

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN R. SANCHEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39659

FILED

JAN 27 2003

ORDER OF AFFIRMANCE

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

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

On October 7, 1999, the district court convicted appellant, Steven R. Sanchez, pursuant to a jury verdict, of murder with the use of a deadly weapon, robbery, and grand larceny auto. The district court sentenced Sanchez to serve in the Nevada State Prison a term of twenty to fifty years plus and equal and consecutive term for the deadly weapon enhancement, a consecutive term of thirty-five to one hundred and fifty-six months for the robbery, and a concurrent term of twenty-two to ninety-six months for the grand larceny auto. This court affirmed Sanchez' conviction.¹

On March 7, 2002, Sanchez 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 34.770, the district court declined to appoint counsel to represent Sanchez or to

¹Sanchez v. State, Docket No. 35099 (Order of Affirmance, May 21, 2001).

conduct an evidentiary hearing. On May 30, 2002, the district court denied Sanchez' petition. This appeal followed.

In his petition, Sanchez raised five claims of ineffective assistance of trial 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.² To show prejudice, a petitioner must show a reasonable probability that but for counsel's errors the result of the trial would have been different.³ "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."⁴ A court may consider the two test elements in any order and need not consider both prongs if an insufficient showing is made on either one.⁵

First, Sanchez claimed that trial counsel was ineffective for failing to ensure that the district court rule on his pretrial petition for a writ of habeas corpus. On April 3, 1998, Sanchez filed a pretrial petition for a writ of habeas corpus, arguing that his indictment for robbery by the grand jury was not supported by sufficient evidence. Therefore, argued Sanchez, the State improperly presented the theory of felony murder to

²Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 431, 683 P.2d 504, 505 (1984).

³Strickland, 466 U.S. at 694.

⁴Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691) (abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000)).

⁵Strickland, 466 U.S. at 697.

the grand jury.⁶ Sanchez' claim that the district court did not rule on his pretrial petition is belied by the record.⁷ On May 28, 1998, the district court orally denied the petition.⁸ Furthermore, a jury found that there was sufficient evidence to convict Sanchez of robbery.⁹ Therefore, Sanchez did not show that the defense was prejudiced, and the district court did not err in denying this claim.

Second, Sanchez claimed that trial counsel was ineffective for failing to present his defense theory. Specifically, Sanchez argued that counsel should have presented to the jury the theory that the victim's death was an accident caused when, during a physical altercation, Sanchez hit the victim with a stick and the victim fell head-first into a heavy piece of furniture. Sanchez' girlfriend was present at the time of the incident. She testified at trial to the following: she was approximately ten feet outside the closed bedroom door and did not hear any sounds indicating that a struggle or fight was taking place; when she entered the bedroom she saw Sanchez kneeling over the victim and choking him;

⁶The State presented two alternative murder theories to the grand jury; premeditated murder and felony murder committed in the course of a robbery.

⁷See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

⁸The district court also granted Sanchez leave to refile a "supplemental" petition in order to expound upon the issue of the sufficiency of the evidence to support the robbery charge, and hence, the felony murder theory. The record does not reflect that a second petition was ever filed.

⁹See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (holding that it within the province of the jury "to assess the weight of the evidence and determine the credibility of witnesses").

Sanchez yelled at her, told her to clean up the blood and pack their belongings, and told her to get out of the room; she left the house and then saw Sanchez carrying the victim wrapped in a sheet and put the victim in the car owned by the victim's girlfriend and drive away. Sanchez' girlfriend testified that Sanchez was gone approximately an hour and when he returned he told her to get their stuff, helped her put it in the same car, and they drove to Albuquerque, New Mexico where they stayed with Sanchez' mother until being arrested. She also testified that at one point Sanchez told her that "he couldn't take his hands off his neck." In addition, the woman who owned the room Sanchez and his girlfriend were renting at the time testified that Sanchez carried the victim out of the house wrapped in a sheet and got into the victim's girlfriend's car and drove away, returned approximately an hour later, he and his girlfriend then left and never came back, and she saw what looked like spots of Clorox and blood on the floor of the room they had rented from her. Sanchez also told the police that when he took the victim in the desert to dispose of him, he picked up a rock and hit the victim several times on the head with it. Sanchez did not show that, in light of the overwhelming evidence against him, the jury's verdict would have been different had counsel employed different trial strategies.¹⁰ Therefore, Sanchez failed to demonstrate that counsel was ineffective in this regard, and the district court did not err in denying this claim.

Third, Sanchez claimed that trial counsel was ineffective for failing to file a pretrial motion to dismiss the robbery charge. Specifically,

¹⁰See Ford v. State, 105 Nev. 850, 852, 784 P.2d 951, 952 (1989) ("overwhelming evidence of guilt is relevant to the question of whether a client had ineffective counsel") (citing Strickland, 466 U.S. at 697).

