IN THE SUPREME COURT OF THE STATE OF NEVADA

TODD MICHAEL HONEYCUTT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44430

FILED

APR 18 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On December 8, 1999, the district court convicted appellant, pursuant to a jury verdict, of one count of first-degree kidnapping, two counts of sexual assault and one count of solicitation to commit murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after five years for the kidnapping count, a concurrent term of life with the possibility of parole after ten years for one of the sexual assault counts, a consecutive term of life with the possibility of parole after ten years for the other sexual assault count, and a consecutive term of 72 to 180 months for the solicitation count. This court affirmed the judgment of conviction and sentence on direct appeal.[1]

On June 11, 2003, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

[1]Honeycutt v. State, 118 Nev. 660, 56 P.3d 362 (2002).

06-08154

State opposed the petition. On December 19, 2003, the district court entered an order directing appellant to shorten his petition to no more than thirty pages and resubmit the petition. On March 4, 2004, appellant resubmitted a forty-nine page petition. On April 27, 2004, appellant resubmitted a thirty-two page petition. The State opposed these petitions and appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On December 15, 2004, the district court summarily denied appellant's petition.[2] This appeal followed.[3]

Ineffective assistance of trial counsel:

In his petition, appellant raised thirteen claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that his counsel's errors were so severe that they rendered the jury's verdict unreliable.[4] The district court may

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[2]On October 31, 2005, the district court entered a "Findings of Fact, Conclusions of Law and Order" that denied appellant's petition and included specific findings of fact and conclusions of law in support of the district court's decision. See NRS 34.830.

[3]To the extent that appellant is challenging the denial of his motions for an evidentiary hearing, appointment of counsel, transcription of exhibits and subpoena of records, we conclude the district court did not err in denying these motions. See NRS 34.750, NRS 34.770, NRS 34.780.

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

dispose of a claim if the petitioner makes an insufficient showing on either prong.[5]

First, appellant claimed that his trial counsel was ineffective for failing to investigate or call expert witnesses. Appellant asserted that his counsel should have had a handwriting expert, a latent print expert, a urologist, and a dental expert testify on his behalf. Appellant argued that these experts would have provided testimony that contradicted the testimony of several of the State's witnesses.

Appellant failed to demonstrate that the testimony of a handwriting expert and latent print expert regarding Exhibit 45 would have altered the outcome of his trial. Appellant alleged that their testimony would have proven he did not write or handle Exhibit 45. Appellant testified to this effect at trial. Additionally, the State argued to the jury that the source of the information on Exhibit 45 was what was important, not the source of the handwriting. Appellant also failed to demonstrate that the testimony of a urologist and dental expert would have altered the outcome of his trial. Appellant alleged that their testimony would have contradicted the victim's testimony. The victim testified that she bit appellant's penis two or three times during the assault. However, another witness testified that the victim's sexual assault report stated that she did not bite her assailant. Additionally, an officer testified that he saw appellant's penis within hours of the assault, when a serology kit was prepared for appellant, and he did not see any bite marks on appellant's penis. Accordingly, we conclude the district court did not err in denying this claim.

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[5]Strickland, 466 U.S. 697.

Second, appellant claimed that his trial counsel was ineffective for failing to correct the judge when the judge misstated evidence. Appellant failed to demonstrate that his counsel was deficient in this regard. The record reveals that the judge did not misstate the evidence as alleged by appellant. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to request that the jury see the actual minivan where the alleged assault took place. Appellant alleged that had the jury seen the actual minivan, the jury would have determined that the assault, as testified to by appellant, was physically impossible. Appellant failed to demonstrate that his counsel was deficient in this regard or that he was prejudiced. Photographs of the interior of the minivan and pertinent measurements were admitted into evidence and presented to the jury for consideration. Additionally, appellant's counsel did a demonstration to approximate scale for the jury and argued that the assault could not have physically occurred as testified to by appellant. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to adequately oppose the joining of his solicitation charge to the other charges. Appellant failed to demonstrate that his counsel was deficient. On direct appeal, this court held that the district court did not err in joining appellant's charges or denying appellant's motion to sever the charges.[6] Appellant failed to identify what additional argument his counsel should have made, and failed to demonstrate that any additional

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[6]Honeycutt, 118 Nev. at 667-69, 56 P.3d at 367-68.

argument would have altered the district court's decision. Accordingly, we conclude the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to provide the entire instruction for mistaken belief of consent to the district court as a proposed jury instruction. Appellant failed to demonstrate that his counsel was deficient in this regard.

