

IN THE SUPREME COURT OF THE STATE OF NEVADA

CRAIG ALLEN HARRISON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40467

FILED

JUL 01 2004

ORDER OF AFFIRMANCE

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

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

Appellant Craig Allen Harrison was convicted by a jury of robbery with the use of a deadly weapon and conspiracy to commit robbery with the use of a deadly weapon. We previously affirmed Harrison's judgment of conviction.¹ He subsequently petitioned for a writ of habeas corpus. The district court dismissed two of the claims in his petition without holding an evidentiary hearing. After a hearing on the remaining three claims, the district court denied the petition. Harrison now appeals. We conclude that Harrison's counsel was not ineffective for failing to present and investigate certain witnesses and evidence and that the district court did not err in dismissing the two claims in Harrison's post-conviction petition without conducting an evidentiary hearing.

Ineffective assistance of counsel

A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.² To establish

¹Harrison v. State, Docket No. 36174 (Order of Affirmance, November 20, 2000).

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

ineffectiveness of counsel, Harrison must show that his attorney's performance was deficient and that the deficient performance prejudiced Harrison's defense.³ To establish prejudice, Harrison must show that, but for his counsel's errors, there is a reasonable probability that the verdict would have been different.⁴ We review counsel's performance with deference; Harrison "must overcome the presumption that a challenged action might be considered sound strategy."⁵

First, Harrison argues that his counsel was ineffective in failing to investigate the victim, Ulysses Martinez. Harrison argues that trial counsel should have established, at trial, that Martinez was co-conspirator Candace Koyama's drug source. Harrison asserts that this evidence would have established that Martinez voluntarily entered the room and would have explained why Martinez had been angry with Koyama, thereby causing Harrison to hit him. During his post-conviction hearing, however, Harrison failed to present any evidence indicating that Martinez was Koyama's drug source. Harrison next argues that, had his trial counsel conducted an adequate investigation, she would have been able to attack the inconsistencies in Martinez's testimony. However, during trial, counsel cross-examined Martinez on each of the alleged inconsistencies, and did expose the jury to the discrepancies in Martinez's

³Id. at 646, 878 P.2d at 277-78 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 692 (1984)).

⁴Strickland, 466 U.S. at 694 (noting that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome").

⁵Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001).

testimony. Accordingly, Harrison has failed to demonstrate that his counsel's performance was deficient or that his case was prejudiced.

Second, Harrison argues that his counsel was ineffective in failing to investigate certain factual evidence, including Martinez's cell phone records and Koyama's possession of Martinez's business card, which he argues would have established a relationship between Martinez and Koyama. At trial, however, the district court admitted Martinez's cell phone records and Harrison elicited testimony concerning the timing of Koyama's calls in relation to the cell phone records. Koyama also testified that Martinez had given her his business card. We also note that the card was admitted at trial. The record therefore belies Harrison's claim of ineffectiveness, since Harrison's counsel produced the very evidence that he alleges should have been produced. This claim fails.

Third, Harrison argues that his trial counsel was ineffective in failing to attack Koyama's credibility by impeaching her with the plea agreement she had executed with the State. At trial, however, Koyama testified as to the charges against her and also that her testimony was given in exchange for the State's dismissal of certain charges. Moreover, the district court informed the jury that Koyama had made an agreement with the State in exchange for her testimony at Harrison's trial.⁶ Therefore, Harrison has failed to establish any further benefit to be gained by actually presenting the executed agreement, and accordingly, this claim fails as well.

⁶The district court also informed the jury that they would receive a copy of the plea agreement. However, the record does not reveal whether this actually occurred.

Fourth, Harrison argues that his trial counsel was ineffective in failing to present Harrison's girlfriend, Michelle Ewing, and Wilda Smith, the motel manager and maid, as witnesses. The decision to present witnesses is a strategic one and, absent extraordinary circumstances, is not subject to challenge.⁷ While Harrison argues that Ewing would have testified that Koyama did not have a reputation for truthfulness, trial counsel could have reasonably determined that Ewing herself was not a credible witness, that her testimony would not benefit Harrison or that her testimony might have hurt counsel's theory of the case. Additionally, trial counsel did attack Koyama's credibility through cross-examination of Koyama concerning Koyama's drug use and her reason for testifying. Harrison argues that Smith would have confirmed the presence of tattoo equipment in Harrison's motel room on the day of the incident, corroborating his claimed purpose for being in the room and thereby demonstrating that he did not intend to commit robbery. However, in light of Koyama's testimony that she was in the motel room because Harrison was finishing a tattoo, and the victim's testimony that Koyama's tattoo looked fresh, trial counsel could have reasonably determined that Smith's testimony would have been cumulative. Moreover, the presence of the tattoo equipment in the motel room is not dispositive of the issue of Harrison's guilt or innocence. Accordingly, the district court did not err when it determined that Harrison had failed to establish ineffectiveness in this regard.

⁷See Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (recognizing that "the trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call").

Fifth, Harrison argues that his trial counsel was ineffective because she failed to investigate the knife used in the crime. At the post-conviction hearing, Harrison made several assertions as to what the knife would have revealed, *i.e.*, that it was so sharp that it would have cut skin on contact, and, therefore, that Martinez's injury was inconsistent with Harrison having held a knife to his throat. Harrison, however, did not present any evidence supporting these bald assertions. Therefore, he has failed to demonstrate his counsel's ineffectiveness or his own prejudice.

Finally, Harrison argues that his counsel was ineffective in failing to object to the State's failure to disclose that Koyama would be testifying, and in failing to move for a continuance upon discovering the State's intention to call Koyama as a witness at trial. In Harrison's direct appeal to this court, we determined that the State did not commit prosecutorial misconduct when it did not properly endorse Koyama as a potential witness.⁸ Harrison has not shown that an objection to the failed disclosure would have resulted in a ruling by the district court that she should be excluded as a witness. Harrison has also failed to demonstrate a reasonable probability that a continuance would have been granted and that had one been granted, that a continuance would have affected the outcome of the trial. Finally, Harrison has not overcome the presumption favoring trial counsel's effectiveness. We certainly can foresee several scenarios by which Harrison's counsel would perceive a strategic

⁸Harrison v. State, Docket No. 36174 (Order of Affirmance, November 20, 2000) (determining that, because appellant was charged by an indictment and therefore a list of witnesses need not be disclosed, Harrison's "contention that the State committed prosecutorial misconduct by not properly endorsing the accomplice as a potential witness is without merit").

advantage in having Koyama testify, thereby allowing him the opportunity to cross-examine her. Accordingly, Harrison's argument is without merit.

Post-conviction evidentiary hearing

Harrison contends that the district court abused its discretion when it dismissed the third and fourth claims of Harrison's post-conviction petition without conducting an evidentiary hearing.

Per NRS 34.770, the district court has discretion to determine whether an evidentiary hearing is necessary. A petitioner is entitled to a post-conviction evidentiary hearing "when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief."⁹ To the extent that Harrison advances merely naked allegations, he is not entitled to an evidentiary hearing.¹⁰ Nor may Harrison rely on conclusory claims.¹¹

In the third claim of his petition, Harrison alleged that his counsel was ineffective because she did not present crime scene photographs to the jury which would have shown the motel room's layout. The photographs, however, do not aid Harrison's contention that Koyama and Martinez had a relationship and that Martinez entered the room voluntarily. Harrison has, therefore, failed to provide to the district court any factual allegations, which, if true, would entitle him to relief. Harrison's claim is conclusory, stating mere naked allegations.

⁹Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).


¹⁰Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).


¹¹Colwell v. State, 118 Nev. 807, 812, 59 P.3d 463, 467 (2002).

Accordingly, the district court did not err when it dismissed the claim without an evidentiary hearing.

In his fourth claim, Harrison alleged that his counsel was ineffective in failing to ask Koyama, at trial, if she was under the influence of drugs. Harrison, however, failed to assert any factual allegations, such as witness testimony confirming that Koyama in fact was under the influence of drugs such that, if believed by the jury, would have entitled him to relief. Because Harrison fails to provide any reason why his counsel should have asked Koyama about her drug use during trial, Harrison's argument is without merit. Accordingly, the district court did not err in dismissing Harrison's fourth claim without an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
Karla K. Butko
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk