IN THE SUPREME COURT OF THE STATE OF NEVADA

TODD EVANS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39583

FILED

MAR 0 6 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Todd Evans's post-conviction petition for a writ of habeas corpus. The district court convicted appellant, pursuant to a jury verdict, of first-degree murder, kidnapping, false imprisonment, and battery. The district court sentenced appellant to three consecutive terms of life imprisonment without the possibility of parole for first-degree murder, for using a deadly weapon in the commission of the murder, and for kidnapping. Appellant was also sentenced to a term of six years for false imprisonment. He received no additional sentence for the battery. This court affirmed appellant's conviction and sentence.[1]

Appellant, represented by counsel, subsequently filed a timely, first post-conviction petition for a writ of habeas corpus and a supplement in the district court collectively raising a multitude of claims that his trial

[1]Evans v. State, 113 Nev. 885, 944 P.2d 253 (1997).

counsel John Ohlson rendered ineffective assistance. Following an evidentiary hearing, the district court denied the petition. This appeal followed.

Appellant raises several claims of ineffective assistance of trial counsel. Claims of ineffective assistance of counsel are properly presented in a timely, first post-conviction petition for a writ of habeas corpus because such claims are generally not appropriate for review on direct appeal.[2] A claim of ineffective assistance of counsel presents a mixed question of law and fact subject to independent review.[3] 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 supported by substantial evidence and are not clearly wrong.[4] To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's errors were so severe that they rendered the jury's verdict unreliable.[5] Judicial review of a lawyer's representation is highly

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[2]See, e.g., Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

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

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

[5]See Strickland v. Washington, 466 U.S. 668, 687 (1984).

deferential, and a claimant must overcome the presumption that a challenged action might be considered sound strategy.[6]

Appellant first contends that his trial counsel John Ohlson was ineffective in failing to interview several witnesses, both actual and potential.

First, appellant argues that Ohlson should have interviewed State witness and appellant's girlfriend, Stacey Higgins. At the evidentiary hearing, Higgins testified that she contacted Ohlson before appellant's trial to tell him that she had lied in her police statement and inculpated appellant to retaliate against him. Appellant is not entitled to relief on this claim. At appellant's trial, Higgins testified that she "really did not see [appellant] that night with a gun" and that she had lied in her police statement because she was "pissed off" at appellant and because she was under the influence when she made the statement. Thus, even assuming Ohlson should have interviewed Higgins, appellant cannot show that he was prejudiced by the failure because the jury heard her recantation and nevertheless found appellant guilty.

Appellant next contends that Ohlson failed to interview potential defense witness Ed Ammerman. At the evidentiary hearing, Ammerman testified that appellant dropped off a car at Ammerman's auto repair shop at 8:30 a.m. on the day of the crimes. Appellant argues that

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[6]Id. at 689.

this testimony would have discredited the trial testimony of State witness Larry Hall, who admitted significant involvement in the instant crimes. This claim does not warrant relief. Appellant mischaracterizes Hall's testimony, which was not inconsistent with the testimony of Ammerman at the evidentiary hearing. According to Hall, there was a period of approximately 45 minutes during which he did not know of appellant's whereabouts and during which appellant might have delivered the car to Ammerman. Because Ammerman's testimony would not have contradicted the testimony of Hall, appellant has not established that Ohlson's failure to interview Ammerman was objectively unreasonable or that he was prejudiced.

Next, appellant contends that Ohlson was ineffective in failing to interview Jeanette Anderson, State witness Glenn Rasco's sister-in-law. Anderson stated in an affidavit admitted into evidence at the evidentiary hearing that she knew of Rasco's reputation as a habitual liar; that he was a habitual drug user who engaged in violent conduct; and that he would not fear appellant, thus contradicting Rasco's trial testimony that he pretended to participate in the beating of Wilkinson because he was terrified that otherwise appellant would kill him as well.[7] Even assuming Ohlson should have interviewed Anderson, appellant was not prejudiced because almost all of Rasco's testimony was corroborated at appellant's

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[7]See Evans, 113 Nev. at 887, 944 P.2d at 254.

trial. That Rasco abandoned the criminal enterprise, that he ran to a nearby house and reported the incident to the inhabitant, and that he was terrified at that time were all corroborated by independent testimony.[8] Because much of Rasco's testimony was shown to be accurate, and because independent evidence supported appellant's convictions, we conclude that impeaching Rasco's credibility with Anderson's testimony would not have altered the outcome of appellant's trial.

Finally, appellant contends that his trial counsel was ineffective in failing to interview Hall before trial. Specifically, appellant argues that had Ohlson interviewed Hall, Ohlson would have discovered Hall's alleged belief that if appellant were convicted, Hall would never be charged. Appellant is not entitled to relief on this claim. First, Ohlson did investigate Hall prior to trial using a number of means that did not require an interview. Also, appellant has not demonstrated that Hall would have agreed to be interviewed by Ohlson. Under these circumstances, we are not persuaded that Ohlson's failure to interview Hall was objectively unreasonable. Further, even assuming Ohlson could have and should have interviewed Hall, appellant was not prejudiced. This court concluded on direct appeal that independent evidence corroborated the testimony of Hall and did not support appellant's version

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[8]See id. at 893, 944 P2d at 258.

of events.[9] Also, the district court had difficulty accepting that Hall would have revealed his belief regarding immunity to Ohlson given Hall's testimony at trial that he was not promised anything in exchange for his testimony and his admission at trial that he was properly subject to prosecution for the crimes against the victim. Appellant has failed to show that the court's assessment of Hall was incorrect. We therefore conclude that this claim of ineffective assistance of trial counsel lacks merit.

