IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM DAVID CHAPPELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 33923

FILED

OCT 07 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant William David Chappell's post-conviction petition for a writ of habeas corpus.

On November 14, 1995, the district court convicted Chappell, pursuant to a jury verdict, of first-degree arson and grand larceny auto. The district court sentenced Chappell to serve a term of ten years and a consecutive term of five years in the Nevada State Prison, ordered him to pay restitution in the amount of $56,654.00, and gave him credit for 479 days time served. This court dismissed Chappell's direct appeal from the judgment of conviction.[1] The remittitur issued on April 14, 1998.

On December 7, 1998, Chappell filed a proper person post-conviction petition for a writ of habeas corpus and a motion for the appointment of counsel in the district court. On December 28, 1998, Chappell filed two additional motions. In the first motion, Chappell sought to compel his appellate counsel, Patricia Erickson, to return his property and asked the district court to impose sanctions upon her. In the second motion, Chappell sought a preliminary injunction or temporary

[1]Chappell v. State, Docket No. 28518 (Order Dismissing Appeal, March 23, 1998).

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restraining order against the enforcement of a Nevada State Prison policy requiring prisoners to purchase legal supplies. The State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent Chappell or conduct an evidentiary hearing. On March 8, 1999, the district court denied Chappell's motions and petition. Chappell now appeals.[2]

In his petition, Chappell contended that his trial counsel's performance denied him effective assistance. 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] The court need not consider both prongs of the Strickland test if the defendant fails to make a showing on either prong.[4] A petitioner is entitled to an evidentiary hearing only if he supports his claims with specific factual allegations that, if true, would entitle him to relief.[5] A district court's

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[2]Our review of Chappell's appeal from the denial of his motions reveals a jurisdictional defect. Specifically, the right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists. Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990). No statute or court rule provides for an appeal from an order denying Chappell's motions. Therefore, we conclude that we lack jurisdiction to entertain Chappell's appeal challenging the district court's denial of these motions.

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

[4]Strickland, 466 U.S. at 697.

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

factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.[6] Further, the tactical decisions of defense counsel are "virtually unchallengeable absent extraordinary circumstances."[7]

First, Chappell argued that his counsel was ineffective because he failed to adequately investigate the circumstances surrounding statements that Chappell made to police officers in California. Chappell contends that he was subject to a custodial interrogation in violation of Miranda v. Arizona,[8] and that counsel was ineffective because he did not pursue a pretrial motion to suppress his incriminating statements. We disagree.

Our review of the preliminary hearing and trial transcripts reveals that substantial evidence was presented by the State demonstrating that Chappell voluntarily confessed to police officers prior to being taken into custody; therefore, his rights pursuant to Miranda had not yet attached.[9] According to the testimony of the police officers, Chappell, of his own accord, arrived at the police station in Los Angeles, and with detailed specificity, confessed to his crimes. Chappell was taken into custody only after the officers were able to confirm his story with

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[6]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[7]Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691), modified on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

[8]384 U.S. 436 (1966).

[9]See Alward v. State, 112 Nev. 141, 154-55, 912 P.2d 243, 252 (1996); State v. Lanning, 109 Nev. 1198, 1200-01, 866 P.2d 272, 273-74 (1993); see also Rhyne v. State, 118 Nev. ___, ___, 38 P.3d 163, 170 (2002).

authorities in Las Vegas, approximately 90-120 minutes later. Therefore, because there was overwhelming evidence that Chappell voluntarily confessed prior to being in custody, we conclude that the district court was not clearly wrong in finding that Chappell's counsel was not ineffective in failing to further investigate the circumstances surrounding his confession, or pursue a pretrial motion to suppress his incriminating statements.

Second, Chappell argued that his counsel was ineffective because he failed to obtain documents that would have established that the victim, his ex-boss, received a substantial tax write-off due to the fire. Chappell served the victim with a subpoena duces tecum the morning in which the victim was to testify in an attempt to offer the victim's tax returns for admission into evidence. The State moved to quash the subpoena pursuant to NRS 174.335(2).[10] After hearing arguments from counsel, the district court quashed the subpoena, stating that "[i]t comes too late in service." This evidence, Chappell contends, would have strengthened his defense that the victim actually set the fire. We disagree with Chappell's contention.

