

No. 19-6204

IN THE SUPREME COURT OF THE UNITED STATES

November 7, 2019

JAMES BIELA, *Petitioner*,

v.

THE STATE OF NEVADA, *Respondent*.

*ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEVADA*

RESPONDENT'S BRIEF IN OPPOSITION

CAPITAL CASE

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QUESTION PRESENTED

CAPITAL CASE

In his petition for writ of habeas corpus, Biela alleged that appellate counsel was ineffective for not pursuing the issue of venue on appeal because his case received a great deal of pretrial publicity. Biela did not allege, however, that any seated juror was not fair or impartial. In evaluating the ineffective assistance claim, the Nevada Supreme Court applied the standard contemplated by *Strickland v. Washington*. Applying the local progeny of *Irvin v. Dowd* and *Nebraska Press Ass'n v. Stuart*, it concluded that appellate counsel was not ineffective, because the record did not indicate that the media coverage had become so saturated as to overcome the presumption of impartiality. The reviewing court also concluded that appellate counsel was not ineffective because Biela would not have prevailed on the venue issue had it been raised on direct appeal.

Did the Nevada Supreme Court err in denying the claim for ineffective assistance of appellate counsel?

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STATEMENT OF THE CASE

Petitioner James Biela seeks certiorari of the Nevada Supreme Court's denial of Biela's appeal regarding his post-conviction petition and supplemental petition for habeas corpus. Prior to the Nevada Supreme Court's denial of post-conviction relief, this case has been the subject of substantial trial, appellate, and post-conviction litigation.

In 2010, a jury convicted Biela of three counts of sexual assault, one count of kidnapping, and one count of murder. The charges involved three separate victims: Amanda C., Emma C. and Brianna Denison. Following the penalty phase, the jury returned a special verdict of death as to the murder of Brianna Denison.

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In an *en banc* decision, the Nevada Supreme Court affirmed the conviction in 2012. Biela filed a timely post-conviction petition for writ of habeas corpus, and an evidentiary hearing was conducted on his post-conviction claims. Appendix (“App.”), 2. On April 22, 2019, the Nevada Supreme Court affirmed the district court’s order denying post-conviction relief. *Id.*

A. Facts of the Case

a. Overview of Facts Established at Trial

Over the course of a few months, Biela committed several crimes near the University of Nevada, Reno (UNR). Respondent’s Appendix (“RA”), 1-3. Biela raped two female students, and then graduated into the kidnapping, rape and premeditated murder of Brianna Denison. *Id.* The investigations and the evidence overlapped, and it was that overlap that allowed authorities to eventually identify Biela as a suspect.

Amanda was a student at UNR when she was raped. She was heading for her car when she was grabbed by Biela and forcibly raped at gun point in a parking garage. App., 1-2. At trial, Amanda identified Biela as the man who raped her. *Id.* Amanda did not initially report the sexual assault. *Id.* After the news of Brianna’s murder, she met with detectives and helped prepare a sketch that became an integral part of the investigation. *Id.*

After Amanda was raped, Emma was sexually assaulted. *Id.* This attack involved some escalation as the perpetrator, later identified as Biela via DNA, added an abduction. *Id.* Emma was attacked and kidnapped while approaching her vehicle. *Id.* Biela sexually assaulted Emma too. *Id.*

Biela abducted Brianna Denison at her friend's house early in the morning. *Id.* She was sleeping on a couch at the home on Mackay Court, near UNR. *Id.* Biela pressed a pillow to Brianna's face, kidnapped her, and sexually assaulted her. *Id.* He ultimately strangled her to death with a pair of underwear, and Brianna's body was eventually discovered in a ravine. *Id.*

DNA evidence linked Biela to the crimes. A male DNA profile obtained from Emma was consistent with Biela or any of his male relatives. *Id.* Biela's DNA was also found on Brianna's body, on the underwear that was used to strangle her, and on the doorknob of the residence from which Brianna was taken. *Id.*

b. Facts Established During the Post-Conviction Evidentiary Hearing.

Because the petition appears only to challenge the performance of appellate counsel John Petty, the State limits the recitation of facts established at the post-conviction evidentiary hearing to those relevant to the claim in the petition for writ of certiorari. Biela's former appellate attorney, John Petty, testified that he had practiced criminal defense law for over thirty years, and criminal appellate law for over twenty years. Petty testified that he had handled eight to ten appeals in capital cases prior to representing Biela. Prior to writing the appeal, Petty reviewed the entire trial transcript. Petty did not raise the issue of venue on appeal, because in his judgement, it would not survive the applicable standard of review—abuse of discretion. He believed the issue “wouldn't have traction. It would not have, in my opinion, received an order from the Supreme Court of reversal on that issue.”

