

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD LEE SMITH A/K/A EDWARD
SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44497

FILED

APR 04 2005

ORDER OF AFFIRMANCE

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

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

On March 13, 2002, the district court convicted Smith, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. The district court sentenced Smith to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole after ten years. This court affirmed Smith's judgment of conviction and sentence on appeal.¹ The remittitur issued on December 16, 2003.

On June 8, 2004, Smith filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On July 9, 2004, Smith filed an amended petition for a writ of habeas corpus. The State opposed Smith's petitions. Smith filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent

¹Smith v. State, Docket No. 39492 (Order of Affirmance, November 21, 2003).

Smith or to conduct an evidentiary hearing. On December 1, 2004, the district court denied Smith's petitions. This appeal followed.

In his petitions, Smith raised numerous 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 counsel's performance fell below an objective standard of reasonableness.² 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.³ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁴

First, Smith claimed that his trial counsel was ineffective for failing to argue that police did not have probable cause to arrest him. We conclude that this claim is without merit. There is probable cause to arrest "when police have reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution to believe that [a crime] has been . . . committed by the person to be arrested."⁵ Here, Smith informed police that he stabbed the victim, Martinique Tillman, multiple times during an altercation. Although Smith stated that he stabbed Tillman in self-defense, we conclude that police had probable cause to arrest him, such that Smith did not establish that his counsel was ineffective for failing to raise this issue.

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

³Id.

⁴Strickland, 466 U.S. at 697.

⁵Doleman v. State, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991).

Moreover, we note that the justice court found there was probable cause to bind Smith over for trial.⁶ Accordingly, we affirm the district court's denial of this claim.

Second, Smith contended that his trial counsel was ineffective for failing to call Detective Darlene Falvey to testify at his preliminary hearing. However, Smith failed to establish that the outcome of his preliminary hearing would have been different if Detective Falvey had provided testimony, in light of the fact that she testified at Smith's trial and he was found guilty beyond a reasonable doubt.⁷ Therefore, Smith did not demonstrate that his trial counsel was ineffective in this regard.

Third, Smith argued that his trial counsel was ineffective for failing to adequately cross-examine Detective Falvey at trial about Smith's voluntary statement. Smith contended that Detective Falvey provided "false testimony" concerning his statement. However, the record reveals that Smith's recorded statement was played for the jury and a copy of the tape was admitted into evidence. Therefore, the jury heard Smith's entire voluntary statement, and he failed to establish that the outcome of his trial would have been different if his trial counsel had conducted a more extensive cross-examination of Detective Falvey regarding Smith's statement. Consequently, the district court did not err in denying this claim.

⁶See NRS 171.206.

⁷See State v. Justice Court, 112 Nev. 803, 806, 919 P.2d 401, 402 (1996) ("The justice court's role at the preliminary hearing is to determine whether there is probable cause to find that an offense has been committed and that the defendant has committed it").

Fourth, Smith claimed that his trial counsel was ineffective for failing to object to the admission of a copy of his taped statement to police. Smith contended that the copy was not clear and may have been edited from the original tape. Smith further argued that his counsel should have requested that the State admit the original copy of his taped statement. We conclude that Smith did not provide sufficient facts to support his speculative claim that the copy was edited.⁸ Smith further failed to establish that the district court's admission of the copy was erroneous,⁹ such that his counsel's performance was deficient for failing to object. We therefore affirm the district court's denial of this claim.

Fifth, Smith contended that his trial counsel was ineffective for failing to examine surveillance video taken at the scene of the crime. The record reveals that Detective Falvey testified that she "spent hours" reviewing the surveillance videotapes and they did not contain any video relating to the crime. Falvey further stated that Smith's car never appeared on the surveillance tapes. Smith failed to demonstrate that he was prejudiced by his counsel's allegedly deficient performance, and he therefore did not establish that his counsel was ineffective for failing to review the videotapes.

Sixth, Smith argued that his trial counsel was ineffective for failing to move for dismissal of his case based on the State's failure to preserve evidence. Specifically, Smith contended that the State failed to properly preserve a black knife discovered in his vehicle, as well as the

⁸See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁹See NRS 52.245(1).

vehicle itself. We conclude that Smith is not entitled to relief on this claim.

In order to establish a due process violation resulting from the State's failure to preserve evidence, "a defendant must demonstrate either (1) that the state lost or destroyed the evidence in bad faith, or (2) that the loss unduly prejudiced the defendant's case and the evidence possessed an exculpatory value that was apparent before the evidence was destroyed."¹⁰ In the instant case, Smith did not adequately establish the existence of a small black knife allegedly discovered in his car,¹¹ or that evidence of the knife would have altered the outcome of his trial.¹² Smith similarly failed to include sufficient facts to support a claim that he was prejudiced by the State's failure to preserve his impounded automobile, or that the State's actions amounted to anything more than mere negligence at worst.¹³ Consequently, Smith did not demonstrate that his counsel was ineffective for failing to move for a dismissal on this basis, and the district court did not err in rejecting the claim.

Seventh, Smith contended that his trial counsel was ineffective for failing to request that his taped statement to police, which was played for the jury, be transcribed by the court reporter and included

¹⁰See State v. Hall, 105 Nev. 7, 9, 768 P.2d 349, 350 (1989).

¹¹We note that there was conflicting testimony at trial concerning whether a black knife was discovered in Smith's vehicle.

¹²We reject Smith's contention that he would not have been convicted of the deadly weapon enhancement because of the knife's small size. See NRS 193.165(5).

¹³See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

in the trial transcripts. Smith did not demonstrate that he was prejudiced by his counsel's actions, however, aside from speculation that the tape "may" have been altered or rearranged. As such, the district court did not err in denying Smith relief on this claim.

Eighth, Smith argued that his trial counsel was ineffective for failing to procure testimony from Tamilla Jones at trial. Smith claimed that Jones' testimony would have bolstered his claim of self-defense. A review of the record reveals that at Smith's preliminary hearing, Jones testified that she observed Smith threaten Tillman with a knife earlier in the evening. Jones then observed Smith and Tillman "struggling" in Smith's car, and Tillman did not appear to have a weapon in his hands. We conclude that Smith did not demonstrate that he was prejudiced by his counsel's failure to call Jones as a witness, and the district court did not err in denying this claim.

Ninth, Smith claimed that his trial counsel was ineffective for failing to have Barbie George and Lawrence Ward testify at trial. Smith contended that George and Ward would have testified that they informed Smith that people were sitting in his parked car. This would have corroborated Smith's statement to police that he was upset because people were sitting in his car. However, even assuming George and Ward provided such testimony at trial, we conclude that Smith did not establish that the results of his trial would have been different. We therefore affirm the district court's denial of this claim.¹⁴

¹⁴Smith also argued that his trial counsel was ineffective for failing to procure testimony from Sergeant Kevin Manning that various witnesses told him they saw people sitting in Smith's parked car. Even assuming this testimony would not have been inadmissible hearsay, we conclude

continued on next page . . .

Tenth, Smith argued that his trial counsel was ineffective for advising him against testifying at trial. However, Smith's taped statement to police was played for the jury, and he failed to articulate what additional information he would have provided to the jury if he had testified. Further, "this court will not second-guess an attorney's tactical decisions where they relate to trial strategy and are within the attorney's discretion."¹⁵ Therefore, Smith did not establish that his counsel was ineffective in this regard.

Eleventh, Smith contended that his trial counsel was ineffective for failing to offer evidence that Tillman had been arrested several times and was barred from the apartment complex. Assuming this evidence would have been admissible as opinion or reputation testimony,¹⁶ or as specific instances of conduct to support Smith's claim of self-defense,¹⁷ we conclude that Smith did not establish a reasonable probability that the results of his trial would have been different.

. . . continued

that Smith did not establish that the outcome of his trial would have been altered if this testimony had been presented. See NRS 51.035.

¹⁵Davis v. State, 107 Nev. 600, 603, 817 P.2d 1169, 1171 (1991).

¹⁶See NRS 48.045(1)(b) (evidence of the character of the victim is admissible when offered by an accused); 48.055(1) (evidence of character must be in the form of reputation or opinion testimony, although inquiry into specific instances of conduct is permitted on cross-examination).