The district court stated that although it was quashing the subpoena requesting the victim's tax returns, counsel would be allowed to inquire into the matter of his finances. The victim did, in fact, state during defense counsel's cross-examination that the damage from the fire was written-off for tax purposes. During this line of questioning, counsel was able to demonstrate for the jury other ways in which the victim may

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[10]NRS 174.335(2) states: "The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."

have benefited financially from the fire. Chappell was not deprived of an opportunity to present a theory of defense based on counsel failing to obtain the victim's tax returns. Therefore, we conclude that Chappell has failed to demonstrate that he was prejudiced by his counsel's alleged ineffectiveness in this regard.[11]

Third, Chappell argued that his counsel was ineffective for not obtaining a handwriting analysis on a check that he was accused of forging. Chappell claimed that the victim gave the check to him, that it was signed by either the victim or a co-worker, and that it was not a forgery. Chappell contended that he was prejudiced by the admission of this evidence alleging that he forged the victim's name on a check made out to him for $480.00. We disagree with Chappell's contention.

There was overwhelming evidence presented at trial that Chappell forged the check in question; therefore, we conclude that counsel was not ineffective in failing to obtain a handwriting analysis in an attempt to prove otherwise.[12] After the fire, the victim reported four checks missing from his office; the checks were taken from a secret drawer in his desk known only to his employees. The victim testified that Chappell admitted to him during a telephone conversation that he cashed one of the checks. The check was drawn on a closed account and was made out to one of Chappell's known aliases. Therefore, we conclude the district court did not err in rejecting this claim.

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[11]See Howard, 106 Nev. at 722, 800 P.2d at 180; Strickland, 466 U.S. at 691.

[12]See id.

Fourth, Chappell argued that his counsel was ineffective for not: (1) discovering that the victim did not hold a master's degree in piano technology, and (2) objecting when the victim stated as much.[13] We disagree. Whether or not the victim had such a degree was not relevant or material to either the prosecution or Chappell's defense. The victim was not certified as an expert for trial, and he did not testify as an expert. The victim's testimony detailed his relationship with Chappell, and the events pertaining to the charges brought against Chappell. Therefore, Chappell's contention regarding his counsel's ineffectiveness was without merit.

Fifth, Chappell argued that his counsel was ineffective for not: (1) obtaining "all necessary documents," more specifically, the California arrest report, and (2) moving for a mistrial. Chappell maintains that he was unable to challenge the admission of the incriminating statements made to the police detectives without the report. We disagree. Chappell's claim consisted of an unsupported, unsubstantiated, and conclusory allegation which lacked the necessary factual specificity. Additionally, Chappell has failed to demonstrate how his allegedly ineffective counsel prejudiced his defense.[14] There is no indication in the record that Chappell's counsel did not have the arrest report, or that the State failed to produce the document for defense counsel. Further, Chappell failed to note what exculpatory information was contained in the arrest report. And to the contrary, our review of the record reveals that the arrest report

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[13]More specifically, the victim stated that he had a "master's in piano technology" from the Conservatory of Music in Kansas City.

[14]Hargrove, 100 Nev. at 502, 686 P.2d at 225.

quoted the incriminating statements made by Chappell, and did not contain any exculpatory information.

Sixth, Chappell argued that his counsel was ineffective because he failed to: (1) object to the prosecutor's misstatement of a fact during closing arguments, and (2) move for a mistrial. This contention is without merit and belied by the record.[15] Chappell claimed that the prosecutor was commenting on the time of the explosion which occurred during the fire, when, in fact, the prosecutor was commenting on Chappell's demeanor and disregard for human life. Therefore, we conclude that defense counsel was not ineffective in failing to object to the prosecutor's statements, or move for a mistrial.

Seventh, Chappell argued that his counsel was ineffective in failing to call an expert witness to rebut the State's witness' testimony regarding the time of the explosion. We disagree. The time of the explosion was not relevant or material to either the prosecution or Chappell's defense. The defense theories were: (1) Chappell had an alibi, and therefore, could not have started the fire; and (2) the victim set the fire for financial reasons. Chappell has failed to demonstrate how testimony regarding the time of the explosion during the fire prejudiced his defense, or that his counsel was deficient in failing to call an expert on the subject.[16]

Eighth, Chappell argued that his counsel was ineffective in failing to object to allegedly improper jury instructions. More specifically,

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[15]See id. at 503, 686 P.2d at 225.