He noted that trial counsel filed a “righteous motion to file in light of all the publicity that had surrounded this particular case. So they were setting that up. They alerted the Court to the fact that, ‘Hey, this is going to be an issue. We need to use some care with the jury selection process.’” Petty recalled that ultimately, however, “the actual jury selection process lasted about two days...it wasn’t a situation where jury selection had going on for a week or a week plus, and it was looking like we were not going to be able to set this jury. They set the jury and then thereafter they proceeded with the case. So as I said, under a deferential standard of review, that just didn’t strike me as a winning issue.” Petty recalled that “the question is whether or not you can seat a fair and impartial jury” and explained that “in my review of that issue, I did not think it was going to have legs, and therefore I made the decision not to write it, so I did not raise that issue.”

REASONS FOR DENYING THE PETITION

A. The Facts Concerning Juror Bias are in Dispute.

Biela states that seated jurors were partial and hostile to him before trial began. Petition, 13. Respondent disputes this factual allegation. In his post-conviction petition for writ of habeas corpus, Biela claimed that appellate counsel was ineffective for not raising the issue of venue on direct appeal. The Nevada Supreme Court rejected this claim, in addition to the rest of Biela’s claims. Instead, the reviewing court found that Biela’s contention that the voir dire transcript “evinces pernicious pretrial publicity that necessitated a change of venue” was not supported by the record. App., 18. The Court further noted that in his petition, Biela did “not allege that any empaneled juror was unfair or biased.” *Id.*, 20. It

found that while all prospective jurors indicated that had been exposed to media reports, those that indicated they could not put aside what they had learned from news reports were dismissed. *Id.* The jurors who remained indicated they could remain impartial despite publicity prior to or during the trial. *Id.* “No seated juror indicated that the publicity would prevent them from acting impartially.” *Id.*, 19.

The Nevada Supreme Court’s finding regarding the impartiality of the jurors on post-conviction review echoed its earlier factual findings on direct appeal:

...there is nothing in the record demonstrating that the jury’s verdict was the result of passion, prejudice, or any other arbitrary factor. Biela claims that the extensive media attention this case received polluted the jury pool with fear that a violent sexual predator was on the prowl for months and that the evidence that the police released to the media served to inflame members of this community. To the contrary, the jury’s finding of 23 mitigating circumstances and the 99 questions it asked during trial provide ample evidence that it was attentive, thoughtful, and did not rush to judgment in the determination of either guilt or penalty.

See RA, 14.

B. The Nevada Supreme Court Applied the Correct Legal Standards in Denying Biela’s Claim that Appellate Counsel was Ineffective.

In seeking certiorari, Biela argues that in denying his venue-based post-conviction claim, the Nevada Supreme Court applied an “improper standard.” Petition, 15. Yet a review of the case authority underlying the reviewing court’s decision makes clear that it relied on well-established law regarding ineffective assistance of counsel, as well as venue and pretrial publicity. It noted that appellate counsel is not required to raise every non-frivolous issue on appeal and agreed with Biela’s former appellate counsel that a claim related to venue was not likely to succeed. App., 18-19, *citing Jones v. Barnes*, 463 U.S. 745, 751 (1983).

Applying the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and its local progeny, the Nevada Supreme Court concluded that appellate counsel's performance was not ineffective, because counsel would not have been able to demonstrate that the district court abused its discretion in denying the motion to change venue. App., 19.

In reaching its conclusion regarding appellate counsel's effectiveness, in addition to *Strickland v. Washington*, *supra*, the reviewing court relied on two Nevada cases, *Sonner v. State*, 112 Nev. 1328, 930 P.2d 707 (1996) and *Ford v. State*, 102 Nev. 126, 717 P.2d 27 (1986). App., 18-19. Both *Sonner* and *Ford* are firmly rooted in the jurisprudence of this Court.