Appellant's trial counsel proffered a jury instruction on the defense theory of reasonable belief of consent. The district court refused to give the proffered instruction. On direct appeal, this court concluded that because appellant's counsel omitted the State's theory of the case from the proposed jury instruction, the proposed instruction was an incorrect statement of the law, and the district court did not err by refusing to give the instruction.[7] Prior to this court's opinion on direct appeal, this court had never obligated defense counsel to provide both the defense's and State's theories of the case in proffered jury instructions. Appellant's trial counsel could not have anticipated this court's decision on direct appeal, and counsel's inability to do so does not constitute ineffective assistance of counsel. Accordingly, we conclude the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to conduct investigation regarding the Hard Rock Hotel and Casino. Appellant asserted that such investigation would have revealed that there were employees outside and cabs available at the time of the assault, contradicting with the victim's testimony.

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[7]Id. at 671, 56 P.3d at 369-70.

Appellant failed to demonstrate that his counsel was deficient in this regard. Appellant's counsel elicited testimony from the security manager for the Hard Rock that at the time of the assault there would have been two bicycle security guards patrolling the parking lot and an employee manning the valet area at the main entrance. The security manager also testified that cabs are generally available at the main entrance. Appellant failed to demonstrate that additional testimony regarding the Hard Rock would have altered the outcome of the trial. Accordingly, we conclude the district court did not err in denying this claim.

Seventh, appellant claimed his trial counsel was ineffective for portraying appellant as a "bad guy" and a "terrible boyfriend." Appellant failed to demonstrate that his counsel was deficient in this regard. Although the record reveals that during closing arguments appellant's counsel referred to appellant as a "bad guy" and a "terrible boyfriend," appellant's counsel made these statements in an attempt to argue that appellant's prior conduct does not mean that he committed the instant offenses. "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."[8] Appellant failed to demonstrate that acknowledging appellant's faults was not a reasonable tactical decision. Accordingly, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for failing to move for dismissal of the solicitation charge. Appellant

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[8]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (citing Strickland, 466 U.S. at 691).

asserted that the indictment was improper under NRS 172.255, the police presented perjured testimony and false evidence to the grand jury, and the State failed to present exculpatory evidence to the grand jury.

Appellant failed to demonstrate that his counsel was deficient in this regard. Nothing in the record supports appellant's claim that the indictment was not properly filed. Further, appellant failed to demonstrate that a motion to dismiss the indictment would have been successful. NRS 172.145(2) requires the district attorney to present to the grand jury any evidence that will explain away the charge. Contrary to appellant's assertions, his letters stating that he wanted the victim scared would not tend to explain away the charge, so long as the prosecution could establish that he sought to have the victim killed. One of appellant's letters mentioned the victim dying. This was sufficient to establish probable cause to support the indictment. Finally, any misstatement on the part of Officer Hanna regarding any possible deal made with an inmate for his cooperation in obtaining evidence to support the solicitation charge was not sufficient to dismiss the indictment. Accordingly, we conclude the district court did not err in denying this claim.[9]

Ninth, appellant claimed that his trial counsel was ineffective for failing to move for acquittal due to insufficient evidence. Appellant failed to demonstrate that his counsel was deficient in this regard or that such a motion would have been successful. The record reveals that

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[9]To the extent that appellant also raised this claim in the context of a claim of ineffective assistance of appellate counsel, appellant failed to demonstrate that his appellate counsel was ineffective, and we conclude that the district court did not err in denying this claims. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996).

sufficient evidence supported the jury's finding of guilt on all charges.[10] Accordingly, we conclude the district court did not err in denying this claim.[11]

Tenth, appellant claimed his trial counsel was ineffective for failing to interview Lisa Sapanaro, Robin Hoppe and Joann Klassen and have them testify on his behalf. Appellant asserted that the testimony of these individuals would have contradicted and undermined Lisa Bard's testimony regarding appellant's alleged prior sexual assault of her.

