IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK MILFORD PECK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42672

FILED

JUL 11 2005

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

ORDER OF AFFIRMANCE

This is an appeal from an order denying a post-conviction petition for writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

FACTS AND PROCEDURAL HISTORY

Appellant Frank Peck was charged with one count of digital penetration and one count of penile penetration during a sexual assault that occurred in a parking lot on November 16, 1996, after a University of Nevada football game in Reno. His first trial ended when the court declared a mistrial after the jury deadlocked. Peck was tried again and found guilty on both counts. Peck appealed the judgment of conviction, asserting several errors. This court affirmed his convictions.[1]

Peck then filed a petition for writ of habeas corpus, which the district court denied without holding an evidentiary hearing. On appeal of that decision, this court affirmed in part and reversed in part, and remanded the case to the district court for an evidentiary hearing on the issue of ineffective assistance of counsel for failure to poll the jury upon

[1]See Peck v. State, 116 Nev. 840, 7 P.3d 470 (2000).

mistrial.[2] The district court conducted the evidentiary hearing and denied Peck's claim.

Peck now appeals the district court's denial of his ineffective assistance of counsel claim. Additionally, Peck argues that the trial court erred in dismissing his habeas petition pursuant to NRCP 41(b), and that his trial counsel, Dennis Widdis (Widdis), was ineffective by failing to forward to him an "offer of settlement" from the district attorney.

DISCUSSION

"Generally, this court will defer to the district court's factual findings concerning claims of ineffective assistance of counsel."[3] However, because "[a] claim of ineffective assistance of counsel presents mixed questions of law and fact" the claim is still "subject to independent review."[4] This court recently held that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective assistance of counsel claim by a preponderance of the evidence.[5]

The key to evaluating an ineffectiveness claim is whether the proper functioning of the adversarial system was so undermined by counsel's conduct that the reviewing court cannot trust that the trial

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[2]Peck v. State, Docket No. 38835, Order Affirming in Part, Reversing in Part and Remanding, (March 4, 2003).

[3]McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Hill v. State, 114 Nev. 169, 175, 953 P.2d 1077, 1082 (1998); see also Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004) (a "district court's purely factual findings regarding a claim of ineffective assistance of counsel are entitled deference on subsequent review by this court.").

[4]McNelton, 115 Nev. at 403, 990 P.2d at 1268; see also Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing State v. Love, 109 Nev. 1136, 1139, 865 P.2d 322, 323 (1993)).

[5]Means v. State, 120 Nev. ___, ___, 103 P.3d 25, 33 (2004).

produced a just result.[6] Under the test established in Strickland v. Washington,[7] in order to prevail on a claim of ineffective assistance of counsel, a claimant must make two showings: (1) "[a claimant] must show that counsel's performance was deficient,"[8] i.e., that counsel's performance fell "below an objective standard of reasonableness;"[9] and (2) that counsel's "deficient performance prejudiced the defense."[10]

With respect to counsel's performance, the inquiry on review is whether, in light of all the circumstances, counsel's assistance was reasonable.[11] Moreover, "[j]udicial review of [counsel's] representation is highly deferential . . . ."[12] To fairly assess counsel's performance, "[t]he reviewing court must try to avoid the distorting effects of hindsight and evaluate the conduct under the circumstances and from counsel's perspective at the time."[13] A tactical decision by counsel is "'virtually unchallengeable absent extraordinary circumstances.'"[14]

Regarding prejudice, the claimant "must show that there is a reasonable probability that, but for counsel's errors, the result of the

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[6]Strickland v. Washington, 466 U.S. 668, 686 (1984).

[7]Id. at 687.

[8]Id.

[9]Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001).

[10]Id.

[11]Strickland, 466 U.S. at 688.

[12]Evans, 117 Nev. at 622, 28 P.3d at 508.

[13]Id.

[14]Doleman v. State, 120 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[15] Finally, this court need not consider whether the petitioner has made both showings pursuant to Strickland if the petitioner fails to sufficiently show either.[16]

Failure to poll the jury

Peck alleges that at his first trial the jury reached verdicts on the two counts against him and had deadlocked on the question of whether his statements to the police were voluntary. In particular, Peck alleges that the jury found him not guilty of digital penetration. Therefore, Peck argues that had his attorney polled the jury before the court declared a mistrial, the finding of not guilty would have precluded retrial on that count under the double jeopardy clause.

At the evidentiary hearing on his habeas petition, Widdis testified that he was certain the jury had found Peck not guilty of digital penetration. He based this assertion on the fact that the jury had signed the verdict forms and that Earl Walling (Walling), the bailiff, advised him that the jury had returned a not guilty verdict on the issue of digital penetration. Nevertheless, Widdis decided not to poll the jury because in his 24 years of practice he had never had occasion to poll the jury when the court declared a mistrial. Widdis stated, that in hindsight, he would have polled the jury and that his failure to do so was not a strategic decision.

Bailiff Walling testified at the evidentiary hearing that he never told Waddis that the jury reached a verdict of not guilty on the

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[15]Strickland, 466 U.S. at 694.

[16]Id. at 697.

charge of digital penetration. Likewise, Judge Steven Kosach testified that although he thought the jury had reached a verdict on two of the counts, he could not recall whether either verdict was not guilty.[17]

Widdis may have been appropriately concerned that if he had polled the jury, Peck would more likely have been convicted of one or both counts. By not polling the jury, and recording the verdicts, Widdis ensured Peck would receive a new trial on all charges. This decision was not unreasonable, and in fact, represented the wishes of his client. Thus, we conclude that Widdis's decision not to poll the jury did not fall below an objective standard of reasonableness.

Additionally, assuming Peck could have demonstrated Widdis's actions fell below an objective standard of reasonableness, Peck failed to demonstrate prejudice. Peck was provided a list of the jurors from his first trial, yet did not call any of the jurors as witnesses at his hearing.[18] Moreover, the jury foreman signed both the "not guilty" and "guilty" verdict forms for both counts. Therefore, Peck did not prove that the jury had actually reached a not guilty verdict on one count. Because Peck did not prove that but for Widdis's failure to poll the jury he would

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[17]Pursuant to this court's order remanding the case to the district court for an evidentiary hearing regarding Peck's ineffective assistance of counsel claim, the case was re-assigned to Judge Brent Adams so that Judge Kosach could be called as a witness.

[18] Pursuant to NRS 50.056(2)(a), Peck would not have been able to question jurors at his evidentiary hearing regarding "the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith." However, he could have questioned the jurors as to whether they actually reached a not guilty verdict on the charge of digital penetration.

have been found not guilty of digital penetration, he did not demonstrate that Widdis's performance prejudiced him.

Failure to forward offer

In his opening brief, Peck argues for the first time at any stage of this case that his trial counsel was ineffective for failing to forward him an "offer" submitted by the district attorney.[19] Generally, "[w]here a defendant fails to present an argument below and the district court has not considered its merit, [this court] will not consider it on appeal."[20] Moreover, Peck's claim is belied by the record.

Peck refers to the testimony of his trial counsel in the transcript of the evidentiary hearing to support his assertion regarding

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[19]Peck incorrectly cites SCR 156 stating, "Counsel has an absolute duty to forward offers of settlement to their client." SCR 156 involves attorney-client confidentiality, not settlement offers. Peck most likely meant to cite SCR 152, which states:

> A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Here, any "offer" submitted by the district attorney would have been a plea bargain as Peck was a defendant in a criminal case, not a litigant in a civil suit. It appears Peck mischaracterized the alleged plea agreement as a settlement offer. Nevertheless, this mistake is immaterial to our decision.

[20]McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998); see also Hudson v. State, 92 Nev. 84, 87, 545 P.2d 1163, 1165 (1976) (this court will not review issues raised by a defendant for the first time on appeal where none of the issues are "so fundamental as to suggest that the lower court proceedings did not comport with the requirements of due process or that appellant was afforded anything less than a fair trial.").

the offer. However, a review of the transcript upon which Peck relies confirms that Peck's counsel was presented with only one offer, which was promptly forwarded to, and rejected, by Peck. We also note that the State vehemently denied it had ever made any offers besides the single offer that Peck rejected.[21]

In sum, we conclude that Peck is not entitled to relief as to this claim.

NRCP 41(b)

After Peck had presented his case in chief at the evidentiary hearing, the State moved for dismissal. In its findings of fact, conclusions of law and order, the court stated it granted the request pursuant to NRCP 41(b). Peck argues that the district court erred by granting the motion because the Nevada Rules of Civil Procedure do not govern hearings regarding habeas corpus petitions. Therefore, Peck requests this court reverse the district court's decision, and remand so that the State can present evidence and Peck can then rebut the evidence.

"[H]abeas corpus is a proceeding which should be characterized as neither civil nor criminal for all purposes. It is a special statutory remedy which is essentially unique."[22] Additionally, "[t]his court

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[21]In its answering brief the State argued that Peck's claim is "patently false," "scandalous," and "not supported by evidence." NRAP 28(e) requires that "[e]very assertion in briefs regarding matters in the record shall be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found." The portion of the record Peck cites does not support his assertion. The State suggests the unsupported allegation warrants "sanctions [from] this court." Although duly noted, we decline to accept the invitation.

[22]110 Nev. 339, 341, 871 P.2d 357, 358 (1994) (quoting Hill v. Warden, 96 Nev. 38, 40, 604 P.2d 807, 808 (1980)); see also Edwards v. State, 112 Nev. 704, 709, 918 P.2d 321, 325 (1996) ("Habeas corpus is a

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may look to general civil and criminal rules for guidance only when the statutes governing habeas proceedings have not addressed the issue presented."[23]

In Beets v. State,[24] this court held that the district court erred in entertaining a motion for summary judgment during a post-conviction petition for writ of habeas corpus. This court advised that NRS 34.770, NRS 34.800, and NRS 34.810 "provide for the manner in which the district court decides a post-conviction petition for writ of habeas corpus."[25] Therefore, because "these statutes do not provide for summary judgment as a method of determining the merits of a post-conviction petition for a writ of habeas corpus . . . [w]e cannot turn to the rules of civil procedure for guidance when NRS chapter 34 has already addressed the matter at issue."[26]

Here, the district court should not have granted the State's motion to dismiss pursuant to NRCP 41(b). Because NRS 34.770, NRS 34.800, and NRS 34.810 all address the manner in which a habeas petition may be dismissed, the district court's reliance on the Nevada Rules of Civil Procedure was erroneous. Nevertheless, the court's dismissal was harmless in light of Peck's failure to prove his ineffective assistance of counsel claim pursuant to Strickland.

. . . *continued*
unique remedy that is governed by its own statutes regarding procedure and appeal.").

[23]Mazzan v. State, 109 Nev. 1067, 1070, 863 P.2d 1035, 1036 (1993).

[24]Beets, 110 Nev. at 341, 871 P.2d at 358.

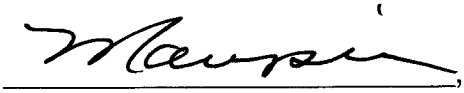
[25]Id.

[26]Id.

CONCLUSION

We conclude that Peck failed to demonstrate his counsel's decision to not poll the jury fell below an objective standard of reasonableness and that the decision resulted in prejudice. With respect to Peck's contention that counsel failed to forward him a negotiated plea agreement, Peck argues this issue for the first time on this appeal and the record belies his claim. Finally, although the district court erred in part in dismissing Peck's habeas petition pursuant to NRCP 41(b), the error was harmless due to Peck's failure to prove his ineffective assistance of counsel claim and lack of evidence in the record. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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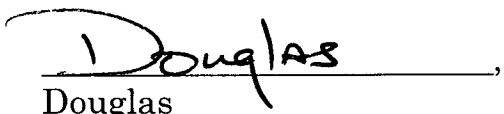

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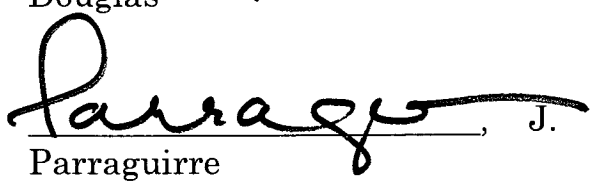

_____, J.
Parraguirre

cc: Hon. Brent T. Adams, District Judge
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