IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES E. NELLUMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42506

FILED

JUN 13 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from the district court's denial of appellant James Nellums' petition for a writ of habeas corpus alleging that his trial counsel was ineffective. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

A jury convicted Nellums of murder and attempted murder with a deadly weapon, robbery and attempted robbery with a deadly weapon, and possession of a firearm by an ex-felon. Nellums was found guilty of shooting a father and son, killing the father during a robbery in Las Vegas, Nevada.

Nellums appealed, but this court dismissed the appeal. Nellums then filed a petition for a writ of habeas corpus, which the district court denied without an evidentiary hearing. Nellums argues that the district court erred in rejecting his claims that his counsel was ineffective for: failing to introduce medical records that Nellums had a scar on his arm prior to the date of the crime, failing to investigate the whereabouts of a knife used against the attacker, and failing to move to suppress a gun discovered during a search of Nellums' apartment.

05-11525

A defendant has a constitutional right to assistance of counsel in a criminal prosecution.[1] This court evaluates claims of ineffective counsel under the test established in Strickland v. Washington.[2] In order to avoid the distorting effects of hindsight, the evaluation begins with the strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance."[3] Strickland states that a petitioner must demonstrate that (1) counsel's performance was deficient, falling below an objective standard of reasonableness, and that (2) the deficient performance prejudiced the defense.[4] To establish prejudice based on trial counsel's deficient performance, a petitioner must show that, but for counsel's errors, there is a reasonable probability that the verdict would have been different.[5] A court may consider the two prongs in any order and need not consider both if the petitioner fails to provide sufficient proof of one.[6] A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by

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[1]U.S. Const. amend. VI.

[2]466 U.S. 668, 687 (1984); see Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984).

[3]Strickland, 466 U.S. at 689.

[4]Id. at 687. This court recently held that the petitioner must prove the facts underlying his ineffective assistance of counsel claim by a preponderance of the evidence. Means v. State, 120 Nev. __ , 103 P.3d 25 (2004).

[5]Id. at 694 (explaining that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome").

[6]Id. at 697.

substantial evidence and is not clearly wrong.[7] As ineffective assistance claims present mixed questions of law and fact, this court will exercise independent review.[8]

Nellums' claims for ineffective assistance of counsel are without merit. First, although the failure to acquire Nellums' medical records concerning a prior arm injury was arguably unreasonable, Nellums has shown no prejudice from the failure. Detective Martin and Priscilla Scott both testified that Nellums received a cut on his arm on the night of the incident. Thus, we conclude that Nellums failed to demonstrate a reasonable probability, that, but for counsel's alleged error, the result of the proceeding would have been different.

Second, trial counsel's decision to forego investigation of the knife used by the victim to attack his assailant was reasonable. Going further, in light of the substantial evidence in the record that supports the State's case, Nellums has not demonstrated any prejudice from this alleged failure. In particular, police obtained concrete physical evidence from Nellums' residence, including a weapon and a jacket, that tied Nellums to the offense. Third, trial counsel's failure to attack a clearly consensual search was perfectly reasonable. The State emphasizes that Nellums' girlfriend of eight years, Priscilla Scott, also lived in the apartment and consented to the search in writing. She had clear authority to consent to the search. This court has stated that trial counsel need not "'make every conceivable motion no matter how remote the

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

[8]Id.

possibilities are of success.'"[9] Therefore, we conclude based on the clearly consensual search that Nellums' argument lacks merit.

Fourth, trial counsel's failure to pursue a non-meritorious motion to dismiss based upon the State's failure to gather evidence was reasonable. In Daniels v. State, this court outlined the test to evaluate the State's failure to gather evidence.[10] First, the defense must show that the evidence was "'material,' meaning that there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different."[11] Second, the court must decide whether the State failed to collect material evidence due to negligence, gross negligence or bad faith.[12] Dismissal of the charges may occur only when the State acts in bad faith.[13] Nellums has alleged no other facts that, if true, would suggest that the State was negligent, and Nellums certainly has alleged no facts pointing to bad faith actions or omissions by the State. Accordingly, Nellums' argument lacks merit.

Fifth, Nellums argues that his trial counsel was ineffective for failing to properly investigate or call expert witnesses. Nellums fails to

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[9]Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (quoting Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

[10]114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998). This court noted the distinction between failure to collect evidence and failure to preserve evidence. Id. at 266, 956 P.2d at 114.

[11]Id. at 267, 956 P.2d at 115 (quoting State v. Ware, 881 P.2d 679, 685 (N.M. 1994)).

[12]Id.

[13]Id.

delineate any specific arguments with regard to these claims and they are unsupported by the record. Thus, Nellums' arguments lack merit.

Finally, we also conclude that the claims of ineffective assistance of counsel are belied by the record and, thus, the district court properly refused to conduct an evidentiary hearing in connection with them. "When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record."[14] Mere "'naked' allegations" will not entitle petitioner to an evidentiary hearing.[15] In light of the overwhelming evidence, including Nellums' confession to Priscilla Scott, physical evidence found in Nellums' residence connecting him to the offenses in question, and testimony that Nellums' gun was the murder weapon, it cannot be said that recovery of the victim's knife would have entitled Nellums to relief. Similarly, medical records indicating a previous injury to Nellums' arm would not have given rise to reasonable doubt so as to

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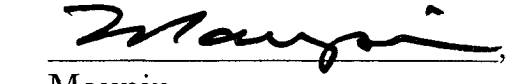
[14]Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994)).

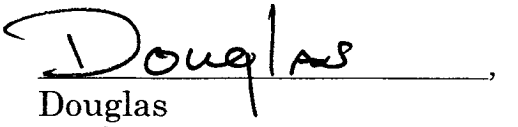
[15]Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (quoting Vaillancourt v. Warden, 90 Nev. 431, 529 P.2d 204 (1974)).

entitle Nellums to relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Maupin



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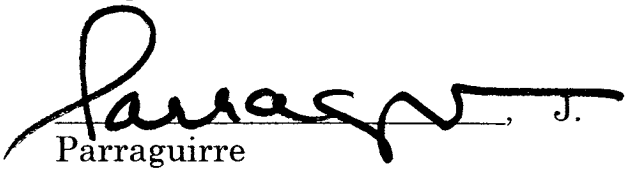

_____, J.
Parraguirre

cc: Hon. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk