

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN TYRONE POWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43483

FILED

SEP 21 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying appellant Norman Tyrone Powell's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On August 10, 1995, the district court convicted Powell, pursuant to a jury verdict, of three counts of assault with a deadly weapon and one count each of being an ex-felon in possession of a firearm and discharging a firearm from a motor vehicle. The district court adjudicated Powell as a habitual criminal and sentenced him to serve a term of life in prison without the possibility of parole. On direct appeal, this court reversed two of the assault convictions and remanded the case for resentencing.¹

After conducting a new sentencing hearing, the district court again adjudicated Powell as a habitual criminal and sentenced him to life

¹Powell v. State, 113 Nev. 258, 934 P.2d 224 (1997).

in prison without the possibility of parole. Powell appealed from the judgment of conviction and also from an order of the district court denying his motion to correct an illegal sentence. This court consolidated the appeals and affirmed the district court's decisions. However, this court remanded the matter to the district court for the sole purpose of correcting clerical errors in the judgment of conviction.² The remittitur issued on May 11, 1999.

On April 28, 1999, the district court entered a corrected judgment of conviction pursuant to this court's order. Powell appealed, and this court dismissed the appeal.³ The remittitur issued on September 21, 1999.

On May 2, 2000, Powell filed a proper person petition for a writ of habeas corpus. On August 16, 2000, Powell filed a proper person supplement to the petition. The district court appointed counsel, and counsel filed a second supplement to the petition. On May 22, 2001, the State moved to dismiss the supplement to the petition, and Powell filed a response to the State's motion to dismiss. Without conducting an evidentiary hearing, the district court entered an order dismissing the supplement to the petition and denying the petition for a writ of habeas corpus. Powell appealed. On March 14, 2002, this court remanded the

²Powell v. State, Docket Nos. 30035 and 30614 (Order of Remand, April 12, 1999).

³Powell v. State, Docket No. 34222 (Order Dismissing Appeal, August 26, 1999).

matter to the district court for entry of specific findings of fact and conclusions of law as required by NRS 34.830(1).⁴ Pursuant to this court's order, the district court entered an order denying the petition. Powell filed this timely appeal.

Powell contends that the district court erred in rejecting his claims of ineffective assistance of trial and appellate counsel. 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 errors prejudiced the defense.⁵ To establish prejudice based on the deficient assistance of trial counsel, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the outcome of the trial would have been different.⁶ To establish prejudice based on the deficient assistance of appellate counsel, a defendant must show that the omitted issue would have a reasonable probability of success on appeal.⁷ "A petitioner is entitled to a post-conviction evidentiary hearing when he

⁴Powell v. Warden, Docket No. 38192 (Order Dismissing Appeal and Remanding, March 14, 2002).

⁵See Strickland v. Washington, 466 U.S. 668 (1984).

⁶Id. at 694.

⁷Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief."⁸

Powell contends that his original trial counsel and appellate counsel were ineffective by failing to challenge the misjoinder at his 1995 jury trial of the ex-felon in possession of a firearm charge with the assault with a deadly weapon and discharging a firearm from a motor vehicle charges. Powell also alleges that his trial counsel and appellate counsel were ineffective with respect to the 1997 resentencing proceeding.⁹ He argues his counsel should have collaterally attacked the convictions and evidence presented in support of the habitual criminal adjudication by arguing that: (1) the 1984 burglary conviction was unconstitutional because the State breached the plea agreement at sentencing; (2) the 1991 attempted robbery conviction was unconstitutional because the district court did not follow the proper procedure to determine his competency, and he was not competent at the time he entered his nolo contendere plea; (3) the evidence of the 1978 pandering conviction in California was inadequate because it failed to establish Powell's identity and whether he

⁸Mann v. State, 118 Nev. 351, 353, 46 P.3d 1228, 1229 (2002); see Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

⁹To the extent that Powell contends that the district court erred in denying his claims of ineffective assistance of counsel at the original 1995 sentencing proceeding, we reject his contentions. Powell cannot demonstrate prejudice arising from counsel's conduct at that proceeding because this court vacated his sentence and remanded for a new sentencing hearing.

was represented by counsel; (4) the three gross misdemeanor judgments of conviction "did not meet the standards of NRS 207.010(2)"; and (5) evidence of a temporary protection order should have been excluded under the "collateral estoppel doctrine" because the case was closed. Finally, Powell argues that his trial and appellate counsel were ineffective at the 1997 resentencing by failing to request that the habitual criminal adjudication be determined by a jury and proven beyond a reasonable doubt and by failing to challenge the use of a conviction arising from a nolo contendere plea to support the habitual criminal adjudication.¹⁰

In this case, the district court found that some of Powell's claims of ineffective assistance of counsel involving the collateral attacks of the prior convictions "were not properly before the court" and untimely pursuant to NRS 34.726. Although the district court erred in ruling that the claims of ineffective assistance of counsel were untimely,¹¹ we conclude


¹⁰Powell also contends that his sentences for being an ex-felon in possession of a firearm, discharging a firearm from a motor vehicle and assault with a deadly weapon are redundant and violated his rights under the Double Jeopardy Clause of the Fifth and Fourteenth Amendments. We conclude that Powell waived this claim by failing to raise it on direct appeal. See NRS 34.810(1)(b)(2); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) ("claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings"), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

¹¹The petition filed on May 2, 2000, was filed within one year from the issuance of the May 11, 1999, remittitur in Powell's direct appeal. See NRS 34.726(1).

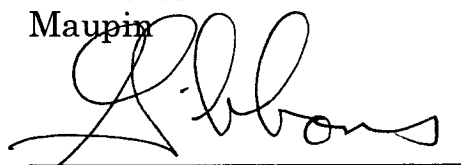
that the district court did not err in denying the petition. Powell has failed to demonstrate that his trial counsel's and appellate counsel's performance was deficient and that he was prejudiced by the deficient conduct.

Having considered Powell's contentions and concluded that they lack merit, we

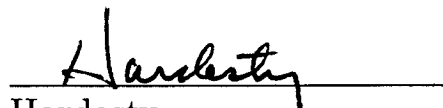
ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Hon. Steven R. Kosach, District Judge
Scott W. Edwards
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk
Norman Tyrone Powell