IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN K. BATCHELOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40353

FILED

MAY 30 2003

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

ORDER OF AFFIRMANCE

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

The district court convicted appellant, pursuant to a guilty plea, of three counts of sexual assault on a child under the age of 14 years and sentenced him to three consecutive terms of imprisonment for life with a minimum parole eligibility of 60 years. Appellant did not file a direct appeal. Appellant subsequently filed a timely, first post-conviction petition for a writ of habeas corpus. Counsel was appointed and filed a supplement. Following an evidentiary hearing, the district court denied appellant relief. This appeal followed.

First, appellant argues that the district court relied upon suspect and highly impalpable evidence in imposing sentence. Appellant argues that his claim of district court error is not subject to procedural bar. In support, appellant cites Pertgen v. State, which states that a claim of ineffective assistance "may establish good cause such that [this court] may review apparently meritorious issues that should have been raised on

direct appeal."[1] Appellant also suggests that the district court abused its discretion by imposing consecutive sentences. These claims do not warrant relief. In Pellegrini v. State, this court abrogated the language in Pertgen relied upon by appellant.[2] Similarly, appellant's contention that "an appellate court has the power to address plain error regardless of the procedural stance of the case," for which he provides no citation to authority,[3] does not comport with Nevada law [4] Thus, appellant's claims of district court error are procedurally barred.[5]

Appellant next claims that counsel provided ineffective assistance at the sentencing hearing by presenting suspect and impalpable expert opinion evidence. Sentencing counsel presented an evaluation by Donald Jackson, Ph.D., and the testimony of licensed clinical social worker Robert Stuyvesant. Dr. Jackson interviewed and

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[1]Pertgen, 110 Nev. 554, 560, 875 P.2d 361, 364 (1994).

[2]Pellegrini, 117 Nev. 860, 883-84, 34 P.3d 519, 535 (2001) ("Pertgen failed to make a crucial distinction: trial court error may be appropriately raised in a timely first post-conviction petition in the context of claims of ineffective assistance of counsel, but independent claims based on the same error are subject to the waiver bars because such claims could have been presented to the trial court or raised in a direct appeal.").

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

[4]Pellegrini, 117 Nev. at 884, 34 P.3d at 535 (stating that "plain error rule is a rule for review on direct appeal and does not create a procedural bar exception in any habeas proceeding, capital or not").

[5]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).

administered numerous tests to appellant for six hours over two days. He concluded, among other things, that appellant posed a "significant risk of reoffense." Dr. Jackson also stated, however, that it was likely appellant could be successful in a future conditional release from incarceration. Mr. Stuyvesant, who had treated appellant when he was in a sex offense specific treatment program for adolescents, agreed that appellant was at a high risk to reoffend. He also noted, however, that "individuals with pedophilic interests or diagnosed as pedophiles can be managed within the community." At the evidentiary hearing, appellant submitted evaluations by social worker Hans Solveg, M.S.W., L.C.S.W., and psychologist Dwight T. Colley, Ph.D., both of the Augustus Institute in Alexandria, Virginia. Dr. Colley also testified at the hearing. In their reports, these experts determined that appellant presented a low risk of recidivism, and Dr. Colley testified that Dr. Jackson's evaluation of appellant was incompetent. He further stated that appellant did not fit the definition of a pedophile. He admitted, however, on cross-examination that if released "today," appellant's risk of recidivism would be high and that Dr. Jackson's evaluation was based on some appropriate test instruments.

Appellant argues that by presenting him "as an incurable pedophile likely to reoffend," counsel "prejudiced all chances appellant had for a concurrent sentence structure." Appellant contends that "it cannot be plausibly maintained that the prevailing professional norm is to present incorrect and detrimental expert testimony." He also argues that he received the maximum sentence, at least in part, on the presentation of the allegedly erroneous expert testimony.

This claim does not warrant relief because appellant cannot demonstrate prejudice. In its order, the district court stated that it

predicated its sentencing decision on the entire record, appellant's criminal history, and the egregious nature of the instant offenses. The court concluded that although it found Dr. Colley's testimony "enlightening," it would not have had an impact on the sentence imposed. Thus, appellant cannot show that Dr. Colley's testimony would have affected the result of the sentencing hearing.[6] Further, appellant has not demonstrated that the district court's determination was not supported by substantial evidence or was clearly wrong.[7]

Finally, appellant contends that the district court might have employed an incorrect burden of proof in rejecting appellant's claims of ineffective assistance of counsel. Appellant is not entitled to relief on this claim. First, appellant has failed to establish the burden of proof relied upon by the district court in rejecting appellant's claim of ineffective assistance.[8] Further, judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a

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[6]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (stating that to prevail on a claim of ineffective assistance, a petitioner must show that defense counsel's performance deficient and that the deficient performance prejudiced the defense) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

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

[8]See Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001) ("A defendant seeking post-conviction relief cannot rely on conclusory claims for relief but must support any claims with specific factual allegations that if true would entitle him or her to relief.").

challenged action was sound.[9] Under this standard, appellant has failed to demonstrate that sentencing counsel was ineffective for failing to obtain an evaluation equivalent to that provided by Dr. Colley. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Janet J. Berry, District Judge
Scott W. Edwards
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[9]See Strickland, 466 U.S. at 689.