

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ANTHONY DIMEGLIO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45033

**FILED**

JUN 14 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOR  
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's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; David Wall, Judge.

On September 9, 2003, the district court convicted appellant, pursuant to a jury verdict, of one count of robbery. The district court adjudicated appellant as a habitual criminal and sentenced appellant to serve a term of 60 to 240 months in the Nevada State Prison. This court affirmed the judgment of conviction and sentence on appeal.<sup>1</sup> The remittitur issued on May 21, 2004.

On December 21, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to

---

<sup>1</sup>Dimeglio v. State, Docket No. 42116 (Order of Affirmance, April 26, 2004).

represent appellant or to conduct an evidentiary hearing. On March 16, 2005, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised several claims of ineffective assistance of counsel. 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 but for counsel's errors, the result of the proceeding would have been different.<sup>2</sup> The district court may dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>3</sup>

First, appellant claimed that his counsel was ineffective for failing to file a pre-trial motion to dismiss the charges against him. Appellant argued that there was insufficient evidence produced at the preliminary hearing to charge him with robbery. Appellant failed to demonstrate that his counsel was deficient. At the preliminary hearing the victim testified that when appellant took the money from his tip jar he felt afraid of and intimidated by appellant. We conclude that the victim's testimony demonstrated probable cause sufficient to hold appellant to answer the charge of robbery in the district court.<sup>4</sup> Further, any possible

---

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

<sup>3</sup>Strickland, 466 U.S. at 697.

<sup>4</sup>See NRS 171.206; Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) ("[t]he finding of probable cause may be based on slight, even 'marginal' evidence").

error in the preliminary hearing was rendered harmless because the jury found appellant guilty beyond a reasonable doubt.<sup>5</sup> Accordingly, the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to argue to the jury that appellant's conduct did not constitute more than petit larceny. This claim is belied by the record.<sup>6</sup> Our review of the record on appeal reveals that appellant's counsel specifically argued to the jury during closing arguments that appellant's conduct arose only to the level of petit larceny and did not constitute robbery. Accordingly, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for failing to object to the filing of an amended information. Appellant argued that the amended information improperly charged him with habitual criminal status because two of the five prior felonies alleged in the habitual criminal count were purged from his record. Although it appears that the State of Connecticut purged two of the prior convictions alleged in the count for habitual criminal status, the count alleged three additional prior felony convictions, which was sufficient for seeking habitual criminal

---

<sup>5</sup>See generally, United States v. Mechanik, 475 U.S. 66, 70-71 (1986) (holding that a rule violation during a grand jury indictment was not reversible error because the jury's subsequent guilty verdict meant that there was probable cause to believe that the defendants were guilty as charged).

<sup>6</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

status.<sup>7</sup> We conclude that appellant failed to demonstrate that an objection to the filing of the amended information would have altered the outcome of his sentence. Accordingly, the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for failing to object to the district court's reliance on his two purged Connecticut convictions during the sentencing hearing. This claim is belied by the record.<sup>8</sup> Our review of the record on appeal indicates that appellant's counsel objected to the consideration of the purged convictions for determining whether appellant should be adjudicated a habitual criminal. Accordingly, we conclude that the district court did not err in denying this claim.

Appellant also claimed that the district court erred by relying on his purged Connecticut convictions when adjudicating him a habitual criminal. This claim is outside the scope of claims permissible in a post-conviction habeas corpus petition.<sup>9</sup> Moreover, as additional grounds for denying this claim, this claim is belied by the record.<sup>10</sup> Our review of the record on appeal reveals that the district court specifically indicated at the sentencing hearing that it was not using the purged convictions for the

---

<sup>7</sup>See NRS 207.010(1)(a).

<sup>8</sup>See Hargrove, 100 Nev. at 503, 686 P.2d at 225.


<sup>9</sup>See NRS 34.810(1)(b)(2).

<sup>10</sup>See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

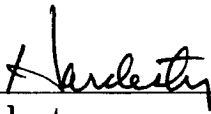
purpose of adjudicating appellant a habitual criminal. Accordingly, we conclude that the district court did not err in denying this claim.

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.<sup>11</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. David Wall, District Judge  
Joseph Anthony Dimeglio  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

---

<sup>11</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).