

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT PAUL SERVIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41903

FILED

MAR 01 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant Robert Paul Servin's post-conviction petition for a writ of habeas corpus.

We have reviewed the record on appeal and conclude that the factual findings stated in the attached order of the district court are supported by substantial evidence and are not clearly wrong.¹ We further conclude for the reasons stated in the attached order that the district court did not err in denying Servin's petition. Therefore, briefing and oral argument are not warranted in this case.² Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Shearing C.J.
Shearing

Rose J.
Rose

Maupin J.
Maupin

¹Riley v. State, 110 Nev. 638, 647, 878 P.2d 175, 180 (1990).

²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Brent T. Adams, District Judge
Robert Paul Servin
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

FILED

JUL 14 2003

RONALD A. LONGTIN, JR., CLERK
By: H. Boe
DEPUTY

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE

* * *

ROBERT PAUL SERVIN,

Petitioner,

v.

Case No. CR98P1033A

THE STATE OF NEVADA,
MICHAEL BUDGE, WARDEN,

Dept. No. 6

Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT

This cause is before the court upon a petition for writ of habeas corpus (post-conviction). Petitioner Servin was represented by members of the Washoe County Public Defender's Office when he was tried for crimes stemming from the murder of Kimberly Fondy. The case involved three accomplices, Servin, Brian Allen and Pedro Rodriguez. Allen elected to plead guilty and to become a witness in the trial of the remaining defendants.

Prior to trial, Chief Deputy Public Defender Mazie Pusich filed a motion by which she sought the court's assistance in discovering the type of medication being taken by Allen. She

1 apparently sought to show that the medication altered his
2 demeanor and made him appear docile to the jury. That motion was
3 denied. Servin was found guilty and was sentenced to death.

4 After the trial, Servin filed a motion for a new trial,
5 asserting that there was newly discovered evidence consisting of
6 the proposed testimony of one Damien Winkelman to the effect that
7 Allen had bragged (unconvincingly) that he was the shooter, not
8 Servin. However, counsel conceded that the proposed testimony
9 was not newly discovered at all, that she had been aware of the
10 statement but elected not to present Winkelman's testimony
11 because she was unable to interview him and thus there was a
12 great risk in presenting his testimony without any preview. She
13 was ultimately able to interview Winkelman after the trial, and
14 presented his testimony in support of the motion for a new trial.

15 That motion was also denied.

16 Servin appealed to the Supreme Court of Nevada. That
17 Court issued four separate opinions, but a majority of the Court
18 affirmed the guilty verdict but reversed the death penalty,
19 finding that the death penalty was excessive. Servin v. State,
20 117 Nev. 775, 32 P.2d 1277 (2001). The Court found no error in
21 the denial of the pre-trial request that the court inquire into
22 the medication being prescribed for Allen. The Court ruled this
23 court properly declined to conduct the investigation and that
24 defense counsel had been free to conduct her own investigation
25 and to present any favorable evidence to the jury.

26 The Supreme Court also ruled that the motion for a new
trial was properly denied because the evidence of Winkelman's

proposed testimony was not newly discovered evidence.

1 Servin then filed a timely petition for writ of habeas
2 corpus (post-conviction) raising a variety of claims for relief.

3 The court appointed counsel who filed a supplemental petition.

4 The State answered and moved to dismiss, asserting that the
5 various conclusory claims did not warrant a hearing. This court
6 determined to conduct a hearing despite the asserted defects in
7 the pleading.

8 The parties appeared for a hearing on June 13, 2003.
9 The court received documentary evidence, including some jail
10 records, and heard testimony from both trial lawyers. In
11 addition, the parties stipulated that if Allen's attorney were
12 called as a witness in the habeas corpus hearing, she would voice
13 the opinion that Allen appeared more credible when he was
14 medicated than he did when he was not medicated. The parties did
15 not stipulate that her testimony was admissible in the habeas
16 corpus hearing or that it would have been available or admissible
17 in the trial.

18 Servin first attempted to show that he was deprived of
19 the effective assistance of counsel when counsel decided not to
20 present the testimony of Winkelman in the trial. One who would
21 assert a claim of ineffective assistance of counsel bears the
22 burden of showing by strong and convincing evidence that specific
23 aspects of the performance of counsel fell below an objective
24 standard of reasonableness and that but for the failings of
25 counsel, a different result was likely. Hill v. State, 114 Nev.
26 169, 953 P.2d 1077 (1998). If the court finds either prong

1 unproven the claim is properly rejected. Strategic or tactical
2 decisions, such as what witnesses to call, are virtually
3 unchallengeable absent extraordinary circumstances. Doleman v.
4 State, 112 Nev. 843, 921 P.2d 278 (1996).

5 The court is persuaded that the decision not to present
6 the testimony of Winkelman at trial was a legitimate tactical
7 decision and that no extraordinary circumstances exist. Ms.
8 Pusich testified credibly at the habeas corpus hearing that she
9 made a considered decision that the risk of presenting
10 Winkelman's testimony to the jury, without the opportunity to
11 preview that testimony, was just too great. The court also notes
12 that the proposed testimony was not clearly exculpatory. The
13 evidence might support (but would not establish) the theory that
14 Allen was himself the shooter, but the court notes that Servin
15 was charged with a felony-murder theory. The identity of the
16 shooter would not affect the decision of a properly instructed
17 jury.

18 If the theory that Allen was himself the shooter were
19 proven, it might serve to impeach Allen. However, as counsel
20 noted, even a devastating impeachment of Allen would not serve to
21 negate the other evidence demonstrating that Servin was indeed
22 liable under a felony-murder theory.

23 If the theory that Allen was the shooter was proven, it
24 might have been relevant at sentencing in that it would alter the
25 relative moral culpability of the various actors. However, the
26 death sentence has already been vacated and this court recalls
the trial in sufficient detail to be confident that there is no

1 chance that the jury would have imposed a lesser sentence even if
2 Servin had proved that Allen was the actual shooter. The court
3 is convinced that a properly instructed jury would not have
4 attached any great significance to the proposed testimony that
5 Allen had unconvincingly bragged that he was himself the shooter.

6 Accordingly, the court remains unpersuaded that counsel was
7 ineffective, or that Servin was prejudiced by the decision not to
8 call Winkelman as a witness.

9 In a related vein, Servin argues that trial counsel was
10 ineffective in failing to gather and present evidence showing how
11 certain medication altered Allen's demeanor. To date, the court
12 notes the lack of any substantial evidence supporting the
13 conclusion that the medication greatly altered Allen's demeanor
14 in any significant way. Servin presented jail records showing
15 that Allen was prescribed mood-altering medications (as was known
16 to trial counsel) but he presented no evidence showing that
17 Allen's demeanor was thereby altered in some significant way.
18 The stipulation to the effect that Allen's attorney felt that he
19 was more credible when medicated means virtually nothing.
20 Certainly that attorney was not available as a witness to attack
21 her own client in the trial. Furthermore, her opinion does not
22 tend to show that any other person would have been willing to
23 testify that the medication altered Allen's demeanor. Finally,
24 the court notes that Ms. Hubach's opinion that Allen appeared
25 more credible when medicated, even it were available and
26 admissible, hardly seems to provide any benefit to Servin. If
anything, such an opinion would lead the jury to be more likely

to believe Allen, as he testified while medicated.

1 The court also finds that trial counsel was not
2 ineffective in failing to seek out and present the jail records
3 or the testimony of Ms. Hubach (or the similar testimony of some
4 other potential witness). Counsel had no reason to believe that
5 this court would allow Servin to obtain confidential medical
6 records of Allen. Furthermore, the theory that the jury might
7 have believed that Allen was the shooter if only he hadn't
8 appeared so docile is just too tenuous. Reasonable counsel would
9 not have devoted any resources to trying to advance that theory.

10 Furthermore, as noted above, the jury was properly instructed on
11 a felony-murder theory in the guilt phase of the trial, and on
12 the liability of participants in a felony-murder during the
13 penalty phase. This court is persuaded that even if Servin had
14 proved that Allen's demeanor was altered, and that he was more
15 aggressive when not medicated, and persuaded the jury that his
16 aggressive demeanor should lead to the conclusion that Allen was
17 the shooter, the outcome of this trial would not be changed.

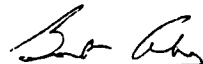
18 Finally, Servin seems to contend that the outcome would
19 have been different if only trial counsel had used the closing
20 argument to point out the various inconsistencies in the trial
21 testimony of Joana Diaz. When a lawyer seeks to impeach a
22 witness by showing inconsistent statements, the lawyer has to
23 decide how to exploit those inconsistencies. Reasonable lawyers
24 might well believe that the jury could have been left with a
25 negative impression of the witness, and that to explore the basis
26 for that negative impression in any detail might well result in

1 jurors realizing that the impression was unwarranted. On the
2 other hand, some lawyers might feel that it is best to re-hash
3 every little bit of evidence presented during the trial. This
4 court finds that the question of how to structure a closing
5 argument is by nature a strategic decision that is virtually
6 unassailable absent extraordinary circumstances. This court also
7 finds that review of such a decision would require the court to
8 employ a subjective standard rather than the appropriate
9 objective standard. Finally, the court finds that there is no
10 reason to believe that the jury would have returned a different
11 verdict if only counsel had argued this case in any certain way.

12 This court observed the trial and finds that Servin was ably
13 represented by the office of the Public Defender. Mazie Pusich
14 and Cotter Conway both did an outstanding job. They did the best
15 they could with what they had to work with.

16 The court finds that Servin has failed to prove that
17 his conviction was the product of ineffective assistance of
18 counsel. Accordingly, the petition for writ of habeas corpus
19 (post-conviction) is denied.

20 DATED this 24th day of July, 2003.

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22 _____
23 DISTRICT JUDGE
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