

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN WELLINGTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44017

FILED

DEC 08 2004

ORDER OF AFFIRMANCE

JANETTE L. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
OFFICE DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant Kevin Wellington's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On November 26, 2002, the district court convicted Wellington, pursuant to a guilty plea, of attempted murder (count I), robbery (count II) and conspiracy to commit robbery (count III). The district court sentenced Wellington to serve 96 to 240 months in the Nevada State Prison for count I, 72 to 180 months for count II and 28 to 72 months for count III. The terms were imposed to run concurrently. This court affirmed the judgment of conviction on appeal.¹ The remittitur issued on July 8, 2003.

On May 3, 2004, Wellington filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹Wellington v. State, Docket No. 40569 (Order of Affirmance, June 12, 2003).

State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Wellington or to conduct an evidentiary hearing. On September 1, 2004, the district court denied Wellington's petition. This appeal followed.

In his petition, Wellington asserted several claims of ineffective assistance of counsel. To establish ineffective assistance of counsel, a claimant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense.² To show prejudice, Wellington must demonstrate a reasonable probability that but for counsel's errors the result of the proceeding would have been different.³ Furthermore, because Wellington pleaded guilty, he must demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.⁴

First, Wellington claimed that his counsel was ineffective for failing to call witnesses and present mitigating evidence during sentencing. In his petition, Wellington listed several witnesses he argued his counsel should have called to testify. However, he did not explain the nature of the witnesses' testimony or how he was prejudiced by this omission. Additionally, Wellington failed to identify any mitigating

²See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

³See id. at 988, 923 P.2d at 1107.

⁴See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

evidence he desired his counsel to present.⁵ Accordingly, we conclude Wellington did not demonstrate that his counsel was ineffective in this regard.

Second, Wellington argued that his counsel was ineffective for misinforming him about the sentence he would receive. Specifically, Wellington contended that his counsel advised him that he would receive the same sentence his co-defendant received. Wellington's claim is belied by the record.⁶ Wellington acknowledged in his written plea agreement that he could be sentenced to a term of 2 to 20 years for the attempted murder charge, 2 to 15 years for the robbery charge and 1 to 6 years for the conspiracy to commit robbery charge. Moreover, during the plea canvass, the district court advised Wellington of the possible sentences for each of the charged offenses, and Wellington acknowledged that he understood. Accordingly, we conclude Wellington failed to demonstrate that his counsel was ineffective in this regard.

Third, Wellington asserted that his counsel was ineffective for failing to "provide necessary discovery prior to coercing [him] into pleading guilty." Specifically, Wellington argued that he was entitled to review his co-defendant's statement to the police prior to entering his guilty plea. However, Wellington neglected to explain how the lack of opportunity to examine the statement affected his decision to plead guilty. The record

⁵See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁶See id. at 503, 686 P.2d at 225.

suggests that the co-defendant's statement did not exculpate Wellington, but rather implicated him in the crimes. Furthermore, there is no support in the record, other than Wellington's bare allegation, that his counsel coerced him into pleading guilty.⁷ Wellington represented in his signed plea agreement that he was not acting under duress or coercion in accepting the agreement. Additionally, during the plea canvass, Wellington acknowledged that he was entering his plea voluntarily. Accordingly, we conclude Wellington failed to demonstrate that his counsel was ineffective on this issue.

Fourth, Wellington claimed that his counsel was ineffective for failing to consult with him prior to entering his guilty plea. However, during the plea canvass, Wellington acknowledged that he had the opportunity to discuss the charges with counsel. The district court offered Wellington the opportunity to question the district court, the State or his counsel about the charges prior to accepting his plea. Wellington declined. Furthermore, Wellington acknowledged in his plea agreement that he had discussed with his counsel the charges, possible defenses and consequences of his plea. We conclude that Wellington failed to demonstrate that his counsel was ineffective in this regard.

Wellington 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 that the deficient performance

⁷See id. at 502, 686 P.2d at 225.

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

First, Wellington claimed that his appellate counsel was ineffective for not consulting with him about his direct appeal. However, Wellington failed to explain whatsoever how he was prejudiced by any alleged lack of communication with appellate counsel.¹⁰

Second, Wellington asserted his appellate counsel was ineffective for failing to frame his direct appeal issues as constitutional matters in order to preserve them for federal appellate review. However, Wellington failed to demonstrate that the results of his direct appeal would have been different had counsel "federalized" the issues. Accordingly, we conclude that Wellington did not establish that appellate counsel was ineffective in this regard.

Finally, Wellington claimed that the district court erred in refusing to allow him to withdraw his guilty prior to sentencing. However, this court considered and rejected Wellington's claim in his direct appeal. The doctrine of the law of the case prevents further relitigation of this matter.¹¹

⁸See Strickland, 466 U.S. at 668.


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

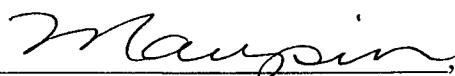
¹⁰See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

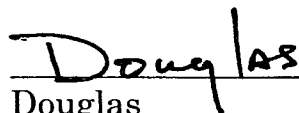
¹¹See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Wellington is not entitled to relief and that briefing and oral argument are unwarranted.¹² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Joseph T. Bonaventure, District Judge
Kevin Wellington
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹²See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).