Appellant failed to demonstrate that his counsel was deficient in this regard or that, had these individuals testified on his behalf, the outcome of the trial would have been different. Appellant claimed that Saponaro and Hoppe would have testified that they were with him at the time the alleged prior assault occurred. Appellant testified to this same information at his second trial.[12] Although Saponaro testified at appellant's first trial that she was with appellant at the time he allegedly committed the assault on Lisa Bard, on cross-examination, Saponaro

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[10]See Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980) (holding that sufficient evidence will support a conviction if a jury, acting reasonably, could have been convinced by the evidence presented that the defendant was guilty of the charge by beyond a reasonable doubt); see also Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994) (recognizing that the uncorroborated testimony of a victim is sufficient to uphold a rape conviction).

[11]To the extent that appellant also raised this claim in the context of a claim of ineffective assistance of appellate counsel, appellant failed to demonstrate that his appellate counsel was ineffective, and we conclude that the district court did not err in denying this claim. See Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

[12]Appellant's first trial resulted in a hung jury.

stated that she never came forward with this alibi information, and appellant ended up entering an Alford[13] plea to a charge of coercion for the incident with Bard. Appellant claimed Klassen would have testified that Bard told her that appellant did not assault her, but rather made the story up. This information was presented to the jury through the testimony of an investigator who investigated the prior incident. Appellant also failed to demonstrate that his counsel would have been able to locate either Hoppe or Klassen to testify at his second trial. In his petition appellant stated that both of these individuals have moved, they no longer worked at the same place, and he did not know how to locate either of them. Accordingly, we conclude the district court did not err in denying this claim.

Eleventh, appellant claimed that his trial counsel was ineffective for failing to object to multiple instances of prosecutorial misconduct. This claim is belied by the record.[14] The record reveals that appellant's counsel objected to the conduct challenged by appellant. Accordingly, we conclude the district court did not err in denying this claim.

Twelfth, appellant claimed that his trial counsel was ineffective for failing to adequately cross-examine the State's witnesses. Appellant failed to demonstrate that his counsel was deficient in this regard. The record reveals that appellant's counsel conducted a thorough

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[13]North Carolina v. Alford, 400 U.S. 25 (1970).

[14]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (a petitioner is not entitled to an evidentiary hearing on claims belied by the record).

cross-examination of the State's witnesses and exposed discrepancies and inconsistencies in the witnesses' statements. Appellant failed to identify what additional questions his counsel should have asked on cross-examination that would have altered the outcome of his trial. Accordingly, we conclude the district court did not err in denying this claim.

Thirteenth, appellant claimed that his trial counsel was ineffective for failing to present to the jury his letters that stated he only wanted the victim scared. Appellant asserted that these letters would have undermined that State's claim that he wanted the victim killed. Appellant failed to demonstrate that the presentation of the letters would have altered the outcome of his trial. Even assuming some of the letters stated he only wanted the victim scared, at least one of the letters referenced the victim dying, and overwhelming evidence supported appellant's conviction for solicitation to commit murder. Accordingly, we conclude the district court did not err in denying this claim.

Ineffective assistance of appellate counsel:

Appellant also raised three claims of ineffective assistance of appellate counsel. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.[15] Appellate counsel is not required to raise every non-frivolous issue on appeal.[16] This court has held that

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[15]Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14 (citing to Strickland, 466 U.S. 668).

[16]Jones v. Barnes, 463 U.S. 745, 751 (1983).

appellate counsel will be most effective when every conceivable issue is not raised on appeal.[17]

First, appellant claimed that his appellate counsel was ineffective for failing to appeal the introduction of the Luxor videotape on the basis of inaudibility. Appellant failed to demonstrate that this issue would have had a reasonable probability of success on appeal. The record reveals that although portions of the videotape are inaudible, the videotape was redacted to remove large portions where the victim was inaudible or just crying. The record further reveals that the videotape, as redacted, was not entirely inaudible since both the prosecution and the defense referred to statements made on the videotape. Additionally, on direct appeal, this court rejected appellant's other challenges to the admission of the videotape.[18] Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to appeal the improper introduction of undercover agent testimony. This claim is belied by the record.[19] The record reveals that this claim was raised on direct appeal and this court concluded the claim lacked merit.[20] Accordingly, we conclude the district court did not err in denying this claim.

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[17]Ford, 105 Nev. at 853, 784 P.2d at 953.

[18]Honeycutt, 118 Nev. at 666 n.6, 56 P.3d at 366 n.6.

[19]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

[20]Honeycutt, 118 Nev. 666 n.6, 56 P.3d at 366 n.6.

