IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDRICK BENSON A/K/A
FREDERICK BENSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44932

FILED

JUN 16 2005

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; Jennifer Togliatti, Judge.

On October 11, 2002, the district court convicted appellant, pursuant to a guilty plea, of first degree murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison without the possibility of parole. This court affirmed the judgment of conviction on January 28, 2004.[1] The remittitur issued on February 24, 2004.

On November 16, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

[1]Benson v. State, Docket No. 40463 (Order of Affirmance, January 28, 2004).

05-11879

State opposed the petition. 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 February 17, 2004, the district court denied appellant's petition. This appeal followed.

In his petition, appellant made several claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness.[2] Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.[3] Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. [4]

First, appellant claimed that trial counsel was ineffective for advising him to waive his rights to a preliminary hearing. Specifically, appellant claimed that by waiving the preliminary hearing, his attorney did not inform him that he would be waiving the rights to present

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[2]Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[3]See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey, 112 Nev. 980, 923 P.2d 1102.

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

witnesses, gather evidence and learn what evidence the State had prior to proceeding to trial. Appellant does not explain how proceeding with the preliminary hearing would have assisted in his defense, and thus, he failed to demonstrate that he was prejudiced by counsel's performance. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to provide appellant with discovery for his review. Specifically, appellant claimed that because he was never provided with such discovery, he didn't know whether there was enough evidence to convict. This assertion is not supported by the record. Appellant knew that he had made an incriminating statement. Appellant was also aware that his two co-defendants had made statements incriminating appellant of murder. Appellant has failed to demonstrate that counsel's performance was deficient in this regard. Appellant further failed to demonstrate that he was prejudiced. Accordingly, we conclude that the district court did not err in denying this claim.

Third, appellant asserted that his trial counsel was ineffective for failing to object to the district court's denial of appellant's review of "exculpatory evidence." Specifically, appellant claimed that review of the videotape of his voluntary statement would have shown that appellant was coerced with promises of leniency and/or that he was under the influence of drugs and alcohol. There was no audio on the tape. Appellant failed to demonstrate how the viewing of this videotape would have assisted in his defense. The detectives testified in an evidentiary hearing

that they had made no promises to appellant, that his statement was voluntary, and that he was aware of his rights to remain silent and have counsel present. The district court listened to another audio recording of appellant's voice and determined that there was no indication that appellant was under the influence of alcohol or drugs during his voluntary statement. Thus, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for using "scare tactics" on appellant and his father in order to coerce appellant to plead guilty. Specifically, appellant claims that his counsel informed him and his father that appellant could receive the death penalty if he chose to go to trial. Appellant was facing charges for conspiracy to commit robbery, robbery with the use of a deadly weapon, and murder with the use of a deadly weapon. If convicted, appellant could have faced a sentence of death.[5] Appellant confessed in a voluntary statement, which the district court had ruled would be admissible as evidence. In order for appellant's guilty plea to be knowing and voluntary, he had to be aware of the risk involved with proceeding to trial. Trial counsel's candid advice about the maximum sentences upon proceeding to trial is not deficient. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that ineffective assistance of trial counsel led to his plea being unknowing and involuntary, and that he did

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[5]NRS 200.030(1)(b), (4)(a).

not have time to discuss the ramifications of his plea with counsel. This claim was previously raised in a presentence motion to withdraw the guilty plea. This court affirmed the denial of that motion on direct appeal. The doctrine of the law of the case prevents further litigation of this issue and cannot be avoided by a more precisely focused and detailed argument.[6]

Next, appellant claimed that his appellate counsel was ineffective. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."[7] Appellate counsel is not required to raise every non-frivolous issue on appeal.[8] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[9] "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."[10]

Appellant claimed that his appellate counsel was ineffective in failing to properly argue the merits of his claims and omitted claims.

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[6]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

[7]Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

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

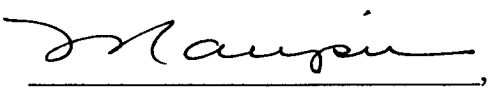
[9]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

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

Appellant failed to demonstrate which claims counsel failed to properly argue, which claims were omitted, and whether omitted claims or arguments had a reasonable probability of success on appeal. Therefore, appellant failed to demonstrate that appellate counsel was deficient in this regard. Thus, the district court did not err in denying this claim.

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.[11] Accordingly, we

ORDER the judgment of the district court AFFIRMED.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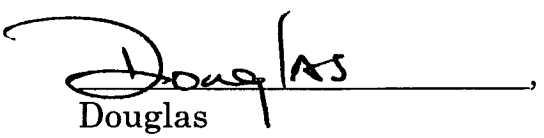
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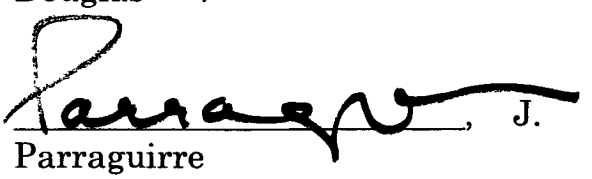
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cc: Hon. Jennifer Togliatti, District Judge
Fredrick Benson
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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