

IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK CODY MCCORMICK,
Appellant,
vs.
JACK PALMER, AS WARDEN OF THE
NORTHERN NEVADA
CORRECTIONAL CENTER,
Respondent.

No. 57697

FILED

NOV 14 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

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

On appeal from the denial of his June 15, 1999, petition, appellant argues that the district court erred in denying his claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate (a) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). Both components of the inquiry must be shown, Strickland, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings regarding ineffective assistance of counsel but

review the court's application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Appellant argues that counsel was ineffective for failing to investigate whether the victim died from anaphylactic shock due to an allergic reaction to penicillin. The record before this court indicates that counsel was deficient and that appellant was prejudiced by that deficiency. Counsel testified that he knew the emergency room physician could not rule out a penicillin allergy as a cause of death; that he could not recall discussing it with Dr. S. Dunton, the medical expert with whom he briefly consulted; and that he would have presented expert testimony that the victim died of anaphylactic shock had he had such an expert opinion. Counsel provided no reason for why he did not investigate this possible defense. It was thus objectively unreasonable for trial counsel to have abandoned the potential defense without first investigating it. Strickland, 466 U.S. at 690-91.

Moreover, appellant has demonstrated a reasonable probability of a different outcome had counsel presented expert testimony regarding a penicillin allergy. The testimony of two key witnesses provided the only evidence at trial that appellant fatally abused the victim. First, Dr. E. Clark testified that the victim died of brain injuries as the result of blunt force trauma to his head, the blunt force trauma was inflicted within 6 to 12 hours of death, and the victim would have exhibited symptoms within minutes of axonal disruptions within the brain. Second, the victim's mother testified that appellant was alone with the victim for approximately 10 minutes during that 6-to-12-hour timeframe, and when she returned at the end of the 10 minutes, appellant was coming out of the victim's room and reported that the victim was

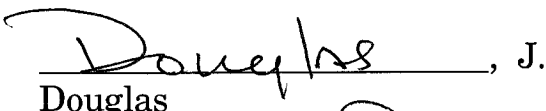
having trouble breathing. The only evidence presented at trial regarding penicillin was that the mother had administered some to the victim shortly before he went into distress, none was found in the victim's stomach or blood, and Dr. Clark's opinion that that was "unusual."

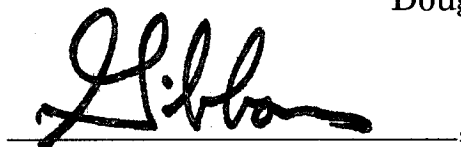
Opinions such as those of Dr. R. Gabriel, whom appellant retained for the post-conviction proceedings, would have impeached Dr. Clark's testimony and provided a plausible, alternative cause of death that did not implicate appellant. Dr. Gabriel opined based on the victim's medical records and the autopsy report that the victim died from anaphylactic shock due to penicillin poisoning. He explained that it was in fact not "unusual" that no penicillin was found in the victim's system as it would have been fully metabolized before death, an opinion with which Dr. Clark agreed at the evidentiary hearing held for the instant petition. Dr. Gabriel further opined that the medical records and autopsy report contained insufficient evidence to support child abuse as a cause of death. Dr. Gabriel testified, consistent with Dr. Clark's testimony at trial and the evidentiary hearing, that the superficial bleeding on the brain was insufficient to cause death. However, where Dr. Clark testified at the trial that the superficial bleeding and retinal hemorrhaging were an indication of axonal disruptions, Dr. Gabriel testified that no such conclusion could be drawn. Rather, he explained that microscopic analysis of deep brain tissue was necessary to determine whether there were axonal disruptions and that the hospital staff could have easily mistaken dilated capillaries in the victim's eyes for retinal hemorrhaging, but neither could be confirmed because no photographs were taken and the autopsy report did not indicate they were examined for. Because Dr. Gabriel's testimony provided an alternative explanation for the death and contradicted that of

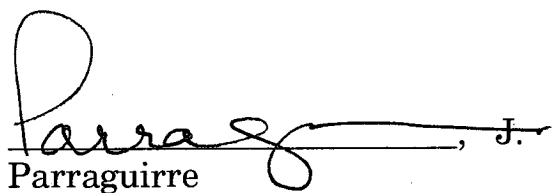
Dr. Clark, and because the expert testimony was critical in this case, appellant demonstrated a reasonable probability of a different outcome at trial had counsel pursued the penicillin theory. We therefore conclude that the district court erred in denying this claim.¹

Because appellant has demonstrated that trial counsel was ineffective, he is entitled to a new jury trial, and we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.²


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

¹The district court's only findings of fact relating to this claim were not supported by substantial evidence and are thus due no deference. Most importantly, the district court found that Dr. Gabriel's testimony was fundamentally flawed because he wrongly believed that microscopic examinations of the deep brain tissue had not been performed when they in fact had been. The court then concluded that its confidence in the outcome of the trial had not been undermined. However, contrary to the district court's finding, the autopsy report did not reference any such examination and Dr. Clark testified at the evidentiary hearing that she did not perform a microscopic examination for axonal disruptions. Thus, there is no evidence that any pathologist looked at the deep brain tissue, which Dr. Gabriel had said was necessary to support a conclusion of death due to axonal disruptions.

²Because of the decision reached in this order, we need not reach the merits of appellant's remaining claims, and we deny appellant's motion for oral argument as moot.

cc: Fourth Judicial District Court Dept. 1, District Judge
Richard F. Cornell
Elko County District Attorney
Attorney General/Carson City
Elko County Clerk