IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMIE L. MCDOWELL, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41089

FILED

JAN 2 8 2004

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

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying appellant Tommie McDowell, Jr.'s post-conviction petitions for a writ of habeas corpus and motion for the appointment of counsel.

On August 15, 1994, the district court convicted McDowell, pursuant to a jury verdict, of one count of second-degree murder with the use of a deadly weapon. The district court adjudicated McDowell a habitual criminal and sentenced him to serve a term of life in the Nevada State Prison without the possibility of parole. This court dismissed McDowell's direct appeal.[1]

On August 19, 1999, McDowell filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. McDowell filed a reply. However, the district court took the petition off its docketing calendar. On November 1, 2001, McDowell filed a motion for the appointment of counsel, a motion to file an

[1]McDowell v. State, Docket No. 26314 (Order Dismissing Appeal, March 26, 1999).

04-01756

amended petition, and a first amended petition for a writ of habeas corpus in the district court. On February 5, 2002, the district court issued an order summarily denying McDowell's petitions. On appeal, this court reversed and remanded McDowell's appeal to a different district court to consider the merits of the arguments in both of McDowell's petitions and to determine whether an evidentiary hearing is warranted.[2]

On remand, a different district court was assigned to review McDowell's petitions and motions. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent McDowell or to conduct an evidentiary hearing. On February 11, 2003, the district court issued separate orders denying McDowell's petitions and motion for the appointment of counsel.[3] This appeal followed.

McDowell raised numerous claims of ineffective assistance of trial counsel in his petitions. A claim of ineffective assistance of trial counsel is reviewed under the two-part reasonably effective assistance of counsel test.[4] First, a petitioner must show that his trial counsel's

---

[2]McDowell v. State, Docket No. 38970 (Order of Reversal and Remand, December 12, 2002). In the order, this court noted that McDowell's first amended petition was not successive or procedurally barred because the district court improperly took McDowell's original petition off its docketing calendar without considering its merits.

[3]We conclude that the district court did not abuse its discretion in denying McDowell's motion for the appointment of counsel.

[4]See Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984).

performance fell below an objective standard of reasonableness.[5] Second, a petitioner must demonstrate prejudice by showing a reasonable probability that, but for counsel's errors, the results of the proceedings would have been different.[6] Both parts of the test do not need to be considered if the petitioner makes an insufficient showing on either.[7]

First, McDowell contended that his trial counsel was ineffective for failing to call Derwin Spencer, the father of the victim's infant child, and Drew Christiansen, McDowell's former trial counsel, to testify as witnesses on his behalf during trial. McDowell contended that Spencer could have testified to such things as the victim's violent and volatile character, the nature of McDowell's relationship with her, and McDowell's conciliatory nature. McDowell also contended that both Spencer and Christiansen could have impeached the testimony of various State witnesses.

Even if true, however, McDowell failed to show that the testimony of Spencer and Christiansen would have altered the outcome of his trial. Moreover, the testimony of Christiansen may have resulted in a waiver of the attorney-client privilege.[8] Although generally admissible,[9]

---

[5]See Strickland, 466 U.S. at 687.

[6]See id. at 694.

[7]See id. at 697.

[8]See NRS 49.095; Lisle v. State, 113 Nev. 679, 701, 941 P.2d 459, 473 (1997).

[9]See NRS 48.045.

testimony about a victim's character may sometimes actually hurt a defense. Given that McDowell chose not to present a defense, his trial counsel's decision not to call these witnesses to testify appears to be a reasonable tactical decision that will not be second-guessed by this court on appeal.[10] Therefore, we concluded that the district court properly denied McDowell relief on these allegations.

Second, McDowell contended that his trial counsel was ineffective for failing to request a self-defense jury instruction. Specifically, McDowell contended that there was sufficient evidence presented at trial that he killed the victim in self-defense to warrant the jury instruction.

A defendant is entitled to a jury instruction so long as there is evidence, no matter how weak or incredible, to support the theory of defense.[11] Our review of the record, however, does not reveal evidence showing that a self-defense jury instruction was warranted.[12] As the district court specifically noted at McDowell's sentencing hearing, "there are really no mitigating factors involved in . . . the killing. . . . [i]t wasn't a self-defense matter." Moreover, and as previously discussed, McDowell strategically chose not to present a defense, which included not presenting

---

[10]See Strickland, 466 U.S. at 690-91; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated on other grounds as recognized by Harte v. State, 116 Nev. 1054, 1073 n.6, 13 P.3d 420, 432 n.6 (2000).

[11]See Vallery v. State, 118 Nev. ___, ___, 46 P.3d 66, 76-77 (2002).

