IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY NEAL LEONARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39627

FILED

AUG 20 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 Gregory Neal Leonard's post-conviction petition for a writ of habeas corpus in a death penalty case.

The district court convicted appellant, pursuant to a jury verdict, of first-degree murder and robbery. Appellant received a death sentence for the murder. This court affirmed appellant's conviction and sentence.[1] Appellant subsequently filed a timely, first post-conviction petition for a writ of habeas corpus. The district court appointed counsel but declined to conduct an evidentiary hearing. It subsequently denied appellant's petition. This appeal followed.

Appellant raises numerous claims of ineffective assistance of trial and appellate counsel. Those claims are analyzed under the two-part test set forth in Strickland v. Washington.[2] To state a claim sufficient to

[1]Leonard v. State, 114 Nev. 1196, 969 P.2d 288 (1998).

[2]466 U.S. 668 (1984) (trial counsel); see also Smith v. Robbins, 528 U.S. 259, 285 (2000) (appellate counsel); accord Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

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invalidate a judgment of conviction, a petitioner must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) but for counsel's mistakes, there is a reasonable probability that the verdict would have been different.[3] Where the claim involves the performance of appellate counsel, the prejudice prong requires that the petitioner demonstrate that an omitted issue would have had a reasonable probability of success on appeal.[4] The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.[5] Moreover, an evidentiary hearing is not necessary where claims in a post-conviction petition are belied or repelled by the record or are not supported by specific factual allegations that, if true, would entitle the petitioner to relief.[6]

Appellant first argues that his trial counsel failed to conduct adequate pretrial investigation. In support of this claim, appellant cites to memoranda that allegedly document one of his trial attorney's dissatisfaction with the investigation undertaken in the case. Appellant also alleges that he wrote to the district court, informing it of his personal dissatisfaction with the investigation. Appellant further asserts that trial counsel failed to adequately investigate (1) various State witnesses' reputations for honesty; (2) the "large number of people" that had master

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[3]Strickland, 466 U.S. at 687.

[4]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

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

[6]Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

keys to the apartment complex where the victim was murdered; (3) improper juror contacts by State witness Phyllis Fineberg; (4) the dispute between appellant and the victim over a poker machine jackpot; and (5) a ring stolen from the victim and pawned by appellant. Appellant also complains that his original post-conviction counsel conducted no investigation.

This claim does not warrant relief. First, appellant has failed to provide this court with two of the three memoranda that allegedly support his contention regarding inadequate pretrial investigation.[7] And the one provided merely directs the defense investigator to undertake specific investigation. Appellant does not state what investigation failed to be accomplished or how he was prejudiced by any alleged failure. Moreover, we conclude that appellant's individual claims are not supported by specific factual allegations that, if true, would entitle him to relief. Further, a claim challenging the effectiveness of appellant's post-conviction counsel needs to be raised in a second post-conviction petition and considered by the district court, which can hold an evidentiary hearing if necessary.[8]

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[7]See Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975) ("It is the appellant's responsibility to provide the materials necessary for this court's review."); see also NRAP 30(b)(3) (providing that it is appellant's responsibility to provide this court with "the record essential to determination of issues raised in appellant's appeal").

[8]See Crump v. Warden, 113 Nev. 293, 302-05, 934 P.2d 247, 252-54 (1997) (in second post-conviction proceeding, remanding to allow appellant opportunity to establish cause and prejudice by proving that his counsel was ineffective in first post-conviction proceeding).

Appellant next asserts that trial counsel should have moved to dismiss the charges or to suppress evidence of a recorded telephonic pager message on the ground that the State failed to preserve the message itself yet presented testimony regarding the message at the guilt phase of his trial. Appellant also argues that trial counsel should have requested an instruction that evidence of the message would have been adverse to the State if produced pursuant to NRS 47.250.[9] Appellant is not entitled to relief on these claims. First, on direct appeal, appellant challenged admission of testimony concerning the message, and this court concluded that the testimony was properly admitted and that appellant had not shown either that prejudice resulted from loss of the message or that it was lost in bad faith.[10] Therefore, the doctrine of the law of the case[11] controls the outcome of appellant's claim that trial counsel should have moved to suppress the evidence or to dismiss charges: appellant cannot demonstrate deficient performance by counsel or prejudice. Assuming that the law of the case does not similarly control appellant's claim regarding the instruction, it fails because he has not shown that the evidence was "willfully suppressed."[12] Again, assuming the law of the case

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[9]See NRS 47.250(3) (providing that a rebuttable presumption exists that "evidence willfully suppressed would be adverse if produced").

[10]Leonard, 114 Nev. at 1206, 969 P.2d at 294-95.

[11]See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). (stating that the law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same; this doctrine cannot be avoided by more detailed and precisely focused argument).

[12]See NRS 47.250(3).

does not control, to the extent appellant complains that the evidence was improperly admitted because it contained impermissible hearsay or because absence of the message itself hindered trial counsel in their cross-examination, his claims are waived because they were not raised on direct appeal.[13]

Third, appellant argues that his trial counsel should have retained a handwriting expert and a locksmith. Appellant also claims that trial counsel did not adequately prepare their expert witness, psychologist Richard Hall, who testified at the penalty hearing. Additionally, appellant asserts that trial counsel's use of Dr. Hall allowed the State to introduce, through cross-examination, Dr. Hall's reliance on a psychological evaluation prepared earlier by Dr. Etcoff, which contained negative information concerning appellant. These claims do not warrant an evidentiary hearing. First, appellant does not specifically articulate how the suggested experts would have benefited the defense. Second, appellant has not stated what greater preparation of Dr. Hall might have been undertaken or what psychological evidence was available that would have avoided disclosure of damaging information.

Appellant apparently contends that trial and appellate counsel inadequately challenged jury instructions on premeditation and deliberation, reasonable doubt, malice aforethought, felony murder/robbery, and equal and exact justice. Appellant is not entitled to

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[13]See NRS 34.810(1)(b)(2), (3) (providing that the district court shall dismiss a petition, absent a demonstration of good cause and prejudice, if the claims raised in the petition could have been raised on direct appeal).

relief on this claim. This court rejected challenges to these instructions on direct appeal, and appellant offers no argument as to how trial and appellate counsel might have better addressed alleged deficiencies in the instructions.

Next, appellant contends that trial counsel should have filed the following eight pretrial motions: (1) to preclude the State from engaging in improper argument; (2) to dismiss the notice of intent to seek the death penalty because Nevada's death penalty scheme is unconstitutional; (3) to bifurcate the penalty phase of his trial; (4) to dismiss based upon extensive contamination of the crime scene, which appellant alleges resulted in a failure to collect potentially exculpatory evidence; (5) challenging the racial composition of the jury pursuant to Duren v. Missouri;[14] (6) to preclude the prosecutor from eliciting that appellant is HIV positive; (7) to prohibit State witnesses from suggesting that appellant committed any "bad acts" and specifically that he was accused of another murder; and (8) to disqualify the district attorney's office.

These claims are controlled by the doctrine of the law of the case, lack sufficient factual allegations, or otherwise lack merit. Appellant's first contention is effectively precluded by the law of the case doctrine.[15] Second, pretrial motions challenging the alleged

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[14]439 U.S. 357 (1979) (providing that a defendant is entitled to a jury selected from a fair cross-section of the community).

[15]Leonard, 114 Nev. at 1212-13, 1215, 969 P.2d at 298-99, 300 (concluding that instances of prosecutorial misconduct did not result in prejudice).

unconstitutionality of Nevada's death penalty scheme and to bifurcate the penalty hearing were so unlikely to succeed that trial counsel did not err in failing to file them.[16] Third, we conclude that appellant does not support his claims regarding an alleged Duren violation or failure to gather potentially exculpatory evidence with sufficient specific factual allegations. Fourth, while the State's question regarding appellant's HIV infection served no legitimate purpose, we are not persuaded that but for this isolated reference, the jury would not have sentenced him to death. Last, we take judicial notice of evidence proffered by the State in appellant's appeal from a second murder prosecution, Docket No. 33732, establishing that prosecutor David Wall was screened from any participation in the instant case.[17]

Appellant next appears to raise two claims of ineffective assistance with respect to trial counsel's performance at jury voir dire. First, appellant appears to contend that trial counsel's performance resulted in a "death stacked" jury. Appellant also argues that trial counsel failed to object to the district court's implicit time limitation on jury voir dire, which appellant alleges prevented a meaningful inquiry into the jurors' true beliefs regarding the death penalty. We disagree. The record

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[16]See Leonard v. State, 117 Nev. 53, 83, 17 P.3d 397, 416 (2001) (reaffirming the constitutionality of Nevada's death penalty scheme); Johnson v. State, 118 Nev. ___, ___, 59 P.3d 450, 462 (2002) (stating that "[t]his court has never required distinct phases in capital penalty hearings"); see also Gallego v. State, 117 Nev. 348, 369, 23 P.3d 227, 241 (2001).

[17]See NRS 47.130(2)(b).

reveals that prospective jurors were not improperly retained or dismissed and that trial counsel were permitted to fully explore the jurors' views on capital punishment.

Next, appellant alleges that trial counsel provided ineffective assistance at the guilt phase of trial. First, appellant argues that trial counsel failed to effectively cross-examine and impeach the following witnesses: (1) Phyllis Fineberg regarding (a) her improper contacts with four jurors, (b) the fact that she was not prosecuted for this conduct, and (c) the absence of her fingerprints on the victim's telephone, although she testified that she had used it to call police when she discovered his body; (2) police officers concerning contamination of the crime scene; (3) the State's handwriting expert with regard to his testimony that appellant had forged Jerry Leonard's signature on a pawn ticket disposing of the victim's property; and (4) Jesus Cintron with regard to his alleged knowledge "that Metro officers suspected [appellant] of being in possession of stolen property, thus establishing Cintron's motive to fabricate a story implicating [appellant]." Appellant further contends that trial counsel failed to adequately question Cintron and appellant regarding Cintron's alleged access to appellant's apartment and to "adequately emphasize" the lack of physical evidence at the crime scene implicating appellant in the offense. Finally, appellant complains about a number of bench and in-chambers conferences that were not recorded and took place without his presence.

None of these allegations entitle appellant to relief. First, any failure to prosecute Fineberg was not apparent during appellant's trial. It is also clear from the record that the district court did not inform counsel

of Fineberg's improper contacts with jurors until after she had testified. Second, trial counsel cross-examined the State's crime scene analyst and elicited that fingerprints generally transfer to a phone's surface and that their absence could indicate that the phone had been wiped down. The record similarly belies appellant's claim that trial counsel failed to adequately question witnesses regarding contamination of the crime scene and authorship of signatures on the pawn slips. We also note that appellant failed to provide this court with Jerry Leonard's alleged statement that he pawned the property. Next, appellant's contentions regarding Cintron's motive to fabricate and his ability to access appellant's apartment are bare allegations unsupported by citation to the record.[18] Further, although trial counsel could have emphasized the absence of physical evidence linking appellant to the crime scene, physical evidence did link appellant to the crime: appellant pawned property belonging to the victim. Last, appellant's claim regarding an alleged failure to assure adequate recording is unspecific and entirely speculative. He "presents absolutely no basis for this court to fear that a substantial or significant portion of the record was omitted or that he has been prejudiced in any way."[19]

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[18]See Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001) (stating that conclusory claims for relief in a post-conviction habeas petition are inadequate); see also NRAP 28(e) (providing that every reference in the briefs to matters of record must be supported by a citation to the page of the transcript or appendix where the matter is found).

[19]Evans, 117 Nev. at 645, 28 P.3d at 522.

Appellant next argues that trial counsel erred in failing to request that the district court more extensively question all jurors concerning Fineberg's contacts with some jurors. Appellant is not entitled to an evidentiary hearing on this claim because he merely speculates that additional jurors might have overheard Fineberg's comments. The record belies appellant's specific representation that one of the jurors contacted by Fineberg "was with two other jurors" at the time of the contact. In fact, the juror said that she was waiting at a stop sign with two other witnesses when Fineberg approached her.

Next, appellant contends that trial counsel did not adequately represent him at his penalty hearing. First, appellant claims that trial counsel failed to conduct adequate prehearing investigation. Specifically, appellant contends that trial counsel failed to (1) investigate appellant's childhood, mental condition, psychological background, and "other relevant factors"; (2) find necessary witnesses; and (3) secure the appearance of witnesses that were found. Appellant also complains that trial counsel failed to object to the scope of the testimony of Jessica Gonzalez, the victim's daughter, who provided victim impact testimony at the penalty hearing. Additionally, appellant argues that trial counsel was ineffective for failing to request a special verdict form indicating the mitigating circumstances found by each juror.

These claims do not entitle appellant to an evidentiary hearing. First, he fails to articulate what investigation of his childhood, mental condition, or psychological background would have revealed, and he does not provide the substance of the testimony of any witness that counsel failed to discover or produce at the penalty hearing. Second, the

doctrine of the law of the case controls appellant's claim regarding Gonzalez's testimony.[20] Last, appellant cannot demonstrate that he was prejudiced by any failure to challenge the verdict form because the jury was properly instructed that "any one juror can find a mitigating circumstance without the agreement of any other juror or jurors."[21]

Appellant next argues that appellate counsel's alleged failure to communicate denied him of meaningful participation in his direct appeal. Appellant is not entitled to relief on this claim. He has failed to identify a single issue not raised by appellate counsel, much less identified one that enjoyed a reasonable probability of success on appeal.[22]

Appellant next asserts that this court's decisions with respect to his direct appeal, petition for rehearing, and motion for summary remand were erroneous. Appellant is not entitled to relief on this claim because he has failed to support it with citation to relevant authority or to articulate how our previous decisions were erroneous.[23] Appellant further

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[20]Leonard, 114 Nev. at 1215, 969 P.2d 300 (concluding that admission of Gonzalez's testimony "was not error at all").

[21]See Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) ("There is a presumption that jurors follow jury instructions."), clarified on denial of rehearing, 114 Nev. 221, 954 P.2d 744 (1998).

[22]Cf. Kirksey, 112 Nev. at 998, 923 P.2d at 1114 ("To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issues would have a reasonable probability of success on appeal.").

[23]See Mazzan v Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000) ("Contentions unsupported by specific argument or authority should be summarily rejected on appeal.").

alleges that cumulative error warrants reversal. This claim lacks merit because he has failed to establish that any of his claims establish error.

Appellant finally argues that the district court erred in denying his petition without permitting him to conduct discovery. We disagree because appellant's claims did not warrant an evidentiary hearing.[24] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Valorie Vega, District Judge
JoNell Thomas
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[24]See NRS 34.780(2) (providing that "[a]fter the writ has been granted and a date set for the hearing," the district court may permit the parties to conduct discovery upon a showing of good cause).