

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO R. ALCARAZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45077

FILED

AUG 18 2005

ORDER OF AFFIRMANCE

JANETTE M. FLOOM
CLERK OF SUPREME COURT

BY *J. R. Rios*
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; Sally L. Loehrer, Judge.

On December 31, 2003, the district court convicted appellant, pursuant to a jury verdict, of conspiracy to commit robbery and robbery with the use of a deadly weapon. The district court sentenced appellant to serve a term of twenty-eight to seventy-two months for the conspiracy count, and two consecutive terms of twenty-four to one hundred months for the robbery count. The district court imposed the terms between counts to run concurrently. This court affirmed the conviction on direct appeal.¹ The remittitur issued on October 26, 2004.

On December 16, 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, the district court declined to appoint counsel to represent appellant; however, pursuant to

¹Alcaraz v. State, Docket No. 42683 (Order of Affirmance, September 29, 2004).

NRS 34.770, the district court held an evidentiary hearing. On March 28, 2005, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that counsel was ineffective.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 Further, the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁵

First, appellant claimed that counsel was ineffective for not obtaining a psychological evaluation prior to trial. Appellant failed to demonstrate that counsel was ineffective. There is no indication in the record that appellant was not of sufficient mentality to be able to understand the nature of the charges against him or that he was not able

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); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

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.

⁵Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

to aid and assist his counsel.⁶ Appellant was competent enough to testify on his own behalf. Appellant did not specify what a psychological exam would have determined, how this exam might have assisted in his defense, or that the outcome of his trial would have been different if he did have a psychological exam. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for not filing motions. Appellant has failed to demonstrate that counsel was ineffective. Appellant did not specify what motions counsel should have filed, or how these motions would have assisted in his defense and affected the outcome of his trial. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for failing to contact him until two days prior to trial. This claim is belied by the record.⁷ Appellant's trial began on October 14, 2003, and his preliminary hearing was on August 6, 2003, at which counsel was present. Even if counsel did not contact appellant until just prior to this time, appellant did not specify how such contact would have assisted in his defense, or if the outcome of his trial would have been different with such contact. Accordingly, the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for failing to review mitigating factors. Appellant has failed to demonstrate that counsel was ineffective. Appellant has not specified what, if any, mitigating factors there were that would have made a difference in the

⁶NRS 178.400(2).

⁷See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

outcome of his trial and thus, the district court did not err in denying this claim.

Fifth, appellant claimed that his counsel was ineffective for failing to present witnesses to testify on appellant's behalf. Appellant has failed to demonstrate that counsel was ineffective. Appellant did not specify what witnesses could have testified, what their testimony would have consisted of, and whether their testimony would have made a difference in the outcome of his trial. Accordingly, we conclude that the district court did not err in denying this claim.


Sixth, appellant claimed that his counsel was ineffective for failing to object to the deadly weapon enhancement. Specifically, he argued that there was no direct proof of a deadly weapon, that appellant had testified in court that there was no weapon, and that the enhancement was based on hearsay evidence. This claim is not supported by the record. Although a gun was never recovered, the victim testified that a gun was placed against his temple, and then he proceeded to describe the gun. Another witness testified that she had seen appellant receiving the gun, and then described it consistent with the victim's description. Neither testimony is hearsay evidence as it is based on personal knowledge, and the jury was free to weigh the testimony of these witnesses and appellant. Therefore, appellant failed to demonstrate that counsel's performance was ineffective. Accordingly, the district court's denial of this claim is affirmed.

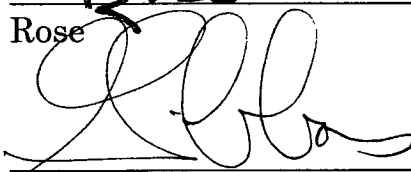
Seventh, appellant claimed that counsel was ineffective for failing to properly impeach the State's witnesses. Specifically, appellant claimed that the victim's testimony during the trial contradicted his preliminary testimony, that one of the witnesses was intoxicated, and that

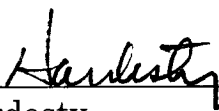
one of the witnesses committed perjury while testifying. Appellant's claims are not supported by the record. Our review of the record on appeal reveals that the victim's trial testimony, while more detailed than his preliminary testimony, was not contradictory. There was no evidence in the transcripts of any of the witnesses being intoxicated. One witness was asked by counsel whether she was under the influence at the present time, but she denied it. Appellant did not specify which witness allegedly committed perjury, nor was there evidence of such from the record. Appellant failed to specify how the impeachment of such witnesses would have made a difference in the outcome of the trial, and failed to demonstrate that counsel's performance was ineffective. 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.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Sally L. Loehrer, District Judge
Francisco R. Alcaraz
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk