

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NORMAN KEITH FLOWERS, A/K/A
NORMAN HAROLD FLOWERS, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68140

FILED

MAR 16 2016

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Appellant Norman Keith Flowers filed his petition on October 9, 2012, more than one year after the Nevada Supreme Court issued its order granting Flowers the voluntary dismissal of his direct appeal on September 28, 2011. *Flowers v. State*, Docket Nos. 53159 and 55795 (Order Dismissing Appeals, September 28, 2011). Thus, Flowers' petition was untimely filed. See NRS 34.726(1); see also *Gonzales v. State*, 118 Nev. 590, 596 n.18, 53 P.3d 901, 904 n.18 (2002) (recognizing that where a timely direct appeal is voluntarily dismissed, the one-year time period for filing a postconviction petition for a writ of habeas corpus commences from the date of entry of this court's order granting the motion to voluntarily dismiss the appeal). Flowers' petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. See *id.*

The district court concluded Flowers had cause for the delay because of difficulty obtaining information about this matter due to official

interference. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *Gonzales*, 118 Nev. at 595, 53 P.3d at 904 (explaining that a petitioner may be able to demonstrate cause to excuse the procedural bars “based on official interference with the timely filing of a petition.”); *see also State v. Huebler*, 128 Nev. ___, ___, 275 P.3d 91, 94 (2012) (explaining a district court’s factual findings regarding good cause are given deference on appeal).

To determine if Flowers can establish undue prejudice sufficient to overcome the procedural time bar, we must consider his underlying claims to ascertain whether any of his alleged claims of error “worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions.”¹ *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993). For the reasons discussed below, we conclude Flowers failed to establish undue prejudice and therefore, the district court should have dismissed the petition as procedurally barred.

Flowers’ underlying claims involved ineffective assistance of his trial counsel. To prove ineffective assistance of counsel, a petitioner

¹We note the district court stated Flowers demonstrated cause for his delay and undue prejudice because he was unable to file a timely petition due to official interference. The district court then considered Flowers’ claims on the merits and denied relief. However, Flowers’ ability to file a timely petition does not factor into his ability to demonstrate undue prejudice, which is a separate and distinct requirement of the procedural time bar. *See Huebler*, 128 Nev. at ___, 275 P.3d at 94-95 (explaining that in order to demonstrate good cause to excuse the “delay under NRS 34.726(1), a petitioner must demonstrate two things: that the delay is not the fault of the petitioner and the petitioner will be unduly prejudiced”) (quotation marks and brackets omitted).

must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and 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.

First, Flowers argues his trial counsel were ineffective for failing to object to the testimony from a medical examiner who did not conduct the autopsy of the victim and testimony from a DNA analyst who did not conduct the initial DNA testing of the victim in a separate case on the bases the testimonies violated his right to confrontation. During trial, expert witnesses informed the jury of the conclusions the non-testifying analysts made regarding the autopsy of the victim in this case and the initial DNA tests of a victim in the separate case. Both expert witnesses also testified they conducted their own review of the material and reached their own independent conclusions regarding the autopsy and the initial DNA testing, respectively. Flowers asserts these testimonies violated the Confrontation Clause based upon *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 577 U.S. ___, 131 S. Ct. 2705 (2011).

Flowers fails to demonstrate prejudice related to admission of these expert testimonies. Substantial evidence of Flowers' guilt was presented at trial, even excluding the challenged expert testimonies. DNA from semen was discovered on the victim in this case and, while 99.99

percent of the population could be excluded from that DNA, Flowers' DNA could not.² Testimony further established Flowers was the ex-boyfriend of the victim's mother, he had been seen near the victim's apartment within a few weeks of the murder, and he attempted to reestablish a relationship with the victim's mother after the murder in an effort to ascertain information regarding the police investigation. Given the substantial evidence of Flowers' guilt produced at trial, Flowers does not demonstrate a reasonable probability of a different outcome at trial had his counsel asserted the challenged testimony violated his right to confrontation. See *Polk v. State*, 126 Nev. 180, 183, 233 P.3d 357, 358-59 (2010) (stating violations of a criminal defendant's right to confrontation are examined for harmless error). Therefore, this claim would not have entitled Flowers to relief.

Second, Flowers argues his trial counsel were ineffective for failing to object to police officers' testimony that vouched for the credibility of George Brass. At trial, the police officers who questioned Brass testified Brass could have refused to speak with them and could have requested an attorney before talking, but Brass had agreed to assist them. They also testified as to how Brass' statements affected the investigation and the importance, if any, of details Brass gave regarding his encounter with the victim during the morning of the murder. Flowers asserts the officers' testimonies improperly caused the jury to believe Brass' testimony.

²We note the expert that conducted the DNA testing for the samples discovered on the victim in this case testified at Flowers' trial and Flowers does not challenge the admission of that DNA evidence.

Flowers fails to demonstrate his trial counsels' performance was deficient or resulting prejudice.

During the investigation of this matter, the police learned George Brass may have had a relationship with the victim. The police questioned Brass, he agreed to answer their questions, and he volunteered to submit a DNA sample for testing. During questioning, Brass stated he and the victim were in a consensual sexual relationship and had intercourse the morning before the victim was killed. DNA testing revealed that there was a mixture of DNA discovered on the victim; the DNA mixture belonged to the victim herself, Brass, and Flowers. Additional evidence established the victim was killed in the afternoon and Brass was working at Walmart when the sexual assault and murder took place. The officers also testified they felt the specific details regarding the sexual encounter between Brass and the victim were not particularly relevant to their investigation, but that Brass' identity as one of the sources of the DNA was important.

A review of the challenged testimony reveals the police officers did not improperly vouch for Brass' credibility. They did not testify that Brass was truthful; rather the officers testified that Brass could have refused to help in the investigation, but he chose to assist. Their testimony regarding their investigation and their perception regarding the importance of Brass' information also did not improperly vouch for Brass' credibility. The challenged testimony contained facts which would be within these witnesses' personal knowledge or were rationally based upon the perception of the witnesses and helpful to a clear understanding of the witnesses or a determination of a fact in issue. *See* NRS 50.025(1)(a); NRS 50.265. Moreover, as there was substantial evidence of Flowers' guilt

produced at trial, Flowers fails to demonstrate a reasonable probability of a different outcome at trial had counsel objected to this testimony. Therefore, this claim would not have entitled Flowers to relief.

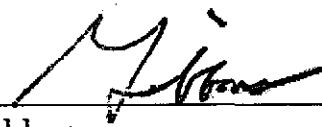
Third, Flowers argues his trial counsel were ineffective for failing to object when the prosecution vouched for the credibility of Brass during closing arguments. Flowers fails to demonstrate his trial counsel's performance was deficient or resulting prejudice. During closing arguments, the State discussed Brass' aid during the investigation of this matter and inferred Brass lacked a motive to fabricate his version of events. This does not constitute improper closing argument because the challenged arguments amounted to inferences based upon the evidence presented at trial. *See Truesdell v. State*, 129 Nev. ___, ___, 304 P.3d 396, 402 (2013). As the State did not place the prestige of the government behind Brass' testimony by providing assurances Brass was telling the truth, Flowers fails to demonstrate objectively reasonable counsel would have asserted the prosecution vouched for Brass' credibility. *See Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004). Flowers fails to demonstrate a reasonable probability of a different outcome had counsel objected to these statements during closing arguments. Therefore, this claim would not have entitled Flowers to relief.

Fourth, Flowers argues his counsel were ineffective for failing to object during closing arguments when the prosecution improperly compared Brass' willingness to help the police with Flowers' uncooperative discussion with the authorities. Flowers cannot demonstrate deficiency for this claim because his counsel objected to this statement during closing arguments, but the district court overruled the objection. In addition, as discussed previously, there was substantial evidence of Flowers' guilt


produced at trial. Accordingly, Flowers fails to demonstrate a reasonable probability of a different outcome at trial had counsel raised further or different objections to this statement. Therefore, this claim would not have entitled Flowers to relief.

Because Flowers' claims would not have entitled him to relief, he failed to demonstrate that he would be unduly prejudiced by denial of his petition as untimely. Therefore, we conclude Flowers failed to overcome the procedural time bar, and we affirm the denial of his petition. *See* NRS 34.721(1); *see also* *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) ("If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Oronoz & Ericsson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk