("[T]he Fourth Amendment 'is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any government official.'") (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

ammunition or that there was a break in the chain of custody once it was turned over to law enforcement.[9] Accordingly, trial counsel was not ineffective for failing to challenge the admissibility of either Peach's testimony or the ammunition because those challenges would have been unsuccessful and, therefore, would not have changed the outcome of the trial.

Second, Polk contends that his trial counsel was ineffective for failing to challenge the "flagrant contradiction of State witnesses" by adequately cross-examining Leslie Harris and Ronald Price. In particular, Polk contends that trial counsel should have challenged Harris' statement that she saw Polk with the victim on the night of the murder, as well as Price's statement that he observed Polk and the victim engaged in a physical fight over drug money prior to the murder. We conclude that the district court did not err in rejecting Polk's claim.

Even assuming trial counsel was ineffective with regard to the cross-examination of Price and Harris, Polk has failed to show that he was prejudiced by counsel's allegedly deficient conduct. We note that other State witnesses corroborated the testimony of Harris and Price. For example, State witnesses Maurice Finley and Glenn Green testified that they observed Polk with the victim on the evening of the shooting. Also, Peach testified about prior hostilities between Polk and the victim over drug money. Moreover, we note that in Polk's direct appeal, this court concluded there was overwhelming circumstantial evidence of Polk's guilt. In light of the overwhelming evidence presented at trial, Polk has failed to

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[9]See Sparks v. State, 89 Nev. 84, 506 P.2d 1260 (1973) (noting that evidence may not be admitted into evidence if there is a break in the chain of custody or some form of tampering).

demonstrate that a more effective cross-examination of Price and Harris would have changed the outcome of the trial. Accordingly, the district court did not err in rejecting this claim.

Third, Polk contended that his appellate counsel was ineffective for failing to raise the issue of the State's failure to gather a 7-11 video surveillance tape, which Polk alleged was very valuable to his case.[10] We conclude that the district court did not err in rejecting Polk's claim.

Appellate counsel was not ineffective for failing to raise the issue of the failure to gather the videotape because that issue had no reasonable likelihood of success on appeal. Polk failed to establish both that the videotape was likely to be material and that the State's failure to gather the evidence was attributable to negligence, gross negligence, or bad faith.[11] In fact, the record reveals that the State's failure to gather the

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[10]Polk also contended that his appellate counsel was ineffective in failing to allege that the State conducted a deficient investigation. In particular, Polk alleged that detectives failed to investigate State witnesses Deshon Felton and Elvin Harrell about their participation in the homicide and defense eyewitness Charlotte Barringer. We conclude that the district court did not err in rejecting Polk's contention because it lacked specificity; Polk failed to set forth the exculpatory evidence that further investigation of the named individuals would have revealed. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Moreover, because the individuals named in Polk's petition testified at trial and were subject to cross-examination, Polk has failed to show how the issue concerning the State's failure to further investigate these individuals would have had a reasonable likelihood of success on appeal.

[11]See Daniels v. State, 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998) (holding that dismissal of criminal charges may be an available remedy for the State's failure to gather evidence where the evidence was

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videotape did not arise from bad faith. Detective Brent Becker testified at trial that he watched the videotape, but did not gather the evidence because he believed it was not valuable to the investigation since it did not show the scene of the shooting outside the store. Moreover, any alleged prejudice Polk suffered from the State's failure to gather the videotape was cured when Becker testified about its potential exculpatory value. Particularly, at trial, Becker testified that the videotape neither showed that Polk was present at the crime scene nor showed a fight between Polk and the victim inside the store, which a witness alleged occurred prior to the shooting. Because the issue concerning the State's failure to gather the videotape had no reasonable likelihood of success on appeal, we conclude the district court did not err in rejecting Polk's contention that his appellate counsel was ineffective.

Finally, Polk raised a claim that could have been raised on direct appeal. Namely, Polk claimed that the justice court abused its discretion in binding Polk over for trial because there was insufficient evidence presented that Polk was involved in the murder and because Polk had an actual conflict with his counsel. Polk waived this claim by failing to raise it on direct appeal.[12] Therefore, we need not consider it.

. . . *continued*
material and was the result of a bad faith attempt to prejudice the defendant's case).

[12]See NRS 34.810(1)(b)(2).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Polk is not entitled to relief and that briefing and oral argument are unwarranted.[13] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[14]

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Joseph T. Bonaventure, District Judge
Levenral Demarlo Polk
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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

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