

IN THE SUPREME COURT OF THE STATE OF NEVADA

HARVEY ALONZO BOLIEN, SR. A/K/A
HARVEY ALONZO BOLENE, SR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40851

FILED

JUL 01 2004

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

ORDER OF AFFIRMANCE

Appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

A jury convicted appellant Harvey Alonzo Bolien, Sr., of four counts of sexual assault; one count of coercion; one count of annoying a minor, second offense; one count of intimidating a witness; two counts of solicitation; and four counts of open and gross lewdness. The district court sentenced Bolien to several terms of incarceration in the Nevada State Prison. Bolien's sexual assault convictions involved three separate victims: Bettina Smith, Dena Harris, and E.H., a minor.

This court issued an order dismissing Bolien's direct appeal.¹ On May 13, 2002, Bolien filed a post-conviction petition for a writ of habeas corpus in the district court. In his petition, Bolien made numerous claims of ineffective assistance of trial and appellate counsel.

In Strickland v. Washington, the United States Supreme Court held that a claim for ineffective assistance of counsel requires the

¹Bolien v. State, Docket No. 31849 (Order Dismissing Appeal, August 13, 1999).

defendant to show (1) that his attorney's performance "fell below an objective standard of reasonableness"² and (2) the attorney's deficient performance prejudiced the defendant.³ Prejudice is established if the defendant proves that "but for counsel's unprofessional errors, the result of the proceeding would have been different."⁴ We have adopted the Strickland test.⁵ We review a lawyer's representation with deference, and the defendant "must overcome the presumption that a challenged action might be considered sound strategy."⁶

We have held that "[t]he constitutional right to effective assistance of counsel extends to a direct appeal. A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland."⁷ "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."⁸

Bolien alleges several instances of ineffective assistance of trial counsel.

²466 U.S. 668, 687-88 (1984).

³Id. at 691-92.

⁴Id. at 694.

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

⁶Id.

⁷Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996) (citations omitted).

⁸Id. at 998, 923 P.2d at 1114.

Transfer of record to appellate counsel

Bolien contends that his trial counsel was ineffective because he failed to provide appellate counsel with copies of trial counsel's motion requesting that Bettina undergo a psychological examination and the district court's July 18, 1997, order regarding that motion. We disagree.

Bolien's trial counsel testified at the post-conviction hearing that he would have given appellate counsel everything "necessary . . . for him to go for an appeal." Bolien's trial counsel responded negatively when asked if he would intentionally remove documentation from the file for an appeal.

Because Bolien failed to prove at his post-conviction hearing that his trial counsel did not provide his appellate counsel everything needed for the appeal, we conclude that his trial counsel was not ineffective.

E.H.'s psychological exam

Bolien contends that his trial counsel was ineffective because he failed to obtain E.H.'s psychological evaluation after the district court granted Bolien's motion to have E.H. psychologically examined. We disagree.

On July 18, 1997, the district court granted Bolien's motion for a psychological examination of E.H. Before Bolien's trial, the State filed a motion to continue the trial in order to provide Bolien more time to find a doctor to testify. Bolien opposed the State's motion, arguing that a continuance would violate his right to a speedy trial. During trial, Bolien's trial counsel answered negatively when asked whether the defense planned on presenting an expert witness.

Bolien's trial counsel testified at the post-conviction hearing that a psychiatrist evaluated E.H. one time. Trial counsel also testified that he did not have the doctor testify at Bolien's trial because the doctor never completed interviewing E.H. and that "there was really nothing that he could testify to that would hurt or help Mr. Bolien." Finally, trial counsel testified that he decided not to have the doctor testify because Bolien did not wish to pay for the doctor's fee. Laurie Ralston, Bolien's daughter, testified at the post-conviction hearing that Bolien paid his trial counsel \$900 for a psychological examination of E.H. The district court held that Bolien's trial counsel was not ineffective because "[t]he court cannot conclude this was not a trial strategy on the part of the trial counsel."

We have held that "[j]udicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy."⁹

In the instant case, substantial evidence supported the district court's decision that Bolien's trial counsel opposed the State's motion to continue trial. The State filed the motion for continuance because it would provide Bolien with more time to secure an expert witness. Bolien opposed the motion because he felt that prolonging his time in custody prejudiced his case. During trial, Bolien never disputed his trial counsel's statement that he could not afford the expert witness fee. Therefore, we conclude that Bolien's trial counsel's decision to forego securing a

⁹State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998).

psychiatrist as an expert witness was part of trial counsel's trial strategy and was not ineffective assistance of counsel.

Failure to subpoena witness

Bolien contends that his trial counsel was ineffective because he failed to subpoena a University Medical Center Quick Care doctor. We disagree.

The Quick Care doctor allegedly told Bettina that he would not do anything about her allegation that Bolien had been inserting his penis in her mouth. The district court held that trial counsel was not ineffective because it "may have been trial counsel's strategy" to forego the doctor's testimony.

Because Bolien failed to produce any evidence to the contrary, we agree with the district court that his trial counsel's failure to subpoena this doctor constituted part of his trial strategy.

Bettina's psychological examination

Bolien argues that his trial counsel was ineffective for failing to gather sufficient information to convince the district court that Bettina should be psychologically examined. We disagree.

Before trial, Bolien's trial counsel moved the district court to require Bettina to undergo a psychological evaluation. Bolien contends that Bettina needed an evaluation because Bettina stated that she previously received treatment from a psychiatric facility in Oklahoma and because Bettina claimed that the Nye County Sheriff's Department had raped and impregnated her. On July 18, 1997, the district court filed an order concluding that Bolien's motion to have Bettina examined "may be re-considered by the Court upon the defendant presenting more compelling evidence as to why her previous hospitalization for mental

reasons would effect [sic] her emotional or mental state with regard to her veracity, and how this examination would aid in the assessment of her credibility."

At Bolien's post-conviction hearing, Bolien's trial counsel admitted that he never conducted any research on Bettina's medical condition from the time the district court permitted such additional information until the date of the trial. Bolien failed to demonstrate how he was prejudiced from his trial counsel's failure to investigate Bettina's psychiatric history. Therefore, we conclude that Bolien's claim that his trial counsel was ineffective for failing to research Bettina's psychiatric history is insufficient to establish that his trial counsel was ineffective.

Ineffective assistance of appellate counsel

Bolien argues that his appellate counsel was ineffective for failing to review the district court file and appeal the district court's July 18, 1997, order, which concluded that the district court would reconsider Bolien's motion to have Bettina psychologically examined if Bolien presented evidence of Bettina's previous psychiatric hospitalizations. We disagree.

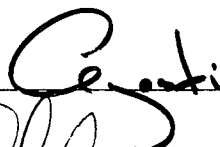
Bolien's appellate counsel responded affirmatively at the post-conviction hearing when asked if he requested the entire file from Bolien's trial counsel. Bolien's appellate counsel stated that he never saw a motion to have Bettina psychologically examined, the answer to that motion or the district court's order regarding that motion in the file forwarded to him by trial counsel. Bolien's appellate counsel responded affirmatively when asked if he would have included the motion and the order regarding Bettina's psychological examination in his direct appeal. Appellate

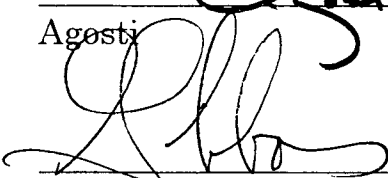
counsel testified that he did "not recall going through the District Court file in this case."

The district court stated in its July 18, 1997, order that it was willing to reconsider the motion requesting Bettina's psychological examination if more evidence was brought to the court's attention. Even if appellate counsel had raised this issue on direct appeal, the appeal would have been unsuccessful because the district court received no additional evidence that would warrant reconsideration of its July 18, 1997, order. Therefore, we conclude that Bolien's argument lacks merit.¹⁰

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. John P. Davis, District Judge
Carl M. Joerger
Attorney General Brian Sandoval/Carson City
Nye County District Attorney Robert S. Beckett/Tonopah
Nye County Clerk

¹⁰We have reviewed all of Bolien's additional arguments and conclude they are without merit.

BECKER, J., dissenting:

I would reverse the judgment of the district court and grant the petition for post-conviction relief. In my original concurrence affirming Bolien's conviction, I indicated that the district court erred in not allowing evidence of Bettina's previous false allegations of rape to be admitted, but that the error was harmless. Given the new evidence produced at the post-conviction hearing on Bettina's hospitalizations for mental illness and trial counsels' failure to raise these issues at trial, I conclude trial counsel was ineffective and that Bolien suffered prejudice as a result of counsel's ineffective actions.

Becker, J.
Becker