IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL WINSETT,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Respondent.

No. 41711

FILED

APR 0 8 2004

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Michael Winsett's post-conviction petition for a writ of habeas corpus.

On March 29, 2000, the district court convicted Winsett, pursuant to a jury verdict, of robbery (victim 65 years of age or older), grand larceny, and three counts of burglary. The district court adjudicated Winsett a habitual criminal and sentenced him to a period totaling life in the Nevada State Prison with the possibility of parole after ten years.[1] On appeal, this court affirmed Winsett's judgment of conviction and sentence.[2] The remittitur issued on December 11, 2001.

On December 10, 2002, Winsett, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.770, the district court declined to hold an evidentiary hearing. On May 21,

[1]An amended judgment of conviction was filed on May 12, 2000 in order to clarify Winsett's sentence.

[2]Winsett v. State, Docket No. 35995 (Order of Affirmance, November 13, 2001).

04-06479

2003, the district court denied Winsett's petition. Winsett appeals, contending that his trial counsel was ineffective and the district court erred in failing to conduct an evidentiary hearing on the matter.[3]

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.[4] A petitioner must further establish that there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.[5] The court need not consider both prongs if the petitioner makes an insufficient showing on either one.[6]

First, Winsett alleges that his trial counsel was ineffective for failing to consult a fingerprint expert. Winsett contends that testimony from an expert for the defense was necessary to rebut the State's case. We conclude that Winsett's claim is without merit. The State introduced evidence at trial that Winsett's fingerprints matched those recovered at the scene of each of the three burglaries.[7] The State's fingerprint expert testified that in 30 years of examining hundreds of thousands of fingerprints, he is aware of making a misidentification only one time

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[3]We note that Winsett is represented by counsel in this appeal.

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

[5]Id.

[6]Strickland, 466 U.S. at 697.

[7]Winsett's fingerprints matched five latent fingerprints recovered from the February 1999 burglary, four fingerprints recovered from the May 1999 burglary, and one fingerprint recovered from the June 1999 burglary.

during a training exercise. Additionally, a second fingerprint examiner always verifies any fingerprint matches. In the instant petition, Winsett does nothing more than speculate that another fingerprint expert may have provided differing testimony concerning the fingerprints. Winsett does not claim that the fingerprints recovered from the burglaries were not his, or that the methods used by the State's fingerprint expert were unreliable. Therefore, Winsett failed to demonstrate that there is a reasonable probability that the outcome of his trial would have been different if his trial counsel had consulted a fingerprint expert.

Furthermore, trial counsel's failure to procure the testimony of a fingerprint expert at trial is a question of strategy.[8] Defense counsel's strategic decisions in achieving the defendant's objective are "virtually unchallengeable absent extraordinary circumstances."[9] Winsett does not demonstrate the existence of such circumstances. Consequently, Winsett failed to establish that his trial counsel was ineffective on this issue, and the district court did not err in denying this claim without conducting an evidentiary hearing.

Winsett next alleges that his trial counsel was ineffective for failing to present a defense of any kind. Winsett claims that he was prejudiced by his trial counsel's failure to present an opening argument, raise objections, or effectively cross-examine the State's witnesses. Winsett further contends that his trial counsel stated during his closing argument that Winsett was probably guilty. The record reveals that trial

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

[9]Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

counsel's theory of defense was that fingerprint evidence alone was not sufficient to find Winsett guilty beyond a reasonable doubt. We conclude that trial counsel adequately raised objections and cross-examined the State's witnesses to support this theory. Trial counsel further reinforced the theory of defense in his closing argument by suggesting that reasonable doubt existed due to lack of evidence apart from fingerprints. Thus, Winsett did not establish that his trial counsel acted unreasonably in this situation, and the district court did not err in denying this claim without conducting an evidentiary hearing.

Lastly, Winsett contends that his trial counsel was ineffective for failing to effectively communicate with him prior to the trial. Aside from the claims raised above, however, Winsett fails to specify how he was prejudiced by the alleged failure of communication.[10] Therefore, Winsett did not establish that his trial counsel was ineffective on this issue, and we affirm the order of the district court with respect to this claim.

As a final matter, we note that the district court erred in concluding that Winsett must attach affidavits, records, or other evidence supporting his allegations to his petition. NRS 34.735, which sets forth the form of the habeas corpus petition, does not require a petitioner to attach affidavits in support of claims raised in the petition. The determination of whether an evidentiary hearing is required can be made on the claims as presented in the petition. Any more stringent requirement may deprive a prisoner of adequate access to the courts. Because we determine that the district court did not err in denying

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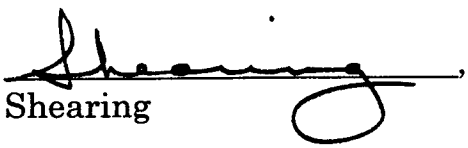
[10]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Winsett's petition without conducting an evidentiary hearing, however, the district court's erroneous conclusion was harmless.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Winsett is not entitled to relief and that briefing and oral argument are unwarranted. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
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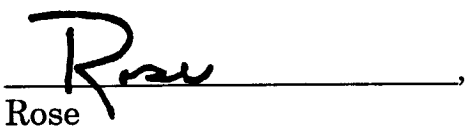

_____, J.
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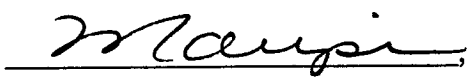

_____, J.
Maupin

cc: Hon. Joseph T. Bonaventure, District Judge
Patti & Sgro
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk