

IN THE SUPREME COURT OF THE STATE OF NEVADA

HERMAN LEE REED,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44408

FILED

APR 05 2005

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant Herman Lee Reed's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

On November 12, 2003, the district court convicted Reed, pursuant to a jury verdict, of possession of a controlled substance. The district court sentenced Reed to serve a term of twelve to forty-eight months in the Nevada State Prison. This court affirmed Reed's judgment of conviction and sentence on appeal.¹ The remittitur issued on June 2, 2004.

On August 3, 2004, Reed 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 Reed or to conduct an evidentiary hearing. On December 3, 2004, the district court denied Reed's petition. This appeal followed.

¹Reed v. State, Docket No. 42180 (Order of Affirmance, May 6, 2004).

In his petition, Reed raised numerous allegations of ineffective assistance of trial counsel.² 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 standard of reasonableness.³ 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.⁴ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁵

First, Reed contended that his trial counsel were ineffective for failing to file a motion to suppress evidence of cocaine discovered in his car during a traffic stop.⁶ Reed argued that police did not have probable cause to stop his vehicle, and that the subsequent search of his car was illegal.⁷ We conclude that this claim is without merit.

²To the extent that Reed 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 Reed did not demonstrate good cause for his failure to do so. See NRS 34.810(1)(b). Further, Reed argued that his appellate counsel was ineffective for failing to raise several of the following issues on appeal. For the reasons discussed below, Reed did not establish that his appellate counsel was ineffective.

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

⁴Id.

⁵Strickland, 466 U.S. at 697.

⁶We note that Reed had a succession of three different court-appointed attorneys.

⁷See U.S. Const. amend. IV; Nev. Const. art. 1, § 18.

The police may stop an automobile when there is probable cause to believe a traffic violation has occurred, even if a reasonable officer would not have made the stop absent a purpose unrelated to traffic enforcement.⁸ A review of the record reveals that Reed was driving recklessly and the light intended to illuminate his license plate was not functioning. Therefore, police had probable cause to stop his vehicle.⁹ Evidence was further presented at Reed's trial that he gave police consent to search his vehicle after he was stopped. "[A] waiver and consent, freely and intelligently given, converts a search and seizure which otherwise would be unlawful into a lawful search and seizure."¹⁰ Reed failed to establish that his counsel acted unreasonably in failing to file a motion to suppress evidence, or that he was prejudiced by his counsels' allegedly deficient performance. Therefore, the district court did not err in denying this claim.

Second, Reed alleged that his trial counsel were ineffective for failing to argue that police engaged in racial profiling when they stopped his vehicle. The United States Supreme Court has noted, "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."¹¹ As such, we conclude that Reed did

⁸See Whren v. United States, 517 U.S. 806 (1996); Gama v. State, 112 Nev. 833, 920 P.2d 1010 (1996).

⁹See NRS 484.377(1)(a); 484.551(4).

¹⁰State v. Plas, 80 Nev. 251, 254, 391 P.2d 867, 868 (1964).

¹¹Whren, 517 U.S. at 813.

not establish that he was prejudiced by his counsels' failure to raise this argument, and we affirm the district court's denial of this claim.

Third, Reed claimed that his trial counsel were ineffective for failing to seek a reduction of the charge to a misdemeanor or gross misdemeanor. Reed provided absolutely no evidence that the State was willing to negotiate a lesser charge, however. Consequently, he failed to establish that his trial counsel were ineffective in this regard.

Fourth, Reed contended that his trial counsel representing him at sentencing was ineffective for failing to object to his sentence. Specifically, Reed argued that he was convicted of a category E felony and his sentence violated NRS 193.130(2)(e) because he was not granted probation. However, the State presented evidence that Reed was previously convicted of attempted possession of a controlled substance, and offering, agreeing, or arranging to sell a controlled substance. Reed's conviction was therefore a category D felony,¹² and his sentence fell within the range prescribed by statute.¹³ As such, we affirm the district court's denial of this claim.

Fifth, Reed claimed that his trial counsel were ineffective for generally failing to review and investigate his case. Reed more specifically argued that his counsels' performance was deficient for failing to investigate the chain of custody and authenticity of the cocaine confiscated by police. Reed failed to adequately support these claims or articulate how

¹²See NRS 453.336(2)(b).

¹³See NRS 193.130(2)(d).

his counsels' performance prejudiced his defense.¹⁴ Therefore, the district court did not err in denying these claims.

Sixth, Reed argued that his trial counsel were ineffective for failing to "adequately" motion the court for suppression of statements he made to police prior to receiving his Miranda warning.¹⁵ A review of the record reveals that two of Reed's court-appointed attorneys filed a motion to suppress his statements. Reed failed to specify how his counsels' performance was deficient. Further, this court concluded on direct appeal that the district court did not err in denying Reed's motion to suppress. For these reasons, Reed did not establish that his trial counsel were ineffective.

Reed additionally argued 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.¹⁶ "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."¹⁷ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁸

¹⁴See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

¹⁵See Miranda v. Arizona, 384 U.S. 436 (1966).

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

¹⁷Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

¹⁸Jones v. Barnes, 463 U.S. 745, 751 (1983).

First, Reed contended that his appellate counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel. However, ineffective assistance of counsel claims are generally not appropriately raised on direct appeal.¹⁹ Thus, Reed did not establish that his appellate counsel was ineffective in this regard, and we affirm the order of the district court.

Second, Reed claimed that his appellate counsel was ineffective for failing to argue that his right to a speedy trial was violated. We conclude that this claim is without merit.

The Sixth Amendment to the United States Constitution provides the right to a speedy trial.²⁰ This right extends to criminal defendants in state courts.²¹ In determining whether a defendant's right to a speedy trial has been violated, the 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.²² Although a period of nineteen months elapsed between Reed's arraignment and trial, Reed failed to establish that the delay was attributable to the State, that he asserted his right, or that he was prejudiced in any way.²³ Accordingly,

¹⁹See Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

²⁰See 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)).

²¹Id.

²²Barker v. Wingo, 407 U.S. 514, 530 (1972); State v. Fain, 105 Nev. 567, 568, 779 P.2d 965, 966 (1989).


²³We note that Reed was constantly unhappy with his court-appointed attorneys, and in fact requested a continuance on the first day of trial so that he could obtain new counsel yet again.

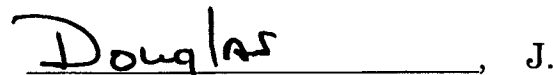
Reed failed to demonstrate that this issue had a reasonable probability of success on appeal, and we affirm the district court's denial of this claim.

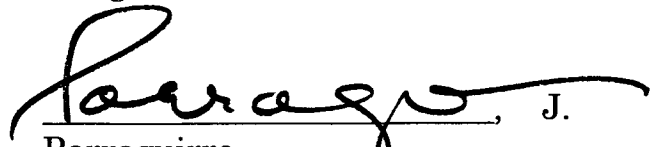
Finally, Reed contended that his appellate counsel was ineffective for failing to challenge the information and indictment. Reed additionally claimed that his counsel should have argued that his basic constitutional rights were violated. Reed failed to support either of these claims with specific facts, however, or articulate how he was prejudiced by his counsel's performance.²⁴ Therefore, the district court did not err in denying these claims.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Reed is not entitled to relief and that briefing and oral argument are unwarranted.²⁵ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Maupin


Douglas


Parraguirre

²⁴See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

²⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Nancy M. Saitta, District Judge
Herman Lee Reed
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk