

IN THE SUPREME COURT OF THE STATE OF NEVADA

RENARD TRUMAN POLK,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44087

**FILED**

JAN 25 2009

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT

THE JUDGMENT OF CONVICTION

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

On April 1, 2002, the district court convicted Polk, pursuant to a jury verdict, of one count each of sexual assault on a minor under fourteen and attempted sexual assault on a minor under fourteen. The district court sentenced Polk to serve a term of life in the Nevada State Prison with the possibility of parole after 240 months for count I, and a consecutive term of 48 to 120 months for count II. This court affirmed

Polk's judgment of conviction and sentence on appeal.<sup>1</sup> The remittitur issued on September 19, 2003.

On July 1, 2004, Polk 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 and 34.770, the district court declined to appoint counsel to represent Polk or to conduct an evidentiary hearing. On September 14, 2004, the district court denied Polk's petition. This appeal followed.

In his petition, Polk raised numerous claims of ineffective assistance of trial counsel.<sup>2</sup> To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective

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<sup>1</sup>Polk v. State, Docket No. 39457 (Order of Affirmance with Limited Remand for Correction of Judgment of Conviction, August 25, 2003). The matter was remanded to the district court for a correction of Polk's judgment of conviction, which inaccurately reflected that he pleaded guilty.

<sup>2</sup>To the extent that Polk raised any of the following issues independently from his ineffective assistance of counsel claims, we conclude that they should have been raised on direct appeal and are therefore waived. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

standard of reasonableness.<sup>3</sup> A petitioner must further establish a reasonable probability that, in the absence of counsel's errors, the results of the proceedings would have been different.<sup>4</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>5</sup>

First, Polk contended that his trial counsel was ineffective for failing to object to errors that occurred at a hearing conducted on Polk's motion for own recognizance release. Specifically, Polk claimed that the State had impermissible ex parte contact with the district court. Polk further alleged that the district court improperly relied on a statement Polk gave police in denying his motion. We conclude that these claims are without merit. Polk failed to adequately demonstrate the existence of an impermissible ex parte communication. Further, he did not establish that the district court inappropriately relied on his voluntary statement to the police in denying his motion. Therefore, Polk failed to demonstrate that his trial counsel acted unreasonably in failing to object to these alleged errors. Additionally, Polk failed to articulate how his counsel's performance prejudiced the outcome of his trial. As such, the district court did not err in denying these claims.

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

<sup>4</sup>Id.

<sup>5</sup>Strickland, 466 U.S. at 697.

Second, Polk argued that his trial counsel was ineffective for failing to move to suppress Polk's statement to police. A review of the record reveals that Polk called the Las Vegas Metropolitan Police Department to surrender because he believed there was an active warrant for his arrest. Polk received his Miranda<sup>6</sup> warning and was interviewed by Detective Timothy Moniot. During the interview, Polk admitted to sexually assaulting his sisters.

Polk failed to demonstrate that he is entitled to relief on this claim. Polk did not articulate a reasonable ground on which his statement should have been suppressed; his argument that Detective Moniot threatened him is not convincing. Therefore, Polk did not demonstrate that a motion to suppress his statement to police would have been successful, and he failed to establish that his counsel was ineffective in this regard.

Third, Polk contended that his trial counsel was ineffective for failing to move to disqualify the district court judge. Polk argued that the district court judge refused to file proper person documents that Polk submitted, and instead sent them to his trial counsel. We conclude that this claim is without merit. The clerk of the court acted appropriately in forwarding the motions to Polk's trial counsel without filing them.<sup>7</sup>

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<sup>6</sup>See Miranda v. Arizona, 384 U.S. 436 (1966).

<sup>7</sup>See EDCR 3.70 ("[A]ll motions . . . delivered to the clerk of the court by a defendant who has counsel of record will not be filed but must be  
*continued on next page . . .*

Further, to the extent that any of the proper person motions dealt with Polk's unhappiness with his trial counsel, the record reveals that the district court addressed Polk's numerous complaints about his trial counsel's performance. Polk did not demonstrate that his counsel acted unreasonably in failing to move to disqualify the district court judge, and we therefore affirm the order of the district court.

Fourth, Polk claimed that his trial counsel was ineffective for failing to object to the composition of the jury, which he alleged contained only white jurors.<sup>8</sup> However, Polk did not have the "right to a 'petit jury composed in whole or in part of persons of his own race.'"<sup>9</sup> Further, Polk did not allege, and there is nothing in the record to suggest, that the State exercised its peremptory challenges on the basis of race.<sup>10</sup> Therefore, Polk did not demonstrate that his trial counsel acted unreasonably in failing to object to the composition of the jury, and the district court did not err in denying this claim.

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*... continued*

marked with the date received and a copy forwarded to that attorney for such consideration as counsel deems appropriate").

<sup>8</sup>We note that nothing in the record before this court supports Polk's statement regarding the racial composition of the jury.

<sup>9</sup>Batson v. Kentucky, 476 U.S. 79, 85 (1986) (quoting Strauder v. West Virginia, 100 U.S. 303, 305 (1880)); see also Holland v. Illinois, 493 U.S. 474, 483 (1990).

<sup>10</sup>See Batson, 476 U.S. 79.

Fifth, Polk argued that his trial counsel was ineffective for failing to cross-examine Detective Moniot and Officer David Newton about the existence of an active warrant for Polk's arrest. Moniot and Newton testified that at the time Polk called police to surrender, there was not a warrant for his arrest; Polk alleged that this testimony was false. However, Polk failed to articulate how this issue affected the outcome of his trial. Consequently, he did not establish that he was prejudiced by his counsel's allegedly deficient performance, and we affirm the order of the district court.

Sixth, Polk claimed that his trial counsel was ineffective for failing to pursue an insanity defense. The record reveals that at his arraignment, Polk entered a plea of not guilty. Subsequently, trial counsel informed the district court that he intended to investigate a possible insanity defense. Polk was evaluated by psychologist Dr. John Paglini, who concluded, "there is no justification for an insanity defense." Consequently, Polk did not change his plea and a not guilty by reason of insanity defense was not presented at trial.<sup>11</sup>

We conclude that Polk is not entitled to relief on this claim. Polk did not demonstrate that he was in a delusional state such that he could not know or understand the nature of his act, or that his delusion

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<sup>11</sup>We note that Polk did testify during trial that he had mental problems and was "not right in the head."

prevented him from appreciating the wrongfulness of his conduct.<sup>12</sup> Thus, Polk did not establish that he was prejudiced by his counsel's failure to pursue an insanity defense. Further, Polk did not adequately demonstrate that his trial counsel abandoned an insanity defense in contravention of his wishes.<sup>13</sup> As such, Polk failed to establish that his trial counsel was ineffective in this regard.<sup>14</sup>

Seventh, Polk argued that his trial counsel was ineffective for failing to: (1) object to instances of prosecutorial misconduct, (2) object to instances of judicial misconduct, (3) file a motion for a new trial based on newly discovered evidence, (4) properly investigate his case, (5) obtain an affidavit from juror five, (6) object to an untimely discovery request, (7) object to the use of spoliated evidence, (8) file any meritorious pre-trial motions, and (9) interview police officers. However, Polk failed to support any of these claims with specific facts, or articulate how his counsel was

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<sup>12</sup>See Finger v. State, 117 Nev. 548, 576, 27 P.3d 66, 84-85 (2001).

<sup>13</sup>See Johnson v. State, 117 Nev. 153, 17 P.3d 1008 (2001) (holding that a defendant has the right to make certain fundamental decisions regarding the objectives of representation, such as whether to present a defense of not guilty by reason of insanity).

<sup>14</sup>Polk additionally alleged that his trial counsel was ineffective for failing to request jury instructions concerning insanity. However, as discussed above, Polk failed to demonstrate that he was prejudiced by this deficiency. See Finger, 117 Nev. at 576, 27 P.3d at 84-85.

deficient with respect to these issues.<sup>15</sup> As such, he is not entitled to relief on these claims.

Next, Polk raised several claims of ineffective assistance of appellate counsel. 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.<sup>16</sup> "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."<sup>17</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>18</sup>

First, Polk contended that his trial counsel was ineffective for failing to appeal the alleged violation of his right to a speedy trial. The Sixth Amendment to the United States Constitution provides the right to a speedy trial.<sup>19</sup> In determining whether a defendant's right to a speedy

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<sup>15</sup>See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

<sup>16</sup>See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

<sup>17</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>18</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>19</sup>See Adams v. Sheriff, 91 Nev. 575, 575 n.1, 540 P.2d 118, 119 n.1 (1975) (citing Klopfer v. North Carolina, 386 U.S. 213 (1967); McGee v. Sheriff, 86 Nev. 421, 423, 470 P.2d 132, 133 (1970) (citing Klopfer).



trial has been violated, this court must examine four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.<sup>20</sup>

In the instant case, a period of nearly two years elapsed between Polk's arrest and his trial. However, the majority of this delay cannot be attributed to the State. Further, Polk did not assert his right to a speedy trial, and failed to demonstrate that he was prejudiced by this delay. Therefore, Polk did not establish that a speedy trial claim had a reasonable likelihood of success on appeal, and we affirm the order of the district court with respect to this claim.

Second, Polk claimed that his appellate counsel was ineffective for failing to argue that his double jeopardy rights were violated. Specifically, Polk alleged that he was previously punished in juvenile court for the instant offenses. However, Polk failed to demonstrate that he was previously punished for the instant offenses in juvenile court. Polk's argument that juvenile court documents were forged is unpersuasive. Accordingly, Polk failed to demonstrate that his counsel was ineffective in this regard.

Third, Polk alleged that his appellate counsel was ineffective for failing to communicate with him and for failing to investigate claims that had been preserved before trial. Polk failed to support either of these

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<sup>20</sup>Barker v. Wingo, 407 U.S. 514, 530 (1972); State v. Fain, 105 Nev. 567, 568-69, 779 P.2d 965, 966 (1989).

claims with specific facts or articulate how his appellate counsel's performance was deficient.<sup>21</sup> Therefore, the district court did not err in denying Polk relief.

Finally, Polk contended that: (1) he was denied the right to an impartial tribunal, (2) he was never certified as an adult, (3) the State committed misconduct with respect to his confession to police, and (4) State mental health experts failed to provide competent psychiatric exams. However, these claims are outside the scope of a post-conviction petition for a writ of habeas corpus.<sup>22</sup> We therefore affirm the district court's denial of these claims.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Polk is not entitled to relief and that briefing and oral argument are unwarranted.<sup>23</sup> However, our review of the judgment of conviction reveals an error. Although this court previously remanded the matter to the district court for a correction of Polk's judgment of conviction, it appears that his judgment of conviction was never corrected. Polk's judgment of conviction states that he was convicted pursuant to a guilty plea when, in fact, he was convicted pursuant to a jury verdict. We therefore conclude that this matter should

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<sup>21</sup>See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

<sup>22</sup>See NRS 34.810(1)(b)(2).

<sup>23</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

be remanded to the district court for a correction of the error. Accordingly,  
we

ORDER the judgment of the district court AFFIRMED and  
REMAND this matter to the district court for the limited purpose of  
correcting the judgment of conviction.<sup>24</sup>

Becker, C.J.  
Becker

Rose, J.  
Rose

Hardesty, J.  
Hardesty

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

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<sup>24</sup>We have reviewed all documents that Polk 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 Polk 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.