

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JAMES COOPER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43976

FILED

APR 05 2005

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant Michael James Cooper's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On May 24, 2002, the district court convicted Cooper, pursuant to a jury verdict, of robbery with the use of a deadly weapon and possession of a firearm by an ex-felon. The district court sentenced Cooper to a term of 48 to 180 months in the Nevada State Prison for the robbery conviction plus an equal and consecutive term for the deadly weapon enhancement. The district court also sentenced Cooper to a term of 13 to 60 months for the possession of a firearm by an ex-felon conviction. This court affirmed Cooper's conviction and sentence on appeal.¹ The remittitur issued on February 11, 2003.

On August 12, 2003, Cooper filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750, the district court

¹Cooper v. State, Docket No. 39608 (Order of Affirmance, January 16, 2003).

declined to appoint counsel to represent Cooper, but conducted an evidentiary hearing pursuant to NRS 34.770. On October 12, 2004, the district court denied Cooper's petition.² This appeal followed.

In his petition, Cooper claimed that his counsel was ineffective. 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 were so severe that they rendered the jury's verdict unreliable.³

First, Cooper argued that his counsel was ineffective for failing to investigate, interview and call certain witnesses at trial. Specifically, Cooper claimed that counsel should have called four alibi witnesses, Delvin Ward, Linda Fay Cooper, Sacar Golf and Ben Flesher. Cooper claimed that he provided a list of these witnesses to counsel. During the evidentiary hearing, trial counsel testified that he did not recognize any of the names, other than Linda Fay Cooper. Counsel further testified that he reviewed his files for notes or correspondence from Cooper regarding the names and found none. Counsel also averred in an affidavit filed after the evidentiary hearing that he found no telephone messages in his telephone records from any of Cooper's listed

²The district court initially denied Cooper's petition on November 4, 2003. However, the district court granted Cooper's motion for rehearing and conducted an evidentiary hearing to address two of Cooper's claims. After denying Cooper's petition, Cooper filed a second motion for rehearing, which the district court also denied.

³See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

witnesses. Counsel stated that if he had been aware of Cooper's witness list he would have interviewed the witnesses. The district court concluded that Cooper did not provide counsel with a list of potential alibi witnesses. Based on the record, we conclude that the district court did not err in rejecting this claim.

Second, Cooper claimed that his counsel was ineffective for failing to object to the discriminatory makeup of the jury. Specifically, Cooper asserted that persons living in the 89106 zip code, a purportedly primarily African-American community, were purposefully excluded from the jury pool. Cooper further argued that the jury pool consisted of persons living in zip codes 89122 and 89012 and that persons in this group had "cultural and economical' differences, as oppose[d] to people who live[d] in the 89106 zip code area." However, Cooper has provided no support, other than his bare allegation, to substantiate his claim.⁴ Accordingly, we conclude that the district court did not err in rejecting this claim.

Cooper also claimed 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.⁵ "To establish prejudice based on the deficient assistance of appellate

⁴Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁵See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."⁶

Cooper claimed that his appellate counsel was ineffective for failing to raise on appeal the alleged improper in-court identification of Cooper by the victim. Specifically, Cooper argued that the victim's in-court identification of him was tainted by a previous improper photographic lineup procedure. "[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."⁷ A court must consider the totality of the circumstances in evaluating whether a photographic lineup is impermissibly suggestive.⁸

Based on the record before us, we conclude that the photographic lineup procedures used in this case were not impermissibly suggestive.⁹ Moreover, the State introduced other evidence linking Cooper to the crime. Accordingly, we conclude that the district court did not err in rejecting Cooper's claim.

⁶Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

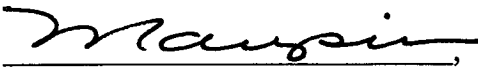
⁷Simmons v. United States, 390 U.S. 377, 384 (1968); see Cunningham v. State, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997).

⁸Simmons, 390 U.S. at 383.

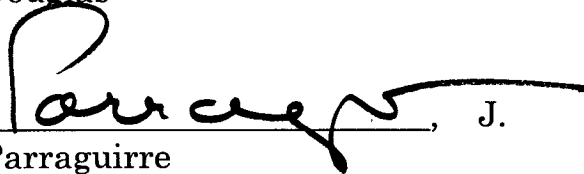
⁹See Cunningham, 113 Nev. at 904, 944 P.2d at 265; Koza v. State, 100 Nev. 245, 681 P.2d 44 (1984); Coats v. State, 98 Nev. 179, 643 P.2d 1225 (1982).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Cooper is not entitled to relief and that briefing and oral argument are unwarranted.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹¹


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Sally L. Loehrer, District Judge
Michael James Cooper
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹¹We have reviewed Cooper's "ex parte motion for appointment of counsel" submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon his motion is warranted.