

IN THE SUPREME COURT OF THE STATE OF NEVADA

GENE ANTHONY ALLEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42969

FILED

SEP 17 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant Gene Allen's post-conviction petition for a writ of habeas corpus, motion for change of venue, and motion for an evidentiary hearing. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On April 7, 2003, the district court convicted Allen, pursuant to a guilty plea, of one count each of sexual assault on a minor under the age of sixteen, and lewdness on a minor under the age of fourteen. The district court sentenced Allen to serve a term of life in the Nevada State Prison with the possibility of parole after ten years for the lewdness conviction, and a concurrent term of five to twenty years for the sexual assault conviction. This court affirmed Allen's judgment of conviction and sentence on direct appeal.¹ The remittitur issued on April 6, 2004.

On June 11, 2003, Allen filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Allen filed additional proper person post-conviction petitions for writs of habeas

¹Allen v. State, Docket No. 41274 (Order of Affirmance, March 11, 2004).

corpus on July 8, 2003, and December 26, 2003.² On January 6, 2004, Allen filed a motion for change of venue. On January 21, 2004 and February 3, 2004, Allen filed motions for an evidentiary hearing. The State filed an opposition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Allen or to conduct an evidentiary hearing. On February 23, 2004, the district court denied Allen's petition and motions. This appeal followed.³

In his petition, Allen claimed that his trial counsel was ineffective. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a guilty plea, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.⁴ A petitioner must further establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."⁵ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁶

²Because the district court stated that it had considered all documents on file at the time it issued its order, we regard Allen's second and third petitions as proper supplements to his original post-conviction habeas petition.

³We conclude that the district court did not err in denying Allen's motion for change of venue; such a motion is not appropriately raised in the context of a post-conviction proceeding. See NRS 174.455. Further, for the reasons discussed below, the district court did not err in failing to hold an evidentiary hearing on Allen's claims.

⁴See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁵Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

⁶Strickland, 466 U.S. at 697.

First, Allen claimed that his trial counsel was ineffective at the time he entered his guilty plea. However, Allen failed to support this claim with specific facts, or adequately articulate how his trial counsel was ineffective at the time Allen entered his plea.⁷ Consequently, the district court did not err in denying this claim.

Next, Allen claimed that his trial counsel was ineffective for failing to subpoena key witnesses to testify at his trial and sentencing hearing. Allen did not provide the names or expected testimony of these key witnesses; he therefore failed to demonstrate that he was prejudiced by his trial counsel's alleged errors with respect to the witnesses. Thus, the district court did not err in denying Allen relief on this claim.

Allen also contended that his appellate counsel was ineffective. To establish ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.⁸ "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."⁹ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁰

Allen claimed that his appellate counsel was ineffective for: (1) failing to transfer the record to him, (2) attempting to file a frivolous

⁷See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁸See Strickland, 466 U.S. 668; Kirksey, 112 Nev. 980, 923 P.2d 1102.

⁹Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

¹⁰Jones v. Barnes, 463 U.S. 745, 751 (1983).

appeal, and (3) failing to communicate. We note that Allen failed to support these claims with any specific facts.¹¹ Further, Allen did not articulate how his appellate counsel's alleged errors prejudiced his direct appeal. Therefore, we affirm the order of the district court with respect to these claims.

Next, Allen claimed that: (1) the State's exercise of a peremptory challenge was impermissible pursuant to Batson v. Kentucky,¹² (2) the State violated his discovery requests and failed to disclose evidence, (3) the evidence presented at his Petrocelli¹³ hearing was inadequate, (4) his speedy trial rights were violated, (5) he did not receive his pre-sentence investigation report, and (6) his Fifth Amendment rights were violated. These claims are outside the scope of a post-conviction petition for a writ of habeas corpus when the conviction is the result of a guilty plea.¹⁴ Therefore, the district court did not err in denying Allen relief on these claims.

Lastly, Allen argued that he has not received his medication while incarcerated at the Clark County Detention Center (CCDC), although he has several psychological disorders. Initially, we note that Allen is no longer jailed at the CCDC. Thus, Allen's challenge to his conditions of confinement with respect to the CCDC is moot. Moreover,

¹¹See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

¹²476 U.S. 79 (1986).

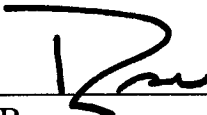
¹³See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).


¹⁴See NRS 34.810(1)(a).

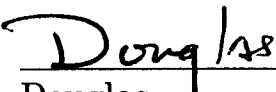
this claim is not cognizable in a petition for a writ of habeas corpus.¹⁵ As such, we affirm the order of the district court with respect to this claim

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Allen is not entitled to relief and that briefing and oral argument are unwarranted.¹⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁷


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

¹⁵See Bowen v. Warden, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984) (providing that this court has "repeatedly held that a petition for writ of habeas corpus may challenge the validity of current confinement, but not the conditions thereof").

¹⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁷We have reviewed all documents that Allen has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Allen has attempted to present claims or facts in those submissions that were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. John S. McGroarty, District Judge
Gene Anthony Allen
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk