

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN JOE PICOTTE,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondent.

No. 41116

FILED

MAY 04 2001

J. Richard
CLERK OF SUPREME COURT
STATE OF NEVADA

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. After two jury trials, appellant Kevin Joe Picotte was convicted of one count of first degree murder and two counts of first degree kidnapping with the use of a deadly weapon. Picotte received six life sentences without the possibility of parole. On direct appeal, we affirmed the district court's entries of judgment.¹ After the district court denied Picotte's habeas corpus petition, Picotte raised two issues in the current appeal: (1) the district court should have granted an evidentiary hearing on Picotte's ineffective assistance of counsel claim, and (2) the district court erred in denying Picotte's request for a continuance.

FACTS

The State charged Picotte with one count of first degree murder and two counts of first degree kidnapping regarding the 1997 death of Estaban Adame. Picotte's trial involved five other defendants; he had counsel at all stages of this proceeding. The case went through two jury trials. In the first trial, the jury convicted Picotte of one count of

¹Picotte v. State, Docket Nos. 33979/35058 (Order of Affirmance, May 21, 2001).

kidnapping with the use of a deadly weapon, but the jury deadlocked on the murder count and second count of kidnapping. Picotte received two consecutive life sentences without the possibility of parole. He appealed the kidnapping conviction, but the court held the appeal in abeyance pending resolution of the murder charge.

The State elected to retry the murder count and the second count of kidnapping. Before the second trial, the parties addressed the need to refer to the first trial proceedings for refreshing recollection and impeachment purposes. Noting that "there is no law" on the issue, the district court permitted references to the first trial, so long as there was no reference to Picotte's prior convictions.²

At the second trial, the jury heard testimony about a prior trial involving Picotte and five other individuals; the jury also heard that one of the other defendants received an acquittal. Some of the same witnesses testified during both trials. The jury found Picotte guilty of murder and kidnapping with the use of a deadly weapon. During the sentencing stage, the jury foreman submitted a question to the district court, asking whether Picotte had been previously sentenced for kidnapping and received life without parole. The district judge answered affirmatively. After the jury's penalty decision, the district court entered judgment, sentencing Picotte to four additional life terms without the possibility of parole. As a result of both trials, Picotte received six life sentences without the possibility of parole. Picotte then appealed the

²Picotte had prior convictions for an ex-felon in possession of a firearm and for reckless disregard of a person causing bodily harm.

second sentence. We consolidated the appeals and affirmed the district court's entries of judgment.³

After we affirmed the district court's decisions, Picotte filed a timely petition for a writ of habeas corpus, raising several grounds for relief involving ineffective assistance of counsel. The court appointed post-conviction counsel who filed a supplement to the petition. In pertinent parts, Picotte's petition stated that his trial and appellate counsel were ineffective because (1) Picotte informed counsel of an alibi defense, but counsel refused to investigate, and (2) counsel failed to object to or appeal testimony about Picotte's first trial conviction. The State moved to dismiss. After considering the arguments, the district court dismissed each claim in the petition, except the ineffective assistance claim for failure to investigate an alibi claim.

The court conducted a hearing to determine the merits of Picotte's only remaining ground for relief. Allegedly, the list of witnesses Picotte gave to counsel included alibi witnesses, but counsel failed to investigate Picotte's leads. Picotte's trial counsel testified that Picotte never mentioned the possibility of an alibi defense and the list Picotte provided contained only character witnesses. The district court found that Picotte lied about informing counsel of the purported alibi, noted the lack of evidence that Picotte actually had an alibi, and denied Picotte's habeas petition. The court also denied Picotte's motion for continuance to continue gathering evidence. This appeal followed.

³Picotte v. State, Docket Nos. 33979/35058 (Order of Affirmance, May 21, 2001).

DISCUSSION

1. Continuance

Picotte asserts that the district court erred in denying his motion for continuance on the alibi defense. We find Picotte's argument inapposite.

At the close of the hearing, while making a closing argument, Picotte's counsel moved for a continuance in order to continue gathering evidence. Picotte explained that Roger Herada, counsel for Picotte's brother,⁴ also attended the evidentiary hearing. Upon seeing Herada, Picotte's counsel realized that Picotte might potentially benefit from his brother's alibi witnesses because the two brothers were allegedly together on the night of the crime. The district court denied the motion as untimely, stating that counsel should have made it at the beginning of the hearing. The court also stated that there was no reason to believe a continuance would serve any purpose. We agree with the district court's ruling.

Granting a motion to continue is within the district court's sound discretion.⁵ In Doleman v. State⁶ we upheld the district court's decision to deny a continuance where the facts the defendant sought to prove through the testimony of the absent witnesses were not essential to the defense. We also noted that defense counsel did not know the

⁴Kevin Picotte's brother, John Picotte, was also a defendant in the underlying trial.

⁵Doleman v. State, 107 Nev. 409, 416, 812 P.2d 1287, 1291 (1991), quoted in Batson v. State, 113 Nev. 669, 674, 941 P.2d 478, 482 (1997).