Next, appellant contends that Ohlson failed to adequately consult with appellant before trial and to adequately prepare appellant to testify at the guilt phase of his trial. Appellant alleged that Ohlson spent only two to two-and-a-half hours with appellant in the months before trial and did not begin to prepare appellant to testify until the day before his testimony. Even assuming Ohlson's efforts to consult with appellant and to prepare him to testify were deficient, appellant is not entitled to relief because he has failed to articulate how he was prejudiced: He has not explained how he would have testified differently given more time to prepare.

Next, appellant contends that Ohlson was ineffective in failing to question a juror that allegedly had impermissible contact with Rasco during appellant's trial. Appellant alleges that during a recess from his

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[9]See id.

trial, Rasco approached the juror, "persisted to discuss 'the drama in the courtroom,' and departed stating 'God bless you.'" Appellant is not entitled to relief on this claim. Appellant did not cite to anything in the record or present evidence at the evidentiary hearing substantiating that the contact occurred.[10] We therefore conclude that appellant's claim of ineffective assistance lacks merit because he has failed to establish that the communication between Rasco and the juror occurred.

Appellant next claims that Ohlson placed the alleged murder weapon in front of appellant during his trial, causing the armed officers to respond aggressively and leaving an impression that appellant was a violent and dangerous person. Appellant relies on Hollaway v. State[11] in support of his claim. This claim does not warrant relief because appellant has not shown that he was prejudiced. The only evidence offered in support of this claim is Ohlson's testimony at the hearing, and while he agreed that the incident occurred and admitted that his handling of the gun was a mistake, he did not recall "the scene that was created." The district court failed to find any reference in the trial record to the incident and concluded that it "must not have been that significant an event." Finally, appellant's reliance on Hollaway is inapposite. The activation of

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[10]See Lozada v. State, 110 Nev. 349, 353 n.3, 871 P.2d 944, 947 n.3 (1994) (providing that "[p]etitioners for post-conviction relief have the burden of establishing factual allegations in support of their petitions").

[11]116 Nev. 732, 6 P.3d 987 (2000).

Hollaway's stun belt was "an arbitrary and prejudicial factor" that "completely disrupted the proceedings, requiring the jurors to leave the courtroom."[12] We conclude that appellant has failed to establish that he suffered any prejudice from Ohlson's handling of the gun, let alone prejudice tantamount to that suffered by Hollaway.

Appellant next contends that Ohlson should have called an expert witness to rebut the testimony of Kenneth Caywood at the guilt phase of appellant's trial. Caywood testified that at about 6:30 a.m. on the morning of the crimes, he saw an "immaculate" white Jeep Cherokee, bearing a dealer's license plate on the rear hatch, leave a 7-11.[13] Appellant established that dealer plates are magnetic and the Jeep's hatch is fiberglass, a nonmetallic surface to which a magnetic plate will not attach. Appellant argues therefore that the Jeep identified by Caywood was not appellant's, leaving appellant's trial testimony that the Jeep was dirty when he met Rasco and Hall at the 7-11 uncontradicted. This claim lacks merit. Although the dealer's plate would not attach to the Jeep's hatch, it was established that it would attach to the bumper. Further, the following evidence corroborated Caywood's testimony: appellant's testimony at trial established that he purchased gas for the Jeep at the 7-

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[12]Hollaway, 116 Nev. at 742, 6 P.3d at 994.

[13]See Evans, 113 Nev. at 889, 944 P.2d at 256.

11 on the morning of the crimes,[14] and a time-stamped receipt established that the purchase occurred at 6:30 a.m.[15] Thus, even assuming Caywood was wrong about the precise location of the plate, his mistaken perception was not significant. We therefore conclude that appellant has not established this claim of ineffective assistance of counsel.

Next, appellant contends that Ohlson should have questioned jurors regarding prejudicial pretrial publicity and provided evidence to the court of all the adverse pretrial publicity. This claim is frivolous. Appellant has provided no evidence of pretrial publicity in support of this claim. Also, the district court found that "the potential jurors who acknowledged they had read about the case were excused." Appellant has done nothing to challenge the adverse finding of the district court.

Finally, appellant contends that he was prejudiced by the cumulative errors of his trial counsel. In addition to the above claims of error, appellant also contends that Ohlson failed to (1) "adequately confront the State's witnesses with their past drug use and psychological problems"; (2) "move for psychological evaluations of these witnesses to determine their competency to testify even though Ohlson had knowledge of their past drug use and psychological problems"; (3) investigate the crime scene to establish a method of presenting inconsistencies in witness

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[14]See Evans, 113 Nev. at 888-89, 944 P.2d at 255.

[15]See id. at 892, 944 P.2d at 257-58.

testimony pertaining to the crime scene; (4) hire forensic, DNA, and blood spatter experts or a crime scene analyst; and (5) object to "the prosecution vouching for its witnesses, . . . portraying appellant as a liar, [and] making improper allegations as to evidence of other crimes." With respect to the additional claimed errors, appellant is not entitled to relief because he has largely failed to support them with specific factual allegations or articulate how he was prejudiced by the alleged omissions. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Jerome Polaha, District Judge
Goodman Chesnoff & Keach
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk