

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY CUCCIA, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45072

FILED

AUG 24 2005

ORDER OF AFFIRMANCE

ANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
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; Jackie Glass, Judge.

On August 16, 2002, the district court convicted appellant, pursuant to a jury verdict, of first degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This court affirmed the judgment of conviction and sentence on appeal.¹ The remittitur issued on March 16, 2004.

On December 28, 2004, appellant 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 appellant or to

¹Cuccia v. State, Docket No. 40188 (Order of Affirmance, February 18, 2004).

conduct an evidentiary hearing. On April 7, 2005, the district court denied appellant's petition. This appeal followed.

In his petition below, appellant presented several claims of ineffective assistance of counsel.² 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 counsel's errors were so severe that they rendered the jury's verdict unreliable.³ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁴

First, appellant claimed that his counsel was ineffective for waiving appellant's right to a speedy trial. Specifically, appellant claimed that his counsel purposely delayed the trial with untrue and false claims. The information was filed on March 24, 2000. Counsel requested a trial setting beyond the 60-day rule in order to properly prepare for trial, and trial was originally set for August 7, 2000, fifteen days beyond the 60-day period prescribed by NRS 178.556. Trial was later continued in order to provide for two competency evaluations for appellant, with the district

²To the extent that appellant raised any of the following issues independently from his ineffective assistance of counsel claims, we conclude that they are waived; they should have been raised on direct appeal and appellant did not demonstrate good cause for his failure to do so. See NRS 34.810(1)(b).

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

⁴Strickland, 466 U.S. at 697.

court finding appellant competent on June 17, 2002, following a competency hearing. Trial thereafter commenced the following day, on June 18, 2002.

We conclude that the district court did not err in determining that appellant's claim lacks merit. Appellant did not establish that his trial counsel waived his right to a speedy trial for an improper purpose. Trial counsel's concerns regarding adequate preparation for trial constituted good cause to waive appellant's right to a speedy trial, especially considering that much of appellant's past history that constituted appellant's theory of defense was located on the eastern coast.⁵ The district court's and trial counsel's concerns regarding appellant's competency also constituted good cause. Further, appellant failed to demonstrate that his Sixth Amendment right to a speedy trial was violated.⁶ Appellant did not allege with any specificity how he was prejudiced by the delay in the commencement of his trial.⁷ Accordingly, appellant failed to demonstrate that counsel acted unreasonably in

⁵See Huebner v. State, 103 Nev. 29, 31, 731 P.2d 1330, 1332 (1987) (providing that 60-day rule under NRS 178.556 is mandatory only when there is a lack of good cause for delay); Schultz v. State, 91 Nev. 290, 292, 535 P.2d 166, 167 (1975) (holding that trial counsel is authorized to waive 60-day rule).

⁶See U.S. Const. amend. VI.

⁷See Barker v. Wingo, 407 U.S. 514, 530 (1972) (delay must be presumptively prejudicial to warrant further inquiry); Sessions v. State, 111 Nev. 328, 332 n.4, 890 P.2d 792, 794 n.4 (1995).

delaying trial or that appellant was prejudiced by the delay. Thus, we affirm the order of the district court with respect to this claim.

Second, appellant claimed that his counsel was ineffective for proceeding to preliminary hearing without consulting with appellant. Appellant failed to demonstrate that counsel's performance was ineffective. Appellant was represented by a public defender prior to the preliminary hearing and had requested replacement counsel. New counsel was appointed prior to the preliminary hearing. Any errors in the preliminary hearing proceedings are harmless error where appellant was later convicted by a jury beyond a reasonable doubt.⁸ There was sufficient evidence presented to bind over appellant for murder in the first degree with a deadly weapon.⁹ Therefore, appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced, and the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for failing to investigate. Specifically, appellant claimed that counsel did not investigate or secure documents and witnesses that could verify appellant's prior mafia connections and evidence of a contract being put on appellant's life by the mafia. Appellant failed to demonstrate that counsel's performance was ineffective. Appellant testified and shared

⁸See generally Mechanik v. U.S., 475 U.S. 66 (1986) (holding that errors in the grand jury proceedings were harmless where later convicted by a jury beyond a reasonable doubt).

⁹NRS 171.206; see also Sheriff v. Holdes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980).

closing argument with counsel, presenting such testimony of prior mafia connections and his attempts to escape from contract killers. Investigating officers testified that the victim had no mafia connections. Appellant failed to demonstrate that counsel's performance was deficient or that such performance prejudiced his case. Thus, we affirm the order of the district court in denying this claim.

Fourth, appellant claimed that his counsel was ineffective in attempting to delay trial by failing to secure witnesses. The claim is not supported by the record. Appellant was representing himself prior to trial. Appellant stated in calendar call on June 17, 2002, that he was prepared for trial. Standby counsel stated that some of the witnesses were out of town, but he did not ask for a delay. On the day of trial, appellant requested that counsel take over representation. Trial was not delayed and proceeded at that time. Appellant failed to demonstrate that his counsel's performance was ineffective, and the district court did not err in denying this claim.