Third, appellant claimed his appellate counsel was ineffective for failing to appeal the district court's refusal to revisit the issue of admitting Bard's testimony regarding the prior bad act. Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal. On direct appeal this court reviewed the admission of Bard's testimony and concluded that the district court did not abuse its discretion in admitting the testimony.[21] Accordingly, we conclude the district court did not err in denying this claim.

Cumulative error:

Appellant also claimed that the cumulative effect of his trial and appellate counsel's errors warrants the reversal of his conviction. Because appellant failed to demonstrate that his trial or appellate counsel were ineffective, he necessarily failed to demonstrate cumulative error. Accordingly, we conclude the district court did not err in denying this claim.

Direct appeal claims:

Finally, appellant raised twenty-six direct appeal claims in his petition. The majority of these claims were raised on direct appeal and appellant is barred by the doctrine of the law of the case from re-raising these issues.[22] As to those claims that appellant did not raise on direct appeal, appellant waived those claims by failing to raise them on direct

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[21]Id. at 672-73, 56 P.3d at 370.

[22]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). These claims include grounds three, four, six, ten, eleven, twelve, fourteen and their respective subsections as identified in the petition filed on June 11, 2003.

appeal and did not demonstrate good cause for his failure to do so.[23] Accordingly, we conclude 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 appellant is not entitled to relief and that briefing and oral argument are unwarranted.[24] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[25]

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
Todd Michael Honeycutt
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[23]See NRS 34.810(1)(b). These claims include grounds five, seven, eight, thirteen and their respective subsections as identified in the petition filed on June 11, 2003.

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

[25]We have reviewed all documents that appellant 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 appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

ROSE, C.J., dissenting:

I dissent because the majority decision concerns itself solely with the technical standard for reviewing a post-conviction petition for habeas corpus and overlooks fundamental fairness. We recently overruled our previous decision in Honeycutt's direct appeal regarding Honeycutt's proffered jury instruction on his theory of reasonable belief of consent.[1] In doing so, we stated that "the defendant in Honeycutt was apparently denied his theory of defense based upon a technical failure to include language that the State easily could have requested. Thus, Honeycutt creates a trap for the unwary that exalts form over substance where a defendant's right to a fair trial is at stake."[2] Further, we addressed the fact that the burden placed on Honeycutt to instruct on both his and the State's theories was unsupported by legal authority and that "we ha[d] never placed such an obligation with these consequences upon litigants."[3] We then acknowledged four "vices" that Honeycutt suffered from concerning the jury instruction issue, and we expressly overruled it.[4]

However, although we recognized just six months ago that Honeycutt was error and we corrected its error for other criminal defendants, Honeycutt himself will reap no benefit from our decision. Today, instead of affording Honeycutt the relief we now conclude is proper, the majority decision places Honeycutt in a "Catch-22."

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[1]Carter v. State, 121 Nev. ___, 121 P.3d 592 (2005).

[2]Id. at ___, 121 P.3d at 595.

[3]Id.

[4]Id. at ___, 121 P.3d at 596.

The majority decision states that Honeycutt's counsel was not ineffective because there was no obligation prior to the decision on Honeycutt's direct appeal "to provide both the defense's and State's theories of the case in proffered jury instructions." But when the district court refused to admit Honeycutt's instruction because it did not contain both his and the State's theories of the case, this court concluded in Honeycutt's direct appeal that, in fact, there was a requirement to introduce both theories.[5] The majority decision reconciles this inconsistency by stating that Honeycutt's counsel was not ineffective because his counsel could not have anticipated this court's gross error on direct appeal but then provides no relief for the major error this court made, which substantially prejudiced Honeycutt. As such, although we have concluded that affirming Honeycutt's conviction was error, the majority decision today makes clear that for Honeycutt himself, this error was theoretical only and will afford him no relief.

This conclusion offends fundamental fairness. On the one hand we have acknowledged that Honeycutt did not get the proper instruction from which to present his theory of the case and should have had a new trial, but on the other hand we hold that there is no remedy for the major error we made in failing to reverse his case on direct appeal—a perfect "Catch 22." We should do as we did in Carter,

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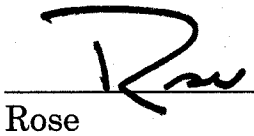
[5]See Honeycutt v. State, 118 Nev. 660, 669-71, 56 P.3d 362, 368-70 (2002).

refuse to exalt form over substance, and grant Honeycutt a new trial as we should have done on his direct appeal.



_____, C.J.
Rose