Sanchez argued that his conviction for both robbery and grand larceny auto violates the Double Jeopardy Clause. When the same act constitutes a violation of two distinct statutory provisions, the applicable test for whether two separate offenses exist for double jeopardy purposes is whether each provision "requires proof of a fact which the other does not."¹¹ The crimes of robbery and grand larceny auto each require proof of an additional fact which the other does not. Robbery requires proof that the defendant used "force or violence or fear of injury" to take "personal property from the person of another."¹² "A taking is by means of force or fear if force or fear is used to . . . facilitate escape."¹³ On the other hand, grand larceny auto requires proof that the defendant intentionally take a motor vehicle owned by another person.¹⁴ Thus, each offense requires proof of an element that the other does not.¹⁵ Therefore, Sanchez failed to demonstrate that counsel was ineffective in this regard, and the district court did not err in denying this claim.

Fourth, Sanchez claimed that trial counsel was ineffective for failing to object to the testimony of the State's expert forensic pathologist. Specifically, Sanchez argued that Dr. Robert Bucklin was not qualified to testify that the victim did not die due to an overdose of morphine.

¹¹See McIntosh v. State, 113 Nev. 224, 225, 932 P.2d 1072, 1073 (1997) (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)).

¹²See NRS 200.380(1).

¹³NRS 205.380(1)(c).

¹⁴See NRS 205.228.

¹⁵Cf. Barrett v. State, 105 Nev. 361, 364, 775 P.2d 1276, 1278 (1989) ("Grand larceny auto is a separate and distinct offense from robbery.").

Sanchez claimed that in so concluding Dr. Bucklin relied on the opinion of a toxicologist who did not testify. Dr. Bucklin did not, as Sanchez claimed, improperly rely on "inadmissible hearsay testimony." Dr. Bucklin testified that the victim had what could be considered a lethal amount of morphine in his system if he were not "known to be a user of morphine and other drugs." Dr. Bucklin testified that he consulted with the head of the toxicology division of Associate Pathologist Laboratories in Las Vegas, who corroborated that the amount of morphine found in the victim's body would not be lethal to a heroin addict. Evidence was presented that the victim was known to be a heroin addict. Dr. Bucklin testified that the victim died of multiple skull fractures caused by blunt force consistent with being hit in the head numerous times with a rock. The defense cross-examined Dr. Bucklin extensively regarding the victim's injuries and the drugs found in his system. Therefore, Sanchez failed to demonstrate that counsel was ineffective in this regard, and the district court did not err in denying this claim.

Fifth, Sanchez claimed that trial counsel was ineffective for failing to file a pretrial motion requesting that an independent forensic toxicologist examine the victim. Specifically, Sanchez claimed that "the evidence showed there was a very substantial likelihood that [the victim] had died of . . . a lethal morphine overdose." According to Sanchez, therefore, had a toxicologist examined the victim there was a reasonable probability that the result of the trial would have been different. This claim is belied by the record and unsupported by any specific factual allegation which would, if true, entitle Sanchez to relief.¹⁶ Moreover, the

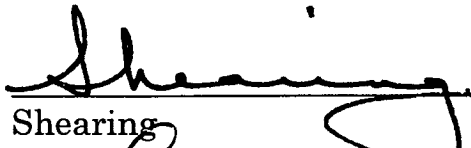
¹⁶See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

jury heard and rejected the theory that the amount of morphine in the victim's system was lethal under the circumstances.¹⁷ Therefore, Sanchez failed to demonstrate that counsel was ineffective in this regard, and the district court did not err in denying this claim.


Sanchez also claimed that appellate counsel was ineffective for failing to raise the five issues discussed above on appeal. Claims of ineffective assistance of counsel "may not be raised on direct appeal, unless there has already been an evidentiary hearing."¹⁸ In this case, there has been no evidentiary hearing, so Sanchez' claims are appropriately raised in a post-conviction proceeding. Therefore, the district court did not err in denying this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Sanchez is not entitled to relief and that briefing and oral argument are unwarranted.¹⁹ Accordingly, we

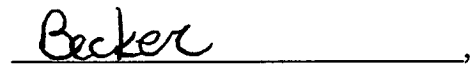
ORDER the judgment of the district court AFFIRMED.



Shearing J.



Leavitt J.



Becker J.

¹⁷See McNair, 108 Nev. at 56, 825 P.2d at 573.

¹⁸Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

¹⁹See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. John S. McGroarty, District Judge
Attorney General/Carson City
Clark County District Attorney
Steven R. Sanchez
Clark County Clerk