

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE CLIFTON CARTER,

No. 36919

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

NOV 05 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *S. P. [Signature]*
CHIEF 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.

On March 4, 1998, the district court convicted appellant, pursuant to a jury verdict, of second degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in prison with the possibility of parole after 10 years. Appellant pursued a direct appeal, arguing that the statutory reasonable doubt instruction is unconstitutional. This court dismissed the appeal.¹ The remittitur issued on October 6, 1998.

On July 15, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent appellant in the post-conviction proceedings and counsel supplemented the petition. The State opposed the petition. On October 18, 2000, the district court denied appellant's petition. This appeal followed.

¹Carter v. State, Docket No. 32028 (Order Dismissing Appeal, September 14, 1998).

Appellant contends that the district court erred in rejecting his claims that trial counsel provided ineffective assistance by failing to object to alleged prosecutorial misconduct during closing argument and that appellate counsel provided ineffective assistance by failing to raise the issue of prosecutorial misconduct. We conclude that these contentions lack merit and that the district court did not err in rejecting them.

A claim of ineffective assistance of counsel presents "a mixed question of law and fact and is thus subject to independent review."² However, a district court's factual findings regarding a claim of ineffective assistance are entitled to deference so long as they are supported by substantial evidence and are not clearly wrong.³

Claims of ineffective assistance of counsel are analyzed under the two-part test set forth in Strickland v. Washington.⁴ To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced the defense.⁵ To establish prejudice based on the deficient performance of counsel at trial, a petitioner must show that but for counsel's mistakes, there is a reasonable probability that the verdict would have been different.⁶ "To establish prejudice based on the deficient assistance of appellate counsel, a petitioner must show that the omitted issue would have a reasonable probability of success on appeal".⁷ The

²State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

³See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁴466 U.S. 668 (1984); accord Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁵Strickland, 466 U.S. at 697.

⁶Id. at 694.

⁷Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁸

Here, appellant claims that trial counsel should have objected to and appellate counsel should have challenged comments that the prosecutor, Thomas Vilorio, made during closing arguments. Appellant argues that the comments were objectionable and would have warranted reversal of his conviction on direct appeal because they constituted improper personal attacks on appellant's trial counsel, placed improper pressure on the jury to convict appellant, and injected the prosecutor's personal beliefs regarding the evidence.

The parties did not present any witnesses at the post-conviction hearing in district court. Instead, they entered into an agreement as to the testimony that trial and appellate counsel would give if they were called to testify. The parties agreed that, if called, trial counsel would testify that he made a strategic decision not to object to the comments. The parties also agreed that, if called, appellate counsel would testify that she decided not to raise the alleged misconduct on appeal in part because the issue had not been preserved by a contemporaneous objection. The district court found that appellant had not overcome the presumption that counsels' strategic decisions were reasonable.⁹ The district court further found that, even assuming that counsel were deficient in failing to object at trial or challenge the prosecutor's comments on appeal, appellant suffered no prejudice because the State had presented overwhelming evidence of his guilt.

Appellant primarily challenges the district court's conclusion as to the deficiency prong of the Strickland test. He argues that counsels' performance was deficient because appellant did not authorize trial

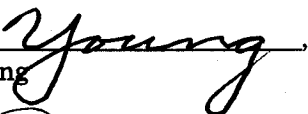
⁸Strickland, 466 U.S. at 697.

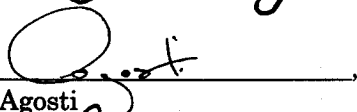
⁹See Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

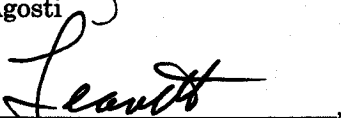
counsel not to object to the comments or appellate counsel's failure to raise the issue on appeal. Appellant does not, however, challenge the district court's conclusion that he cannot demonstrate prejudice.¹⁰ Because appellant must meet both prongs of the Strickland test and he has not demonstrated error in the district court's conclusion that he failed to meet the prejudice prong, we conclude that appellant has not demonstrated that the district court erred in rejecting his claims of ineffective assistance of counsel.

Having considered appellant's contentions and concluded that the district court did not err in denying appellant's post-conviction petition, we

ORDER the judgment of the district court AFFIRMED.

 J.
Young

 J.
Agosti

 J.
Leavitt

cc: Hon. Connie J. Steinheimer, District Judge
Attorney General
Washoe County District Attorney
Marc P. Picker
Washoe County Clerk

¹⁰In fact, appellant has not provided this court with the trial transcripts necessary to evaluate the district court's finding on the prejudice prong. It is appellant's responsibility to provide an adequate appellate record. See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980).