⁶107 Nev. 409, 812 P.2d 1287 (1991).

witnesses' full names or their locations.⁷ Finally, even if counsel had located the alleged witnesses, their testimony would not have exculpated the defendant.⁸ In Lord v. State,⁹ after the jury convicted the defendant of first degree murder, the defendant requested a half-day continuance of the penalty phase to permit his witnesses to arrive in Nevada to testify. The district court denied the request, and the defendant could not present six of his seven witnesses, including his father. On appeal, we held that the district court abused its discretion by "refusing to grant this reasonable request for a modest continuance."¹⁰ We further concluded that denying a reasonable continuance request might amount to abuse of discretion "where the purpose of the motion is to procure important witnesses and the delay is not the particular fault of counsel or the parties."¹¹ In Mulder v. State,¹² we distinguished Lord and held that the district court did not abuse its discretion in denying Mulder's pretrial request to delay the penalty hearing by sixty days. The court's decision was appropriate because sixty days did not constitute a "modest" continuance, Mulder caused the need for the delay by refusing to assist his attorneys, and

⁷Id. at 416, 812 P.2d at 1291.

⁸Id.

⁹107 Nev. 28, 41, 806 P.2d 548, 556 (1991).

¹⁰Id. at 42, 806 P.2d at 556-57.

¹¹Id. at 42, 806 P.2d at 557.

¹²116 Nev. 1, 992 P.2d 845 (2000).

Mulder failed to explain exactly what mitigating evidence he would have presented.¹³

Turning to the facts, we conclude that this case is analogous to Doleman and Mulder and distinguishable from Lord. Unlike Lord, where the defendant had seven witnesses ready to testify, Picotte asserts he had "many potential alibi witnesses," but failed to produce an alibi witness. The two alleged alibi witnesses Picotte produced at the habeas hearing swore they were not with Picotte on the night in question. As in Doleman, even if counsel had located the alleged witnesses, their testimony would not have exculpated the defendant because counsel testified that they were character, not alibi, witnesses. The district court believed counsel's testimony.

Unlike Lord, Picotte requested a thirty-day continuance. Similar to Mulder, such a period does not qualify as a "modest continuance," especially when the case underwent two jury trials and a direct appeal. Picotte had ample time to locate his alleged alibi witnesses. Distinguishable from Lord and analogous to Mulder, the delay is Picotte's fault because he never communicated the possibility of an alibi to his counsel. As in Mulder, Picotte failed to explain exactly what alibi witnesses he intended to present; his hope that his brother's evidentiary hearing would reveal potential witnesses was a mere conjecture. The district court properly denied Picotte's continuance request.

2. Ineffective assistance

Picotte contends that the district court erred in dismissing his ineffective assistance of counsel claim without an evidentiary hearing

¹³Id. at 10, 992 P.2d at 850.

because the second trial counsel wrongfully permitted or failed to appeal evidence of Picotte's first trial conviction. We agree.

A. Strickland

Under Strickland v. Washington,¹⁴ to prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness; and (2) his counsel's deficient performance prejudiced the defense to such a degree that, but for counsel's ineffectiveness, the results of the trial would have been different. "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."¹⁵ "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."¹⁶

B. Evidentiary hearing standard

While Picotte's underlying claim appears to raise an ineffective assistance of counsel issue, the real issue is whether Picotte should have received a post-conviction evidentiary hearing on the matter. "Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations which, if true, would entitle the petitioner

¹⁴466 U.S. 668, 687 (1984); accord Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

¹⁵Kirksey, 112 Nev. at 987, 923 P.2d at 1107 (citing Strickland, 466 U.S. at 697).

¹⁶State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998) (citing Strickland, 466 U.S. at 689).

to relief."¹⁷ "A defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record."¹⁸

We conclude that Picotte's petition and the trial record contained sufficient factual allegations which would entitle Picotte to relief and the district court should have granted Picotte's evidentiary hearing request. During the guilt stage, the jury learned that there was a prior trial. Some references to the first trial were innocuous because they revealed neither the nature of the proceedings nor the fact that Picotte participated in the first trial. However, other references identified the defendants from the prior trial, including Picotte:

Q: At that point you were joined up for trial with Mr. Bennett, Mr. Kevin Picotte, Mr. John Picotte, Danny Voss.

A: Yes.

Q: And Craig Minard.

A: Yes.

Q: All six of us went to trial together in February, didn't we?

A: Yes.

Other statements revealed that one of the defendants faced two life sentences, but received an acquittal:

Q: Explain to the jury what's it like being a defendant going to trial.

¹⁷Hurd v. State, 114 Nev. 182, 188, 953 P.2d 270, 274 (1998) (citing Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984)).

¹⁸Davis v. State, 115 Nev. 17, 21, 974 P.2d 658, 660 (1999) (quoting Hargrove, 100 Nev. at 503, 686 P.2d at 225).

A: Scary. Very scary.

Q: You were facing some pretty severe consequences, weren't you?

A: Two life sentences.

Q: Now, when the jury acquitted you, you were released shortly thereafter, were you not, from the Washoe County Jail?


A: Yes.

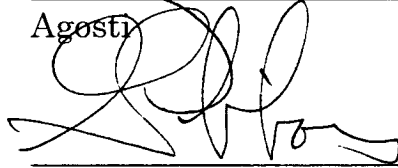
Some of the same witnesses testified in both trials. Because the district court denied Picotte's motion for severance, some of the same defendants participated in both trials. The proximity of the two trials and the identity of the defendants and witnesses could have led the jury to believe that the trials involved the same incident. We conclude this may have been prejudicial because Picotte's retrial suggests that the first jury did not acquit him. The district court should have granted Picotte's evidentiary hearing request to determine whether counsel's conduct fell below an objective standard of reasonableness.

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Steven R. Kosach, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk