

IN THE SUPREME COURT OF THE STATE OF NEVADA

MLADEN PECANAC,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42677

FILED

MAY 18 2005

J. Swails
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

Appellant Mladen Pecanac was tried on several counts of sexual assault and lewdness arising from accusations by four minor boys. The first trial ended in a hung jury. For the second trial, the State prosecuted Pecanac for sexual assault of and lewdness with only one of the boys. Pursuant to the jury verdict, the district court entered a judgment of conviction for sexual assault on a child under fourteen and lewdness with a child under fourteen. On direct appeal, we affirmed the judgment of conviction. Pecanac filed a petition for a writ of habeas corpus with the district court, alleging ineffective assistance of counsel. After a post-conviction evidentiary hearing, the district court denied the writ petition.

In this appeal, Pecanac argues that the district court erred in finding that his counsel was not ineffective for failing to raise the issue of Pecanac's competency, failing to permit Pecanac to testify on his own behalf and failing to present certain witnesses. We conclude that Pecanac did not receive ineffective assistance of counsel, and therefore, we affirm the order denying his petition for a writ of habeas corpus.

A defendant has a constitutional right to reasonably effective assistance of counsel in a criminal prosecution.¹ We analyze claims of ineffective counsel under the Strickland v. Washington standard.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 (2) that 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 Although ineffective assistance claims present mixed questions of law and fact subject to independent review, a district

¹U.S. Const. amend. VI; McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

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

³Strickland, 466 U.S. at 689.

⁴Id. at 687. 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, 33 (2004).

⁵Strickland, 466 U.S. at 694 (explaining that “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome”).

⁶Id. at 697.

court's factual finding on the matter is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.⁷

Pecanac argues that his counsel was ineffective because counsel failed to challenge Pecanac's competency. In order to be competent to stand trial, a defendant must be able to consult with his attorney "with a reasonable degree of rational understanding."⁸ The defendant also must have a rational and factual understanding of the proceedings against him.⁹ Finally, the defendant must demonstrate his incompetence by clear and convincing evidence.¹⁰

Substantial evidence supports the district court's finding that Pecanac was able to relate his version of events to his attorney and assist in his own defense and, therefore, was competent to stand trial. Testimony at the post-conviction hearing indicated that Pecanac had a reasonable understanding of the proceedings as well as a rational understanding. His family and counsel testified that he understood the nature of the charges against him and maintained his innocence throughout. Therefore, Pecanac's argument lacks merit.

Pecanac next argues that his counsel did not permit him to exercise his right to testify.¹¹ Counsel testified at the post-conviction hearing that he advised Pecanac of his right to testify. Further, on cross-

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

⁸Dusky v. United States, 362 U.S. 402, 402 (1960).

⁹Id.

¹⁰Doggett v. Warden, 93 Nev. 591, 595, 572 P.2d 207, 209 (1977).

¹¹See Coleman v. State, 111 Nev. 657, 668, 895 P.2d 653, 660 (1995).

examination at the post-conviction hearing, when Pecanac was asked if he knew that he had the right to testify at the second trial, Pecanac responded that he knew, and that he took his attorney's advice in deciding not to testify. Therefore, substantial evidence supports the district court's determination that Pecanac made the decision not to take the stand, and Pecanac's argument lacks merit.

Finally, Pecanac asserts that, during the second trial, his counsel failed to call a defense investigator and Pecanac's family members who had testified at the first trial on similar charges that resulted in a hung jury. Pecanac also contends that his counsel failed to present, at the second trial, testimony of other boys whose allegations that Pecanac had molested them were the subject of the first trial. Pecanac claims that their inconsistent stories would have aided his defense.


The decision to call witnesses is a legal tactic entrusted to trial counsel.¹² At the post-conviction hearing, counsel provided reasonable explanations for his decisions regarding trial strategy. We conclude that substantial evidence supports the district court's determination that Pecanac's counsel made reasonable tactical decisions in electing not to call to testify the other alleged victims, the defense investigator and Pecanac's family members.

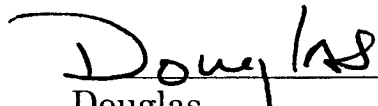
We agree with the district court that counsel acted well within sound legal judgment in deciding that the risks of placing the other alleged victims on the stand outweighed the potential benefits. While the defense investigator could have testified as to his investigation, he was not a material witness, and any proposed opinion testimony as to Pecanac's

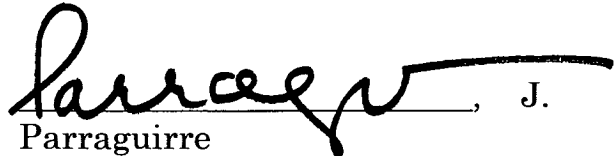
¹²See Strickland, 466 U.S. at 690-91.

innocence was inadmissible.¹³ Similarly, Pecanac's family was not present at the time of the alleged incidents and could provide no factual testimony. Pecanac's challenges to his counsel's decisions regarding calling witnesses are meritless.

Therefore, we conclude that substantial evidence supports the district court's finding that Pecanac failed to demonstrate ineffective assistance of counsel because he failed to show how his counsel's performance fell below an objective standard of reasonableness and that counsel's performance prejudiced Pecanac's defense. Accordingly, we ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. J. Michael Memeo, District Judge
Thomas D. Kershaw Jr.
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk

¹³State v. Dist. Ct. (Romano), 120 Nev. __, __, 97 P.3d 594, 600 (2004).