[12]See Runion v. State, 116 Nev. 1041, 13 P.3d 52 (2000); see also NRS 200.120; NRS 200.130; NRS 200.160; NRS 200.200.

a theory of self-defense. Although unprevailing, McDowell has failed to show that this tactical decision was unreasonable. Therefore, we conclude that the district court properly denied McDowell relief on this allegation.

Third, McDowell contended that his trial counsel was ineffective for failing to provide him with accurate information regarding the potential sentence he faced if the district court adjudicated him a habitual criminal. Specifically, McDowell contended that his trial counsel erroneously informed him that he would face a potential sentence of five to twenty years if the district court adjudicated him a habitual criminal. Based on this advice, McDowell contended that he rejected a pre-trial plea offer by the State.

Any advice by his trial counsel regarding the State's pre-trial plea offer and habitual criminal adjudication, even if accurate, would have nonetheless been speculative. Moreover, McDowell was charged with open murder with the use of a deadly weapon. Regardless of whether he was adjudicated a habitual criminal, when he denied the alleged pre-trial plea offer, McDowell faced the possibility of being convicted of first-degree murder with the use of a deadly weapon and sentenced to life in prison without the possibility of parole.[13] Thus, even if his allegation is true, McDowell cannot show he was prejudiced by any erroneous advice by his trial counsel in making this decision. Therefore, we conclude that the district court properly denied McDowell relief on this allegation.

---

[13]See NRS 200.030(4)(b)(1).

Finally, McDowell contended that his trial counsel was ineffective for failing to investigate and perform forensic analysis of evidence and blood spatter found at the crime scene. Specifically, McDowell contended that a shirt and knife found at the crime scene contained traces of his blood, which would have supported a theory that McDowell killed the victim in self-defense.

Trial counsel has an obligation to conduct a reasonable investigation into information that is pertinent to her client's case before making decisions on how best to present a defense.[14] McDowell, however, did not specify what injuries were allegedly inflicted upon him by the victim such that it would have been reasonable to investigate the crime scene for his blood.[15]

Additionally, there is no indication from the record that McDowell needed or sought any medical treatment on November 19, 1992—the day of the crime. LVMPD Detective Robert Leonard testified that he observed no injuries on McDowell on the day of the crime. In fact, McDowell's former trial counsel, Drew Christiansen, acknowledged during a pre-trial hearing before the district court that "[t]here is no evidence whatsoever" that McDowell was ever injured or his blood would be located at the crime scene. Thus, McDowell failed to show that his trial counsel was ineffective by not investigating the blood at the crime scene.

---

[14]See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996).

[15]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Therefore, we conclude that the district court did not improperly deny McDowell relief on this allegation.

In his original petition, McDowell also contended that his appellate counsel was ineffective for failing to raise claims of ineffective assistance of trial counsel on direct appeal. However, this court has consistently held that claims of ineffective assistance of trial counsel are properly raised for the first time in a post-conviction petition for a writ of habeas corpus, not on direct appeal.[16] Therefore, we conclude that the district court properly denied McDowell relief on this allegation.

McDowell also raised a number of allegations independent from his claims of ineffective assistance of either trial or appellate counsel. McDowell contended that the district court failed to properly adjudicate him a habitual criminal. Yet, this court concluded on direct appeal that the district court did not abuse its discretion in adjudicating McDowell a habitual criminal. The doctrine of the law of the case bars re-litigation of this issue.[17] McDowell also contended that the district court improperly coerced him into not testifying during trial, and the reasonable doubt jury instruction in his case violated the United States Constitution. These allegations should have been raised by McDowell on direct appeal and were properly barred by the district court.[18]

---

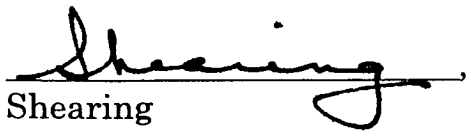
[16]See Pellegrini v. State, 117 Nev. 860, 882-83, 34 P.3d 519, 534-35 (2001).

[17]See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

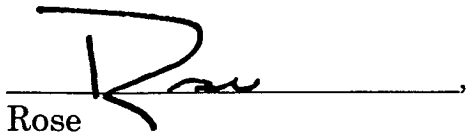
[18]See NRS 34.810(1)(b)(2).

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

ORDER the judgment of the district court AFFIRMED.[20]



_____, C. J.
Shearing



_____, J.
Rose

_____, J.
Maupin

cc: Hon. Joseph T. Bonaventure, District Judge
Tommie L. McDowell Jr.
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

---

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

[20]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.