Fifth, appellant claimed that his counsel was ineffective for attempting to prejudice the jury regarding appellant's mental competency and for failing to demonstrate appellant's sound and stable mind. Specifically, appellant claimed that counsel's mention of the motive of the crime appearing "crazy" was an attempt by counsel to pursue an insanity defense. Appellant failed to demonstrate that counsel's performance was ineffective. Counsel's remark was made in an attempt to bolster appellant's defense of justified homicide due to a mafia contract on his life. In closing arguments, the State specifically addressed the standard for the jury in considering insanity and incompetence issues and the verdict was

consistent with that standard. Therefore, appellant failed to demonstrate that counsel's performance was unreasonable or that the jury's verdict was unreliable, and we affirm the district court in the denial of this claim.

Sixth, appellant claimed that his counsel was ineffective for failing to demonstrate the efficiency of organized crime murders. In particular, appellant claimed that his counsel failed to argue that professional killings are a danger to the proposed victim and all those around him. Appellant failed to demonstrate that counsel's performance was ineffective. Appellant testified specifically on his knowledge of the mafia and mafia contract killings. Appellant argued those same points during closing argument. Therefore, appellant failed to show that counsel's performance was deficient or that he was prejudiced. We affirm the order of the district court with respect to this claim.

Seventh, appellant claimed that his counsel was ineffective for allowing altered documents to be admitted, and failing to have audio and video tapes tested for altering. Appellant failed to provide sufficient facts to support these assertions, or articulate how he was prejudiced by his counsel's actions.¹⁰ Appellant failed to specify which documents were altered, or whether audio tapes or video tapes were in fact altered, or how the altering of such evidence would have made a difference in the outcome of the trial. Thus, the district court did not err in denying this claim.

Eighth, appellant claimed that his counsel was ineffective for having an alliance with the prosecutor and the district court. This claim is

¹⁰See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

not supported by the record. Having reviewed the record, counsel made every effort to adequately represent appellant and appellant failed to demonstrate an actual conflict of interest.¹¹ The district court addressed this issue in court, explaining to appellant that there were no alliances. Appellant failed to demonstrate that counsel's performance was ineffective, and we affirm the order of the district court with respect to this claim.

Ninth, appellant claimed that his counsel was ineffective for failing to request a mistrial after an incriminating hearsay statement was admitted as testimony. Specifically, appellant argued that an investigating officer was allowed to state that appellant had told him that he had killed people for the mafia in the past and that this statement unfairly prejudiced the jury. Appellant failed to demonstrate that counsel's performance was ineffective. Appellant testified that he had a long history with the mafia and that he planned and premeditated the murder of the victim. Appellant shot the victim in a public area with a great number of witnesses, and then he made a voluntary statement to police officers regarding the murder. Appellant, through his own testimony and closing argument, had the opportunity to address and correct any defect created by the admission of the hearsay statement.¹²

¹¹Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993); see also Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992).

¹²NRS 51.035(3).

Appellant failed to demonstrate that the jury's verdict would have been different, and the district court did not err in denying this claim.

Tenth, appellant claimed that his counsel was ineffective for failing to consult with appellant the night before appellant was to testify. Appellant failed to demonstrate how his testimony would have been different if counsel had consulted with him, or how counsel's performance was ineffective, and the district court did not err in denying this claim.

Eleventh, appellant claimed that his counsel was ineffective for conspiring with the court to coerce defendant into allowing the judge to prescribe punishment rather than the jury. This claim is not supported by the record. The district court discussed the decision to have the court determine the penalty with all of the parties, emphasizing that he had not made up his mind whether to impose life with the possibility of parole, or life without the possibility of parole. Appellant was given ample time to express any concerns and did not. Appellant signed a stipulation waiving the penalty hearing before the jury.¹³ Appellant failed to demonstrate that he suffered prejudice and that the outcome would have been different if a jury had established the sentence. Thus, we affirm the order of the district court as to this claim.

Appellant also claimed that he received ineffective assistance of appellate counsel. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set

¹³NRS 175.552(2).

forth in *Strickland v. Washington*, 466 U.S. 668 (1984)."¹⁴ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁵ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.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

Appellant claimed that his appellate counsel was ineffective for failing to argue issues, failing to consult with and notify appellant, and for claiming an untrue defense. Specifically, appellant argues that counsel erred because on direct appeal counsel wrongfully argued that appellant should have been found incompetent and that counsel should have been allowed to present this defense against appellant's wishes, contrary to this court's holding in *Johnson v. State*.¹⁸ Appellate claimed that counsel omitted the proper argument: that appellant killed the victim in self-defense because there was a mafia contract on his life. Appellant failed to demonstrate that the omitted argument had a reasonable probability of

¹⁴*Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

¹⁵*Jones v. Barnes*, 463 U.S. 745, 751 (1983).

¹⁶*Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

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

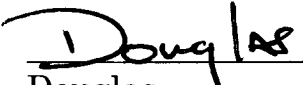
¹⁸117 Nev. 153, 17 P.3d 1008 (2001).

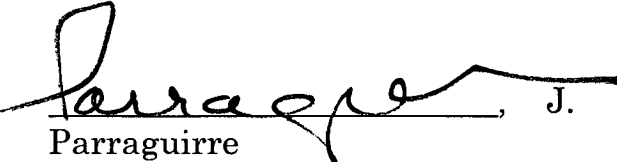
success on appeal.¹⁹ Therefore the district court did not err in denying this claim.

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.²⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²¹


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

¹⁹NRS 200.160 (providing imminent danger must be present).

²⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²¹We 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.

cc: Honorable Jackie Glass, District Judge
Anthony Cuccia Jr.
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk