

IN THE SUPREME COURT OF THE STATE OF NEVADA

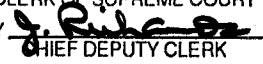
THE STATE OF NEVADA,
Appellant/Cross-Respondent,
vs.
DAVID MARISCAL,
Respondent/Cross-Appellant.

No. 41660

FILED

OCT 10 2006

ORDER OF AFFIRMANCE

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

This is an appeal and cross-appeal from an order of the district court that granted in part and denied in part David Mariscal's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

On October 14, 1994, the district court convicted Mariscal, pursuant to a jury verdict, of murder with the use of a deadly weapon. The district court sentenced Mariscal to serve two consecutive terms of life without the possibility of parole in the Nevada State Prison. This court affirmed Mariscal's conviction and sentence on direct appeal.¹ The remittitur issued on April 23, 1996.

On March 20, 1997, Mariscal filed a post-conviction petition for a writ of habeas corpus. The State filed an answer to the petition. The district court conducted evidentiary hearings on December 13, 1999, and February 25, 2000. The State and Mariscal filed post-hearing briefs. On June 12, 2003, the district court entered a summary order granting

¹Mariscal v. State, Docket No. 26400 (Order Dismissing Appeal, April 3, 1996).

Mariscal's petition in part, denying the petition in part and ordering a new sentencing hearing. These appeals followed. Pursuant to a limited remand by this court, on September 20, 2004, the district court entered a second order resolving Mariscal's petition that contained specific findings of fact and conclusions of law.

In his petition below, Mariscal raised multiple claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³ "[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."⁴ Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal.⁵

On appeal, the State argues that the district court erred by granting Mariscal a new sentencing hearing. The State argues that the

²Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

³Strickland, 466 U.S. at 697.

⁴Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

⁵Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

district court abused its discretion because its decision was not supported by the record and Mariscal failed to demonstrate prejudice. We disagree.

Mariscal claimed, among other things, that his trial counsel was ineffective because they failed to present any of Mariscal's family members as witnesses on his behalf at his sentencing hearing. At the sentencing hearing, the judge noted that in his recollection he had only sentenced one young offender to life without the possibility of parole in the five and one-half years he had been on the bench. The judge indicated that the reason for this is that he likes to believe that young people have the capacity to change. The judge stated that the necessary component to stimulate change is the "understanding that a person must change or has failed or needs a different life." The judge further indicated that he searched the record for evidence that Mariscal had some likelihood of being rehabilitated, but he was unable to come to that conclusion based on the evidence presented at the sentencing hearing. The judge then sentenced Mariscal to two consecutive terms of life without the possibility of parole.⁶

At the evidentiary hearing, Mariscal's trial counsel acknowledged that Mariscal's family was very supportive and some of his family was present at the sentencing hearings. Trial counsel further acknowledged that although Mariscal's sister, Sara, contacted their office on a regular basis and offered to help with Mariscal's sentencing by providing letters in support of her brother and testifying, if necessary, they never contacted Sara or Mariscal's other family members about

⁶Mariscal signed a stipulation waiving his right to be sentenced by a jury.

providing written testimonials or testifying on his behalf. The district court noted that since Mariscal admitted shooting the victim, the primary question at sentencing was Mariscal's character and questioned trial counsel why, when there were family members available and willing to testify, they did not put them on as witnesses. In response, trial counsel testified that they did not have a good reason for not presenting those witnesses. At the evidentiary hearing, Sara testified that Mariscal was a very hard worker at home, he helped out with his family and loved children, he assisted her with community service work, in past conversations he told her he wanted to change and would appreciate her help, and he moved to Reno to try to get away from the gang influence. The district court concluded that "trial counsel's failure to call [Sara] was unreasonable under prevailing professional norms" and had Sara "testified as she did in the habeas proceeding, . . . there is a reasonable probability that a more lenient sentence would have been imposed." We conclude that the district court's determination was supported by substantial evidence and was not clearly wrong. Accordingly, we affirm the order of the district court granting Mariscal a new sentencing hearing.

On cross-appeal, Mariscal first claims that the district court erred by denying his claim that his trial counsel was ineffective for failing to move to suppress his statement to the police because he was not brought before a magistrate within forty-eight hours of his arrest. We disagree.

The district court found that Mariscal's statement was made contemporaneous with his arrest and after a Miranda⁷ warning, and was made long before the expiration of the forty-eight hours. The district court further found that Mariscal failed to demonstrate that his trial counsel acted unreasonably by failing to file a motion to suppress based on this theory. Finally, the district court found that Mariscal was not prejudiced by counsel's failure to move to suppress the statement based on this theory because, even if the motion was granted, it was likely that the statement could have been used to impeach Mariscal's testimony at trial, and Mariscal did not demonstrate that the presence or absence of the statement played a role in his decision to testify. We conclude that the district court's determination was supported by substantial evidence and was not clearly wrong. Accordingly, we affirm the district court's denial of this claim.

Second, Mariscal claims that the district court erred by denying his claim that his trial counsel was ineffective for failing to move to suppress his statement to the police on the basis that it was involuntary. We disagree.

At the evidentiary hearing, trial counsel testified that they had reviewed Mariscal's statement and were of the opinion that the totality of the circumstances indicated that the statement was voluntary and they could find no basis to file a motion to suppress. The district court found that Mariscal failed to demonstrate that his trial counsel acted unreasonably by failing to file a motion to suppress. The district court

⁷Miranda v. Arizona, 384 U.S. 436 (1966).

also found that such a motion, if filed, was not likely to be granted because most of Mariscal's claims of involuntariness were belied by the record, Mariscal adequately waived his Miranda rights, the interview was short in duration and the police did not make promises or threats in order to get Mariscal to talk. We conclude that the district court's determination was supported by substantial evidence and was not clearly wrong. Accordingly, we affirm the district court's denial of this claim.

Third, Mariscal claims that the district court erred by denying his claim that his trial counsel was ineffective for failing to file a motion in limine to preclude the introduction of Exhibit 1.1, a photograph of the victim at the scene receiving medical assistance from paramedics. We disagree.

The district court found that trial counsel did not act unreasonably by failing to file the motion in limine because such a motion would have been denied. The district court further found that Mariscal was not prejudiced because, even if such a motion was granted, Mariscal failed to demonstrate that the exclusion of Exhibit 1.1 would have altered the outcome of his trial. We conclude that the district court's determination was supported by substantial evidence and was not clearly wrong. Accordingly, we affirm the district court's denial of this claim.

Fourth, Mariscal claims that the district court erred by denying his claim that his trial counsel was ineffective for failing to seek preclusion of Vincente Ramos' testimony on the basis that it constituted improper victim impact evidence. We disagree.

The district court found that to the extent that Mariscal challenged Ramos' statement that he missed his brother, the statement was not responsive to the question asked and trial counsel did not act

unreasonably by failing to challenge the statement. The district court further found that Mariscal was not prejudiced because there is no reasonable probability that exclusion of this statement would have altered the outcome of Mariscal's trial. We conclude that the district court's determination was supported by substantial evidence and was not clearly wrong. Accordingly, we affirm the district court's denial of this claim.

Fifth, Mariscal claims that the district court erred by denying his claim that his trial counsel was ineffective for failing to edit the casino surveillance tape so that it depicted only the altercation that occurred at the sports bar. We disagree.

The surveillance tape recording that was shown to the jury periodically switched scenes among different areas within the casino. Although the entire altercation that occurred at the sports bar was depicted in the surveillance tape that was presented to the jury, the jury also saw scenes from the casino that were not relevant to the altercation in the sports bar. During the trial, trial counsel had to start, stop, restart, fast-forward and rewind the surveillance tape in order to present just the relevant portions of the surveillance tape. At the evidentiary hearing, trial counsel testified that in hindsight they believed that presenting an edited version of the surveillance tape might have made it easier to view the tape and cross-examine Detective Jenkins about scenes in the tape, however, when preparing for trial they never considered producing an edited version of the tape. The district court found that although an edited version of the tape makes for easier watching, trial counsel did not act unreasonably by failing to produce an edited version. The district court further found that Mariscal was not prejudiced because there is no reasonable probability that the outcome of Mariscal's trial would have

been different had trial counsel presented an edited version of the surveillance tape, and there was no reason to believe that Detective Jenkins' testimony would have differed if he had been shown an edited version of the tape. We conclude that the district court's determination was supported by substantial evidence and was not clearly wrong. Accordingly, we affirm the district court's denial of this claim.

Sixth, Mariscal claims that the district court erred by denying his claim that his trial counsel was ineffective for failing to investigate the basis for FBI Agent Riley's testimony regarding bullets associated with the shooting and for failing to impeach Agent Riley's testimony. We disagree.

At trial, Mariscal's trial counsel stipulated to Agent Riley's expertise and did not cross-examine him. Agent Riley testified that it was his opinion that bullets obtained from the crime scene and body of the victim matched bullets confiscated from Mariscal's home. Trial counsel did not consult with or call upon an expert to determine whether or not Agent Riley's conclusions were accurate. At the evidentiary hearing, Mariscal presented expert testimony that could have been used at trial to challenge the accuracy of Agent Riley's testimony. At the evidentiary hearing, trial counsel testified that they did not believe challenging Agent Riley's testimony was necessary because Mariscal was proceeding on a theory of self-defense and they did not want to confuse the jury. Trial counsel further testified that they did not challenge Agent Riley's testimony because Mariscal admitted to them that he shot the victim with bullets from the box of cartridges that were confiscated from his home. The district court found that trial counsel's conduct was reasonable under prevailing professional norms. The district court further found that

Mariscal was not prejudiced because, at best, the expert testimony presented would have merely conflicted with Agent Riley's testimony. We conclude that the district court's determination was supported by substantial evidence and was not clearly wrong. Accordingly, we affirm the district court's denial of this claim.

Seventh, Mariscal claims that the district court erred by denying his claim that his trial counsel was ineffective for failing to conduct an adequate investigation into the death of the victim, and for presenting detrimental expert testimony. We disagree.

Trial counsel recalled Dr. Ellen Clark, the pathologist who performed the autopsy, to establish for the defense that she found no powder burns or gun powder residue on or around the victim's wounds. At the evidentiary hearing Mariscal did not present any expert testimony that would draw Dr. Clark's opinions into question. The district court found that Dr. Clark's testimony at trial was credible and Mariscal failed to present evidence proving or tending to prove that she was not qualified to present the testimony and opinions she provided at trial. The district court further found that trial counsel was not ineffective for recalling Dr. Clark because the evidence elicited from her had a logical tendency to contradict the prosecution's theory and prove that the shooting was not an execution style killing and the killing was not done at close range. We conclude that the district court's determination was supported by substantial evidence and was not clearly wrong. Accordingly, we affirm the district court's denial of this claim.

Eighth, Mariscal claims that the district court erred by denying his claim that his trial counsel was ineffective for failing to

adequately investigate the background of defense witness Walter Clark. We disagree.

Trial counsel called Walter Clark to present testimony in support of Mariscal's claim of self-defense. Clark testified that he saw a group of individuals confront a lone individual in a parking lot and he heard some "hollering." Clark further testified that the lone individual pulled a gun and held it in the air. Clark testified that upon seeing this he turned and started to run; he heard shots being fired, but he never saw a person actually shoot the gun. Clark also testified that he never spoke with police officers at the scene on the night the incident took place. Clark's testimony conflicted with the reports generated by the police officers that responded to the scene. The police officers testified in rebuttal that they spoke with Clark at the scene on the night of the incident and he informed them of an altercation he saw inside the casino earlier that night, but he never provided them with any information relating to the shooting. Detective Jenkins testified that Clark had relayed unreliable information to him several times in the preceding years.

At the evidentiary hearing, trial counsel testified that the defense investigator interviewed Clark prior to calling him to appear at trial. The record on appeal reveals that in preparation for trial, the defense investigator interviewed Clark two times. Both times Clark provided the same information and this information was consistent with the testimony Clark provided at trial. This information appeared to be additional information that was never provided to police officers and could have supported Mariscal's claim of self-defense. The district court found that Mariscal failed to demonstrate that a reasonable attorney would have

conducted any additional investigation. The district court further found that Mariscal was not prejudiced because he failed to demonstrate that additional investigation into Clark's background would have resulted in a different outcome at trial. We conclude that the district court's determination was supported by substantial evidence and was not clearly wrong. Accordingly, we affirm the district court's denial of this claim.

Ninth, Mariscal claims that the district court erred by denying his claim that the cumulative effect of trial counsel's errors denied him his right to due process of law and a fair trial. Although the district court determined that trial counsel's conduct with regard to the sentencing hearing was ineffective and granted Mariscal a new sentencing hearing, the district court also determined that taken as a whole, trial counsel's actions were not prejudicially deficient and did not deprive Mariscal of a fair trial. We conclude that the district court's determination was supported by substantial evidence and was not clearly wrong. Accordingly, we affirm the district court's denial of this claim.

Having considered the State's and Mariscal's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. Brent T. Adams, District Judge
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Patricia Erickson
Washoe District Court Clerk