IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHELLE ELAINE KIMBERLIN,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
DON HELLING,
Respondent.

No. 40369

FILED

FEB 05 2003

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Appellant was originally convicted, pursuant to a jury verdict, of one count of trafficking in a Schedule I controlled substance. The district court sentenced appellant to a prison term of life with parole eligibility after 10 years.

On direct appeal, this court affirmed the judgment of conviction.[1] Appellant thereafter filed a proper person petition for a writ of habeas corpus. The district court appointed counsel, who filed a supplement to the petition. After an evidentiary hearing, the district court denied the petition. This appeal followed.

[1]Kimberlin v. State, Docket No. 35192 (Order Dismissing Appeal, September 8, 2000).

Appellant first argues that trial counsel was ineffective by failing to communicate a plea offer from the State. The district court specifically found, however, that counsel did communicate the offer. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[2] Appellant has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. We therefore conclude that this argument is without merit.

Appellant next argues that: (1) the prosecutor committed constitutional error by withdrawing the plea offer; (2) the prosecutor committed constitutional error by disparaging the defense attorney and the defense's tactics and by arguing the case during objections; (3) a mistrial should have been declared based on juror misconduct; (4) juror misconduct occurred when a juror saw a "no deal" notation on the prosecutor's file; (5) the jury was improperly instructed; and (6) the sentence constituted cruel and unusual punishment.

Initially, this court notes that these issues could all have been raised on direct appeal, and they are therefore not properly raised in a post-conviction petition.[3] To the extent that appellant raises these issues as claims of ineffective assistance of trial and appellate counsel, we conclude that the district court did not err by denying the petition.

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

[3]NRS 34.810(1)(b)(2).

To state a claim of ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's performance, the outcome of the proceedings would have been different.[4] The court need not consider both prongs of the test if the petitioner makes an insufficient showing on either prong.[5] As to each issue, appellant has failed to demonstrate either that counsel's performance was unreasonable or that the outcome of the trial would have been different.

Appellant next argues that the jury's verdict was inconsistent in that she was acquitted of possession for purposes of sale. On direct appeal, this court concluded that the verdict was not inconsistent. This argument is thus barred by the doctrine of the law of the case.[6]

Finally, appellant argues that the jurors' questioning of appellant turned the proceeding into an inquisition. This issue could have been raised on direct appeal and is therefore not properly raised in a post-

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[4]Strickland v. Washington, 466 U.S. 668, 694 (1984).

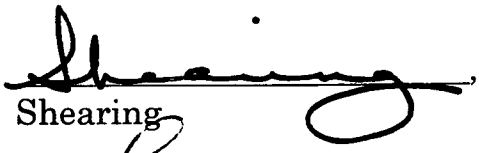
[5]Id. at 697.

[6]Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

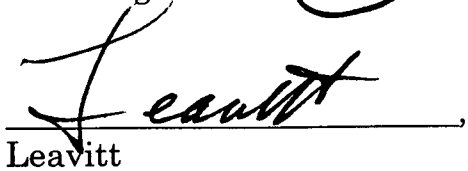
conviction petition.[7] Moreover, this court has generally approved the use of juror questions at trial.[8]

Based on the foregoing, we conclude that the district court did not err by denying the petition, and we

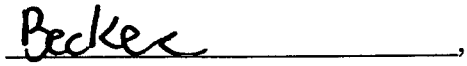
ORDER the judgment of the district court AFFIRMED.[9]



, J.
Shearing



, J.
Leavitt



, J.
Becker

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[7]NRS 34.810(1)(b)(2).

[8]Flores v. State, 114 Nev. 910, 965 P.2d 901 (1998).

[9]Although this court has elected to file the appendix submitted, we note that it does not comply with the arrangement and form requirements of the Nevada Rules of Appellate Procedure. See NRAP 3C(e)(2); NRAP 30(c); NRAP 32(a). Specifically, the documents in the appendix are not in chronological order, and there is no alphabetical index. Counsel is cautioned that failure to comply with the requirements for appendices in the future may result in the appendix being returned, unfiled, to be correctly prepared. See NRAP 32(c). Failure to comply may also result in the imposition of sanctions by this court. NRAP 3C(n).

cc: Hon. J. Michael Memeo, District Judge
Matthew J. Sternitz
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk