

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD LEE TIFFANY, SR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42759

FILED

AUG 23 2004

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant Edward Tiffany, Sr.'s post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On April 13, 2000, the district court convicted Tiffany, pursuant to a jury verdict, of five counts of lewdness on a child under the age of fourteen, two counts of sexual assault on a child, and one count of attempted sexual assault. The district court sentenced Tiffany to serve terms totaling life in the Nevada State Prison with the possibility of parole after thirty years. This court affirmed Tiffany's judgment of conviction and sentence on appeal.¹ The remittitur issued on October 8, 2001.

On July 24, 2002, Tiffany filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to assist Tiffany,² and counsel filed a supplement. The State filed a motion for partial dismissal of Tiffany's petition. On July 28,

¹Tiffany v. State, Docket No. 36146 (Order of Affirmance, September 10, 2001).

²See NRS 34.750.

2003, the district court dismissed three of Tiffany's claims. On November 24, 2003, the district court conducted an evidentiary hearing, during which Tiffany and his trial counsel, Tobin Fuss and Jennifer Lunt, testified. On March 2, 2004, the district court denied the remainder of Tiffany's petition. This appeal followed.

In his petition, Tiffany raised several allegations of ineffective assistance of trial counsel.³ To state a claim of ineffective assistance of trial 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 in the absence of counsel's errors, there is a reasonable probability that the results of the proceedings would have been different.⁵ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁶ The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁷

³Tiffany additionally raised the following claims in the context of ineffective assistance of appellate counsel. For the reasons discussed below, we conclude that Tiffany failed to establish that his appellate counsel was ineffective. See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

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

⁵Id.

⁶Strickland, 466 U.S. at 697.

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

First, Tiffany claimed that his trial counsel were ineffective for failing to request a competency hearing. Tiffany argued that because he suffered a stroke three months prior to his trial, he was unable to assist in his defense. A defendant is competent to stand trial if he has sufficient ability to consult with his lawyer with a reasonable degree of understanding, and comprehends the proceedings against him.⁸ A hearing is required when a reasonable doubt exists as to either of these matters.⁹ Here, attorney Fuss testified that Tiffany understood his questions and did not have any trouble communicating. Fuss further testified that he "never got [the] impression" that Tiffany was unable to assist in his defense. Although Tiffany testified that he had problems focusing after his stroke, we conclude that the district court's determination was supported by substantial evidence and was not clearly wrong.¹⁰ As such, the district court did not err in concluding that Tiffany failed to establish that his trial counsel were ineffective on this issue.

Second, Tiffany contended that his trial counsel were ineffective for failing to investigate crucial witnesses. The State intended to introduce evidence of prior sexual acts Tiffany allegedly committed against other victims only if Tiffany testified on his own behalf. For this reason, Tiffany declined to take the stand. Tiffany claimed that if his trial counsel had investigated the alleged victims of these prior bad acts, his counsel would have discovered that these allegations were false, and

⁸Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983).

⁹Id.

¹⁰See Riley, 110 Nev. at 647, 878 P.2d at 278.

Tiffany would have testified at trial. Tiffany provided the names of six individuals he argued his trial counsel should have contacted prior to trial.

During the evidentiary hearing, both Tuss and Lunt testified that they contacted these individuals, but they all refused to cooperate with the defense. Tuss additionally testified that he did not want to subpoena these individuals to testify at trial without interviewing them first. Further, Lunt stated that regardless of the prior bad act evidence, she advised Tiffany against testifying at his trial because she did not believe he was going to appear credible to the jury. For these reasons, we conclude that Tiffany failed to establish that his trial counsel were ineffective for failing to investigate witnesses, and we affirm the order of the district court with respect to this claim.

Third, Tiffany alleged that his trial counsel were ineffective for failing to procure testimony from nurse Kathy Peele. Peele conducted a sexual assault examination of the victim and concluded that there were no physical signs of sexual abuse. At the evidentiary hearing, attorney Tuss testified that he did not call Peele as a witness because Peele was not "defense-oriented." Tuss believed that Peele would have testified that the victim's allegations were not inconsistent with the results of the physical examination. Further, Tuss believed it was unnecessary to call Peele as a witness because the results of the sexual assault examination were revealed to the jury during the testimony of Detective Benedetti. We conclude that Tiffany failed to establish that the results of his trial would have been different if his trial counsel had procured testimony from Peele, and the district court did not err in denying this claim.

Fourth, Tiffany contended that his trial counsel were ineffective for failing to procure testimony from a medical expert. Tiffany

argued that a medical expert would have testified that the victim could not have been sexually abused in the manner she alleged because her hymen was not damaged. Tiffany failed to demonstrate that any medical expert would have provided such testimony, and as such, this claim is based on nothing more than conjecture. Therefore, Tiffany failed to establish that his trial counsel were ineffective on this issue, and we affirm the order of the district court with respect to this claim.

Fifth, Tiffany alleged that his trial counsel were ineffective for failing to object to the admittance of the victim's hearsay statements. A challenge to the admissibility of the victim's hearsay statements was rejected by this court on direct appeal, however. The doctrine of the law of the case prevents further litigation of this issue and "cannot be avoided by a more detailed and precisely focused argument."¹¹ Thus, the district court did not err in denying this claim.

Finally, Tiffany argued that his trial counsel were ineffective for failing to object to the reasonable doubt jury instruction. The reasonable doubt jury instruction given at Tiffany's trial, however, correctly stated the law. NRS 175.211 provides a statutory definition of reasonable doubt, which the court is required to give juries in criminal cases. The language used at Tiffany's trial was identical to that found in the statute. Further, this court has held that the statutory definition of reasonable doubt does not "dilute the state's burden to establish guilt beyond reasonable doubt and does not shift the burden of proof."¹²


¹¹Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).


¹²Cutler v. State, 93 Nev. 329, 337, 566 P.2d 809, 813-14 (1977); see also Bollinger v. State, 111 Nev. 1110, 901 P.2d 671 (1995); Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991).

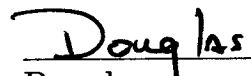
Therefore, Tiffany failed to demonstrate that his trial counsel acted unreasonably in failing to object to the reasonable doubt jury instruction, and we affirm the order of the district court with respect to this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Tiffany is not entitled to relief and that briefing and oral argument are unwarranted.¹³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁴


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Connie J. Steinheimer, District Judge
Edward Lee Tiffany Sr.
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹³See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁴We have reviewed all documents that Tiffany has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Tiffany has attempted to present claims or facts in those submissions that were not previously presented in the proceedings below, we have declined to consider them in the first instance.