IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY CHRISTOPHER ROWE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41113

FILED

JUL 0 1 2004

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

ORDER OF AFFIRMANCE

Appellant Barry Christopher Rowe appeals from a district court order denying his post-conviction petition for a writ of habeas corpus. The district court convicted Rowe, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. The district court sentenced Rowe to serve two consecutive terms of life with the possibility of parole in the Nevada State Prison. On direct appeal, this court affirmed Rowe's conviction.[1]

Rowe contends that the district court erred in denying his habeas petition when it ruled that his trial counsel was not ineffective, and that the district court erred in ruling that evidence admitted at trial of an uncharged prior bad act could not be revisited. Rowe also asserts that this court's decision concerning prior bad act evidence in Walker v. State[2] should be applied to his case retroactively. Because all of Rowe's contentions lack merit, we affirm the district court's order denying the post-conviction petition for a writ of habeas corpus.

---

[1]Rowe v. State, Docket No. 29700 (Order Dismissing Appeal, July 15, 1999).

[2]116 Nev. 442, 997 P.2d 803 (2000).

04-12093

Ineffective assistance of counsel

Rowe argues that the district court erred in denying his habeas petition when it ruled that his trial counsel was not ineffective for failing to object and make a record when the district court substituted an ill juror for an alternate juror.

Under Strickland v. Washington, to prevail on a claim of ineffective assistance of counsel, a petitioner "must show that counsel's performance was deficient."[3] That is, counsel's performance must fall "below an objective standard of reasonableness."[4] Petitioner must also demonstrate that his counsel's deficient performance prejudiced the defense to such a degree that, but for counsel's ineffectiveness, the outcome of the trial would have been different.[5] "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one."[6] "Judicial 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."[7]

Rowe's trial counsel did not object when the district court replaced a sick juror with an alternate juror after the sick juror stated that he felt ill. The district court consulted with a nurse concerning the

---

[3]466 U.S. 668, 687 (1984).

[4]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[5]Id. at 988, 923 P.2d at 1107; see also Strickland, 466 U.S. at 687.

[6]Id. at 987, 923 P.2d at 1107.

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

sick juror's medical condition before deciding to replace the sick juror with the alternate juror.

A reasonably competent defense attorney would not have objected to the juror substitution, especially after the district court consulted a nurse concerning the juror's medical condition when making its decision. Thus, we agree with the district court's finding that trial counsel's failure to object and make a record of the juror substitution does not demonstrate that counsel's performance fell below the standard of reasonableness. We, therefore, conclude that the district court did not err in denying Rowe's post-conviction petition based on ineffective assistance of counsel.

Prior bad act evidence

Rowe argues that the district court erred when it found that the law of the case prevented it from revisiting Rowe's claim that the district court erred when it admitted into evidence at trial the uncharged prior bad act.

The prior bad act involved an incident that occurred two and one-half years before Rowe killed Jason Hansen, the victim in this case. In December 1992, Rowe stabbed a high school friend, "in the leg with a knife while engaging in 'horseplay.'" Rowe's high school friend, Michael William Sellars, testified that the knife was a small pocket-knife with a two-inch blade. Sellars described the stabbing as an accident, which occurred while he and Rowe were horsing around in a high school administrative office.

When a court has already decided the merits of a petitioner's claims for relief, it "must dismiss a habeas petition if it presents claims that . . . were . . . presented in an earlier proceeding, unless the court finds

both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner."[8] Such claims must not be revisited based on the doctrine of the law of the case.[9] "The law of the first appeal is the law of the case in all later appeals in which the facts are substantially the same, and that law cannot be avoided by more detailed and precisely focused argument made after reflecting upon previous proceedings."[10]

In its order dismissing Rowe's direct appeal, this court concluded that Rowe's "prior bad act appeared to establish a pattern of committing acts of violence in the context of horseplay and then claiming that his actions were accidental[. The] evidence [that Rowe stabbed] Sellars was relevant to and probative of absence of mistake and modus operandi."

At trial, Rowe defended on the theory that he accidentally discharged the shotgun when he killed Hansen in July 1995. The intentional pointing of the gun at Hansen's head demonstrates a mental state similar to the knifing incident and is probative of the absence of mistake, pursuant to NRS 48.045(2). Because the facts in this appeal are the same as those in the direct appeal, our conclusion in Rowe's first appeal is the law of the case. Therefore, the district court did not err in holding that the law of the case precludes reconsideration of this issue.

---

[8]Evans v. State, 117 Nev. 609, 621-22, 28 P.3d 498, 507 (2001) (emphasis added); see also NRS 34.810.

[9]State v. Haberstroh, 119 Nev. 173, 188, 69 P.3d 676, 686 (2003).

[10]Id. at 188-89, 69 P.3d at 686.

Rowe asserts another reason for his contention that the erroneous admission of prior bad act evidence warrants reversal of his conviction. Rowe contends that this court's decision in Walker v. State,[11] which concerned the admission of prior bad act evidence, should be applied to his case retroactively. Walker concerned an evidentiary ruling based on the unique facts in that particular case.[12] Each case is reviewed on the basis of whether the district court abused its discretion. Retroactivity does not apply.

We therefore ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Shearing

_____, J.
Becker

_____, J.
Gibbons

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

---

[11]116 Nev. at 442, 997 P.2d at 803.

[12]Id.