[16]See Howard, 106 Nev. at 722, 800 P.2d at 180; Strickland, 466 U.S. at 691.

Chappell contended that counsel should have objected to the instructions to the jury on: (1) flight, because the State presented no evidence supporting such behavior; and (2) grand larceny, because it was a misstatement of the law. We disagree.

The State presented overwhelming evidence of Chappell's flight after the crime, including that he telephoned the victim from California after the fire; he visited three different police stations in Los Angeles attempting to confess to the crimes of arson and stealing the victim's limousine; he was arrested in California after the fire; the victim used phone records to locate Chappell in California; after the fire, Chappell stayed with a friend in Simi Valley, California; and that Chappell confessed to abandoning the limousine in California. Therefore, we conclude that defense counsel was not ineffective in failing to object to the flight instruction.[17]

The allegedly improper grand larceny instruction was as follows:

> If you find that the defendant took the automobile with the intent to appropriate it to his own use and with intent to abandon later the automobile in such circumstances as would render its recovery by the owner difficult or unlikely, then you may find that the taking was with the specific intent to permanently deprive the owner of the property.

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[17]See id.

We conclude that the above instruction accurately reflects the statutory definition of grand larceny.[18] Therefore, counsel was not ineffective in failing to object.

Also in his petition, Chappell argued that his appellate counsel rendered ineffective assistance. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland."[19] Appellate counsel is not required to raise every non-frivolous issue on appeal.[20] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[21] "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."[22]

First, Chappell argued that his appellate counsel was ineffective for failing to challenge prosecutorial misconduct; more specifically, the prosecutor's failure to turn over the arrest report to defense counsel, and presenting false information to the jury regarding the time of the explosion. And second, appellate counsel was ineffective for

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[18]See NRS 205.220(1)(a) ("a person commits grand larceny if the person . . . [i]ntentionally steals, takes and carries away, leads away or drives away . . . [p]ersonal goods or property, with a value of $250 or more, owned by another person"); see also State v. Ward, 19 Nev. 297, 10 P. 133 (1886).

[19]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

[20]Jones v. Barnes, 463 U.S. 745, 751-52 (1983).

[21]Hernandez v. State, 117 Nev. 463, 465-67, 24 P.3d 767, 768-70 (2001); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

[22]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

failing to challenge the jury instructions on flight and grand larceny. Because we concluded above that trial counsel was not ineffective in failing to object to these issues or move for a mistrial, we conclude that the omitted issues would not have had a reasonable probability of success on appeal. Therefore, appellate counsel did not provide deficient assistance.

Finally, Chappell raised claims that should have been pursued in his direct appeal. For the same reasons discussed above, Chappell argued that the prosecutor committed misconduct, effectively denying him due process, by (1) not producing the arrest report, (2) knowingly misstating facts, and (3) presenting false information to the jury.

A court must dismiss a habeas petition if it presents claims that could have been presented in an earlier proceeding unless the court finds both good cause for failing to present the claims earlier and actual prejudice to the petitioner.[23] This court may excuse the failure to show cause where the prejudice from a failure to consider the claim amounts to a "fundamental miscarriage of justice."[24] Anderson failed to demonstrate good cause for not raising the above claims on direct appeal, and he has failed to demonstrate that he is the victim of a fundamental miscarriage of justice.[25] We therefore conclude that the district court properly rejected these claims.

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[23]See NRS 34.810(1)(b)(2); NRS 34.810(3).

[24]Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

[25]Cf. Murray v. Carrier, 477 U.S. 478, 496 (1986) (holding that a federal habeas court may grant the writ in the absence of a showing of cause for the procedural default "where a constitutional violation has probably resulted in the conviction of one who is actually innocent").

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Chappell is not entitled to relief or an evidentiary hearing, and that briefing and oral argument are unwarranted.[26] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Jeffrey D. Sobel, District Judge
William David Chappell
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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