

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD B. CLAY A/K/A EDDIE B.
CLAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45212

FILED

SEP 20 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
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; Stewart L. Bell, Judge.

On September 19, 2003, the district court convicted appellant, pursuant to a jury verdict, of one count each of burglary and robbery. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve two concurrent terms of ten to twenty-five years in the Nevada State Prison. This court affirmed the judgment of conviction and sentence on direct appeal.¹ The remittitur issued on June 8, 2004.

On February 24, 2005, 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

¹Clay v. State, Docket No. 42271 (Order of Affirmance, May 11, 2004).

conduct an evidentiary hearing. On May 9, 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 his counsel's performance fell below an objective standard of reasonableness, and that his counsel's errors were so severe that they rendered the jury's verdict unreliable.² The court may dispose of a claim if the petitioner makes an insufficient showing on either prong.³

First, appellant claimed that his counsel was ineffective for failing to acquire the entire surveillance video of the incident, rather than just relying upon the clips of the video presented by the prosecution. Appellant argued that the entire video would have demonstrated that appellant was initially prepared to pay for the cigarettes, and therefore, he did not have the requisite intent for burglary. Appellant also argued that the entire video would have demonstrated that no force was used to commit the theft or retain the cigarettes, therefore appellant could not have been guilty of robbery.

Our review of the record on appeal reveals that appellant's counsel attempted to obtain a copy of the entire video prior to trial but the entire video was not available. Appellant failed to articulate what additional action his counsel should have taken to obtain the entire video. Our review of the record further reveals that the video clips shown to the

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

³Strickland, 466 U.S. at 697.

jury showed appellant as he took the cigarettes and left the premises, and the victim testified regarding the incident. Appellant failed to demonstrate that his counsel was deficient or that the entire video would have altered the outcome of his trial. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed his counsel was ineffective for having an investigator take pictures of the crime scene many weeks after the crime had taken place and testify about those pictures when surveillance video tapes would have better demonstrated the store as it appeared on the date of the crime. Appellant failed to demonstrate that his counsel was deficient. Appellant failed to demonstrate that there was a surveillance video that showed the front of the store or, if such a video ever existed, that the video was recovered and available to counsel. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed his counsel was ineffective for failing to make the State meet its burden of proving robbery. It appears that appellant claimed his counsel failed to make the State prove that force was used in the commission of the crime. This claim is not supported by the record. Our review of the record on appeal reveals that appellant's counsel impeached the victim regarding a prior statement in which she said appellant looked like he was going to hit her, and strongly argued that the State had not demonstrated that force was used in the commission of the crime. Appellant failed to articulate what additional evidence counsel could have presented or argument counsel could have made that would have altered the outcome of the trial. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed his counsel was ineffective for failing to challenge the victim's testimony that appellant "jerked" away from her as he was trying to leave with the cigarettes. Appellant claimed that this statement was inconsistent with the victim's statement to the police in which she said that she "let go" of appellant's shirt. Appellant failed to demonstrate that testimony that the victim "let go" of appellant's shirt would have altered the outcome of the trial. The video clips shown to the jury showed both the appellant's and the victim's actions as the appellant took the cigarettes and left the premises. Accordingly, we conclude the district court did not err in denying this claim.

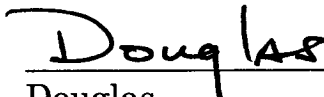
Fifth, appellant claimed his counsel was ineffective for failing to impeach Officer Vorce. Specifically, appellant argued that Vorce's report of what the victim told him contradicted the victim's statement to police. Appellant also argued that his counsel should have impeached Vorce's testimony regarding appellant's confession by showing the entire surveillance video.

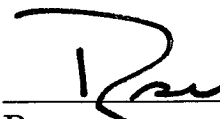
Appellant failed to demonstrate that the use of different adjectives in Vorce's and the victim's written statements regarding the incident affected the outcome of the trial. Our review of the record on appeal reveals that neither of the written statements was introduced as evidence at trial. Further, at trial, the victim admitted that she mistakenly described some of appellant's actions in her written statement. Video clips of the incident shown to the jury corroborated the testimony of both the victim and Vorce. Appellant failed to demonstrate that the entire surveillance video was available, and failed to articulate how the entire video would have contradicted Vorce's testimony. We therefore conclude that the district court did not err in denying this claim.

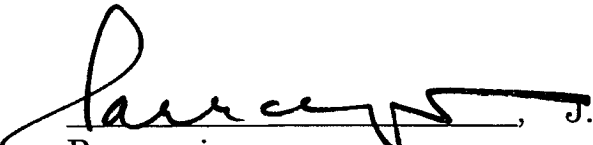
Appellant also claimed that the prosecution suppressed material evidence in violation of Brady.⁴ Appellant waived this claim by failing to raise it on direct appeal and failing to show good cause for not doing so.⁵ Accordingly, we conclude that the district court did not err in denying this claim.

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.⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁷


_____, J.
Douglas


_____, J.
Rose


_____, J.
Parraguirre

⁴Brady v. Maryland, 373 U.S. 83 (1963).

⁵NRS 34.810(1)(b)(2), (3).

⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁷We 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: Hon. Stewart L. Bell, District Judge
Edward B. Clay
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk