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IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN MAURICE DEAN,)
Appellant,)
vs.) No. 81209
AITOR NARVAIZA,)
ELKO COUNTY SHERIFF,)
Respondent.)
_____)

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APPELLANT'S REPLY BRIEF

APPEAL FROM AN ORDER DENYING
PETITION FOR WRIT OF HABEAS CORPUS

FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF ELKO

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1 ARGUMENT

2 Appellant replies to the State’s Answering Brief as follows:

3 1. Trial counsel’s performance during voir dire was “deficient” to the
4 point where he “made errors so serious that counsel was not functioning as
5 the “counsel” guaranteed by the Sixth Amendment. *Strickland v.*
6 *Washington*, 466 U.S. 688, 687 (1994). The State contends that trial
7 counsel’s use of an offensive racial epithet in a hand-written note to himself
8 does not constitute Ineffective Assistance of Counsel because the note does
9 not prove that trial counsel was a racist, and the note was harmless because
10 it was never presented to the jury.

11 A. The issues presented in this case do not turn upon whether
12 Appellant can prove that trial counsel was a “racist.” Rather, the question is
13 whether trial counsel’s performance was deficient because he improperly
14 addressed the issue of race a such an ineffective manner, rising to the level of
15 deficient performance that prejudiced Appellant. *Strickland v. Washington*,
16 466 U.S. 668. 687 (1984).

1 “Reasonable minds can disagree as to whether it is good trial
2 strategy to voir dire jurors on racial bias. Perhaps the most
3 common view is that reflected by Albert Alschuler, who
4 suggested over twenty-five years ago that voir dire into racial
5 bias would be “minimally useful.” Alschuler argued that
6 asking a prospective juror whether he would be prejudiced
7 against the defendant because of the defendant’s race would
8 be patronizing and offense. He also argued that no
9 prospective juror would admit to racial bias, even if he was in
10 fact prejudicial against members of a particular group.”

11 Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, UC Irvine Law
12 Review, Vol. 5: 843 (2015) (quoting Albert W. Alschuler, *The Supreme
13 Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of
14 Jury Verdicts*, 56 University of Chicago Law Review 153 (1989).

15 Therefore, a reasonable question arises as to whether trial counsel
16 should even delve into the issue of racial bias. Appellant testified that he was
17 aware of the potential for racial bias, and did not want his attorney to bring
the issue of race into the proceedings, at all. A.A. Vol. 2, p.177, 219.
However, trial counsel presumably chose to override Appellant’s concerns on
the grounds that the issue was a matter of trial strategy existing solely within

1 his purview as the attorney. Appellant understands that there are many issues
2 of trial strategy existing at the discretion of the attorney. However, he
3 respectfully contends that the issue of race is fundamental to the integrity to
4 the proceedings, and the attorney should at least take the client's views into
5 account, rather than simply ignoring, then denigrating him. As it turns out,
6 there is a substantial body of analysis that concurs with Appellant's point of
7 view, as illustrated by the two above-referenced law review articles.

8 Appellant's point is that trial counsel may legitimately choose to
9 address the issue of race during the process of voir dire. However, that
10 question merits serious consideration in the first place, and once that decision
11 is made, it should be undertaken with care, rather than by use of means
12 overtly calculated to provoke and offend the jury.

13 Accordingly, regardless of whether this Court were to conclude that
14 trial counsel possessed the exclusive right to determine whether to even
15 address the issue of race in voir dire, the approach trial counsel chose to use
16 was overtly "patronizing and offensive." The decision to intentionally

1 patronize and offend the jury cannot be excused, and swept under the rubric
2 of “strategy” as a convenient means to resolve this difficult issue.

3 While the transcript unmistakably reveals that trial counsel deployed
4 a strategy to patronize and offend the jury, trial counsel’s misplaced reasoning
5 is further amplified by the note he inscribed during the process: “Schenk is
6 a nigger too.” This approach was a deliberate effort on the part of trial
7 counsel, which as he testified, was calculated to “take people down” solely
8 on the basis of race. While the jury did not see the note itself, they were fully
9 exposed to the malignant intention that the note expressed.

10 The record in this case reveals that trial counsel succeeded in his effort
11 to offend the jury. (A.A. Vol. 1, p. 39).

12 The State points out trial counsel’s testimony that he used offensive
13 racial stereotypes as a means to move the issue of racial bias “from the
14 unconscious to the conscious mind.” So they could “rationally and logically
15 see that racial prejudice is kind of stupid.” (A.A., Vol 2, p. 139).

16 ///

1 conduct, and to evaluate conduct from counsel's challenged conduct at the
2 time."

3 Trial counsel's letter reveals the intense contempt that he harbored
4 towards his client, to the extent that "I've called you worse names than that.
5 ." [referencing the name "nigger"]. Most importantly, the letter confirms
6 that trial counsel had harbored such animus throughout the course of his
7 representation. Counsel did not hold his contempt in a private manner.
8 Rather, he expressly delivered that message to his client *in writing*, with clear
9 intent to denigrate him, rather than provide an answer or explanation in
10 response to his client's legitimate concerns regarding the issue of race. While
11 the letter was not introduced during the proceedings, it shows that his trial
12 attorney was perfectly willing to act far outside his responsibilities as
13 "counsel."

14 2. Trial counsel's decision to have his client testify about growing
15 up in a bad neighborhood was "deficient" and fatally prejudicial.

16 ///

1 Trial counsel's testimony dove-tails with his unreasonable performance
2 at trial by having his client testify regarding his upbringing in a bad
3 neighborhood, with actual knowledge of knife-fighting, including how to
4 most effectively kill someone with a knife. The "strategy" of placing his
5 client in this light is directly counter to counsel's ostensible calculations
6 during the process of voir dire:

7 "It was my intent to get somebody on that jury . . . who would
8 realize if somebody is sitting at the deliberation table after the
9 trial is over, said, "there is a knife and a black guy, we don't
10 need anything more," that – first of all, we try to prevent
11 anyone at the table from saying that. And second of all, what
I was trying to accomplish was that if somebody said that,
somebody would stand up on their hind legs and say "we're
here to make a decision about Sean Dean, not about blacks and
knives." (AA, Vol 2, p. 139).

12 The testimony trial counsel elicited from his client was:

13 Q. Mr. Dean, while you were being raised in Sacramento,
14 California, did you have...friends or associates or
people that you knew that got in knife fights?

15 A. Yes.

16 Q. Did you ever get in one?

17 A. A few.

1 Q. All right. Were you the person with the knife?

A. Excuse me?

2 Q. Ah. Based on that kind of knowledge, did you learn if
3 you were going to hurt somebody real bad with a knife,
maybe kill them, how you would go about doing that?

4 A. Try to puncture them and twist it and rip it, just try to-
try to rip, try to rip something.

5 Q. Okay, is that something you have ever done?

A. No, sir.

6 Q. How do you know that's how you are supposed to do it?

7 A. That's how it has been done ever since I known people
that get into knife fights.

8 Q. Okay.

A. Most effective way to hurt somebody.

9

AA, Vol. 2, p.38.

10

11 Accordingly, despite trial counsel's stated "strategic" intentions, he
12 himself deliberately placed the client in that exact light to the jury. (AA, Vol.
13 2, p.149).

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14 While the State relies upon trial counsel's testimony - that he discussed
15 this trial strategy with his client - Appellant testified that there was no such
16 discussion, and if he had been made aware that this would be in his trial

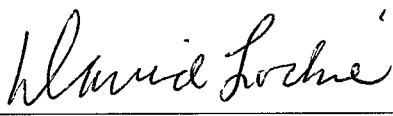
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1 understand that I may be subject to sanctions in the event that the
2 accompanying brief is not in conformity with the requirements of the Nevada
3 Rules of Appellate Procedure.

4 DATED this 13 day of January, 2021.

5 LOCKIE & MACFARLAN, LTD.

6 

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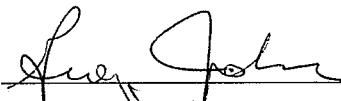
CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 13th day of January, 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

- Nevada Attorney General
- David B. Lockie
- Elko County District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid to the following address(es):

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Georgia Jordan