In *Sonner*, the defendant murdered a police officer during a traffic stop, and the prosecution sought the death penalty. *Sonner*, 930 P.2d at 710-11. Despite extensive media attention, the jurors assured the trial court that they would be fair and impartial. *Id.*, 712-713. The Nevada Supreme Court found that, like Biela, Sonner "utterly failed to demonstrate actual bias on the part of the jury empaneled to decide his fate." *Id.* Relying upon *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791 (1976), the Nevada Supreme Court rejected Sonner's contention that he was entitled to a presumption of prejudice, noting that the presumed prejudice standard is rarely applicable. *Sonner* at 713, citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791 (1976).

The Nevada Supreme Court also cited *Ford v. State*, 102 Nev. 126, 717 P.2d 27 (1986), another venue case that drew its reasoning from this Court's decision in

Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639 (1961). In *Ford*, the defendant mowed her car into numerous pedestrians on Thanksgiving Day, killing six people and injuring nearly two dozen more. *Ford*, 717 P.2d 28. Like Biela’s case, the matter received much publicity. *Id.* at 30. The Ford Court recognized “the tenet that an ignorant jury is neither the hallmark nor the *sine qua none* of a constitutionally qualified jury in today’s society.” *Id.* at 29, citing *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639 (1961).

The Nevada Supreme Court’s conclusion that Petty was not ineffective for not raising the venue issue was well-supported by the appellate attorney’s testimony during the post-conviction evidentiary hearing. John Petty, Chief Deputy District Attorney at the Washoe County Public Defender’s Office, wrote the direct appeal for Biela’s case. At the time he testified, Petty had been practicing law for 36 years and criminal appellate law for over 22 years. Petty chose not to raise the venue issue on appeal because he “did not believe there would be a chance of success.” He noted that the only motion to change venue was filed prior to the commencement of voir dire. He explained that in his judgement, the venue issue would not have traction, and would not have resulted in a reversal on appeal. He recalled that the record during voir dire, coupled with the applicable abuse of discretion standard of review, made the change of venue argument unlikely to be a “winning issue.”

Petty further testified that his general appellate strategy was not to raise all non-frivolous issues on appeal, because “if you simply are throwing everything up there, you are in many ways weakening, probably, your issues, because you

surrounded real strong issues with a morass of other things that the Court nonetheless has to get through.” Petty selected appellate issues based on his evaluation of the likelihood of obtaining a favorable result. Based on the applicable standard of review, and the fact that the jurors who indicated they were fair and impartial were seated, Petty explained that the issue of venue “just didn’t strike me as a winning issue.” When repeatedly pressed by Biela’s attorney, Petty explained:

What I’m saying to you, Counselor, is that in my review of that issue, I did not think it was going to have legs, and therefore I made the decision not to write it, so I did not raise that issue.

Petty’s decision was a strategic decision, based on professional judgment honed over three decades of practice, and informed by a thorough investigation of the record, making it virtually unchallengeable. *Strickland, supra*. Moreover, even if Biela demonstrated that Petty’s decision not to raise the issue on direct appeal was somehow unreasonable, Biela demonstrated no prejudice at his post-conviction hearing. To the contrary, the jury’s finding of 23 mitigating circumstances, and 99 questions, revealed that the panel was unbiased and carefully considered the evidence, as the Nevada Supreme Court recognized. RA, 14.

“To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror’s impartiality would be to establish an impossible standard.” *Irvin*, 355 U.S. at 723 (1961). Biela appears to contend that he was entitled to a presumption of prejudice under *Irvin, supra*, but the presumed prejudice standard is rarely applicable, and the record contains no extraordinary facts supporting its

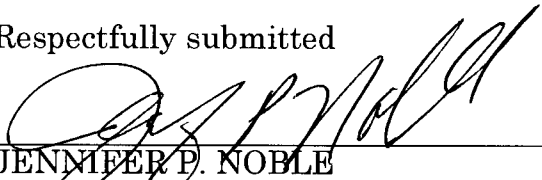
application to Biela's case. *Nebraska Press Ass'n*, 427 U.S. at 554. Each of the jurors seated in this case indicated that they could be fair and impartial, and the trial record contains no indication that they acted otherwise. Instead, the record repels that notion.

CONCLUSION

This Court should deny the petition for writ of certiorari because: 1) the parties cannot agree on the facts supporting or negating the presence of juror prejudice; and 2) the Nevada Supreme Court properly applied standards derived from the decisions of this Court in finding that appellate counsel was not ineffective.

DATED this 7th of November, 2019.

Respectfully submitted



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