¹⁷See Burgeon v. State, 102 Nev. 43, 45-46, 714 P.2d 576, 578 (1986) (holding that for "the purpose of establishing self-defense, specific acts which tend to show that the deceased was a violent and dangerous person may be admitted, provided that the specific acts of violence of the deceased were known to the accused or had been communicated to him").

Therefore, he did not demonstrate that his counsel's performance was deficient, and the district court did not err in denying this claim.

Twelfth, Smith argued that his trial counsel was ineffective for failing to question either medical expert regarding controlled substances found in Tillman's body at the time of his death. However, Smith did not provide adequate support for his assertion that Tillman had drugs in his system when he died. Further, Smith did not articulate how evidence that Tillman was using drugs would have altered the outcome of his trial.¹⁸ Accordingly, we affirm the district court's denial of this claim.

Thirteenth, Smith claimed that his trial counsel was ineffective for failing to call an employee of the coroner's office to testify that \$243 in cash was discovered in Tillman's shoe. Smith asserted that this would have supported his claim that Tillman was selling drugs from Smith's car. Smith failed to demonstrate that he would not have been convicted of second-degree murder with the use of a deadly weapon if his counsel had presented this evidence to the jury. Therefore, Smith did not establish that his counsel was ineffective in this regard.

Fourteenth, Smith alleged that his trial counsel was ineffective for failing to call his girlfriend, Keisha Morris, as a witness. The State implied in its closing argument that Morris hid the murder weapon, and Smith argued that Morris would have testified that she did not dispose of the knife. Smith failed to demonstrate how Morris' testimony would have altered the outcome of the trial, and the district court therefore did not err in denying this claim.

¹⁸See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Fifteenth, Smith contended that his trial counsel was ineffective for failing to object to the testimony of Kenneth Gilmore because Gilmore was present in the courtroom during Smith's preliminary hearing. We conclude that Smith did not establish that Gilmore's presence during Smith's preliminary hearing—during which Gilmore did not testify—violated the exclusionary rule at Smith's subsequent trial.¹⁹ Further, Smith did not establish that Gilmore's testimony was affected by the previous proceeding, such that his counsel's performance was unreasonable for failing to lodge an objection. As such, Smith did not demonstrate that his counsel was ineffective in this regard.

Sixteenth, Smith alleged that his trial counsel was ineffective for failing to impeach witnesses Chinette Jenkins and Marilyn Graham. Smith contended that their testimony was identical and "it was as if they sat and rehearsed their testimonies prior to trial." However, the record reveals that Smith's counsel vigorously cross-examined Jenkins concerning her preliminary hearing testimony, and asked her if she had discussed her testimony with friends. Counsel additionally impeached Graham with her prior statement to police. Finally, during her closing argument, Smith's counsel suggested that Graham and Jenkins discussed their testimony prior to trial. Therefore, Smith's claim is belied by the record,²⁰ and the district court did not err in denying him relief.

Seventeenth, Smith argued that his trial counsel was ineffective for failing to file a motion to dismiss based on insufficient evidence. To the extent that Smith is arguing that his counsel should

¹⁹See NRS 50.155(1).

²⁰See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

have requested a judgment of acquittal,²¹ a review of the record reveals sufficient evidence to sustain Smith's conviction for second-degree murder with the use of a deadly weapon, and he did not establish that his counsel was ineffective for failing to file such a motion.

Smith next raised several allegations 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.²² "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."²³ Appellate counsel is not required to raise every non-frivolous issue on appeal.²⁴

First, Smith argued that his appellate counsel was ineffective for failing to challenge his deadly weapon enhancement. Specifically, Smith contended that the small knife he admitted to using was not inherently dangerous and he therefore was improperly convicted of using a deadly weapon in the commission of his crime. We conclude that this claim is without merit.

A deadly weapon is defined as "[a]ny instrument which, if used in the ordinary manner contemplated by its design and construction,

²¹See NRS 175.381(2).

²²See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

²³Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

²⁴Jones v. Barnes, 463 U.S. 745, 751 (1983).

will or is likely to cause substantial bodily harm or death" or "[a]ny . . . instrument . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death."²⁵ We conclude that the knife Smith used to murder Tillman meets the definition of a deadly weapon, such that Smith did not establish that his appellate counsel was ineffective for failing to raise this issue on appeal. Accordingly, we affirm the district court's denial of this claim.

Second, Smith alleged that his appellate counsel was ineffective for failing to challenge crime scene analyst Robbie Dahn's qualifications as an expert witness. Smith contended that Dahn did not receive training in blood pattern analysis until after she investigated the crime scene in the instant case, and she was therefore not qualified to provide her opinion in that regard. A review of the record reveals that Dahn received training in blood pattern analysis prior to investigating the instant crime, although she testified that she received additional training subsequent to the investigation. We therefore conclude that Smith did not establish that Dahn was not qualified to provide expert testimony concerning blood pattern analysis, such that his counsel was ineffective for failing to raise this issue on appeal. Therefore, the district court did not err in denying this claim.

Third, Smith alleged that his appellate counsel was ineffective for failing to appeal the district court's denial of his motion for a continuance in order to procure testimony from Daniel Stephens. We disagree.

²⁵NRS 193.165(5).

The record reveals that prior to closing arguments, Smith's trial counsel moved for a continuance because Stephens, who was under subpoena, failed to appear in court.²⁶ Trial counsel contended that Stephens would have testified that surveillance cameras at the apartment complex were "operational most of the time." The district court denied the motion on the basis that several other witnesses testified that the surveillance system was operational.

The decision to grant or deny a motion for a continuance is within the sound discretion of the district court.²⁷ In determining whether good cause has been demonstrated to warrant a continuance, the district court must review the totality of the circumstances.²⁸ We conclude that Smith failed to demonstrate that the district court abused its discretion in denying his motion for a continuance, such that an appeal of this issue had a reasonable likelihood of success. Therefore, Smith did not establish that his appellate counsel was ineffective in this regard.

Fourth, Smith claimed that his appellate counsel was ineffective for failing to provide this court with a copy of the police report concerning an incident in which Tillman resisted arrest. On appeal, this court rejected Smith's argument that the district court abused its discretion in denying his request to present evidence of this incident to the jury. Smith failed to demonstrate that the outcome of his direct appeal would have been different if his appellate counsel had provided this court

²⁶See Bustos v. State, 87 Nev. 622, 491 P.2d 1279 (1971).

²⁷Batson v. State, 113 Nev. 669, 674, 941 P.2d 478, 482 (1997).

²⁸Joseph John H., a Minor v. State, 113 Nev. 621, 623, 939 P.2d 1056, 1058 (1997).

with a copy of the police report. As such, we affirm the district court's denial of this claim.

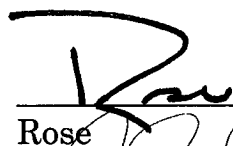
Fifth, Smith contended that his appellate counsel was ineffective for failing to present evidence that he was prejudiced by the violation of his right to a speedy trial. On direct appeal, this court rejected Smith's claim that his right to a speedy trial was violated, noting in part that Smith did not demonstrate that he was prejudiced by the delay. In the instant petition, Smith argued that his appellate counsel should have presented evidence that he was prejudiced for the following reasons: his trial was delayed because the "[t]he jury wanted to get their Christmas shopping done"; and his trial date was vacated one time because the district court judge claimed she would be out of the jurisdiction, although she was not. We conclude that Smith did not demonstrate that the outcome his direct appeal would have been different if his counsel had presented this information in support of his speedy trial claim, as these arguments would not have adequately demonstrated Smith was prejudiced. Consequently, Smith failed to establish that his appellate counsel was ineffective in this regard.


Next, Smith argued that: the prosecutor committed misconduct; there was insufficient evidence to sustain his conviction; he was denied equal protection; his due process rights were violated; his conviction was the result of malicious prosecution; and the district court was biased. However, these claims are outside the scope of a post-conviction petition for a writ of habeas corpus and Smith did not


demonstrate good cause for failing to raise them in his direct appeal.²⁹ 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 Smith is not entitled to relief and that briefing and oral argument are unwarranted.³⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Jennifer Togliatti, District Judge
Edward Lee Smith
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

²⁹See NRS 34.810(1)(b)(2).

³⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).