

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT N. WORDLAW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45238

FILED

NOV 10 2005

ORDER OF AFFIRMANCE

JANETIE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. R. R.*
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; Donald M. Mosley, Judge.

On February 11, 2003, the district court convicted appellant, pursuant to a jury verdict, of battery with the use of a deadly weapon.¹ The district court adjudicated appellant a habitual criminal pursuant to NRS 207.010 and sentenced him to serve a term of ten to twenty-five years in the Nevada State Prison. This court affirmed the conviction and sentence on direct appeal.² The remittitur issued on February 24, 2004.

On June 22, 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

¹The district court amended the judgment of conviction on August 29, 2003.

²Wordlaw v. State, Docket No. 40988 (Order of Affirmance, January 27, 2004).

district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On May 11, 2005, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that counsel was ineffective.³ 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.⁴ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁵ Further, the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁶

³To the extent that appellant raised any of the following issues independently from his ineffective assistance of counsel claims, we conclude that all but one of these claims 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). However, appellant's claim that his confrontation rights may have been violated by admission of the victim's hearsay statement may be raised in a successive post-conviction petition for a writ of habeas corpus in light of the United States Supreme Court's holding in Crawford v. Washington, 541 U.S. 36 (2004), and this court's recent holding in Flores v. State, 121 Nev. ___, ___ P.3d ___ (2005).

⁴See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁵Strickland, 466 U.S. at 697.

⁶Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant claimed that counsel was ineffective for failing to object to the admissibility of the victim's hearsay statement due to the victim's absence. The claim is belied by the record.⁷ Counsel specifically objected and argued several times regarding the admissibility of the victim's statement: (1) she objected during the preliminary hearing; (2) she filed a pretrial petition for writ of habeas corpus stating that there was insufficient notice to bind over appellant after the preliminary hearing, specifically due to the victim being unavailable; (3) she filed a motion in limine to have the statement excluded and the court held an evidentiary hearing on the admissibility of the statement; (4) she argued in a motion for a new trial and the subsequent evidentiary hearing that appellant was prejudiced by the victim's absence and the admission of the statement; and (5) counsel again argued this issue on direct appeal. Appellant failed to indicate what further steps counsel should have taken that would have had a reasonable probability of altering the outcome of the proceedings. Appellant failed to demonstrate that counsel's performance was ineffective. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for failing to request a continuance in order to insure that the State secure the victim to testify. This claim is not supported by the record. There was no indication that the State and the defense did not use due diligence in attempting to locate the victim. Defense counsel stated that at the time of trial, she did not know how to locate the victim. The victim did not

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

appear at the preliminary hearing, and in fact was in bench warrant status in a misdemeanor case in Las Vegas. It was not apparent that a continuance would have insured that the State would have been able to locate the victim. Thus, appellant failed to demonstrate that counsel was ineffective, and the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for failing to object to the State's failure to file an affidavit pursuant to Hill v. Sheriff.⁸ Appellant failed to demonstrate counsel was ineffective. The State did not request a continuance, and thus, no Hill affidavit was required. Accordingly, the district court did not err in denying this claim.

Fourth, appellant claimed that counsel was ineffective for failing to investigate potential witnesses. Specifically, appellant argued that counsel was ineffective because there were medical personnel on the scene that counsel did not interview. Appellant failed to demonstrate that counsel was ineffective. Appellant failed to specify what the medical personnel would have testified to or whether such testimony would have changed the outcome of his trial. Appellant failed to specify what other investigation counsel should have conducted, or how the failure to investigate produced an unreliable jury verdict. Thus, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that counsel was ineffective for failing to object to prosecutorial misconduct. Specifically, appellant claimed that counsel was ineffective for failing to object when the prosecutor alluded to the victim's statement of being hit in the head with a beer bottle.

⁸85 Nev. 234, 452 P.2d 918 (1969).

Appellant failed to demonstrate that counsel's performance was deficient or that appellant was prejudiced. The victim filled out a written statement on the scene which stated that appellant "had the beer bottle on my head." The officer on the scene testified that the victim stated appellant had hit her with the beer bottle. Police officers testified that when they first contacted the victim, her face was covered in blood. The Las Vegas senior crime scene analyst testified that there was blood on the beer bottle. The prosecutor's statements were based on evidence presented. Therefore, appellant failed to demonstrate that counsel's performance was ineffective, and the district court did not err in denying this claim.

Sixth, appellant claimed that counsel was ineffective for failing to have the beer bottle analyzed for the presence of the victim's fingerprints. Specifically, appellant claimed that counsel was ineffective because such fingerprints would have proven that appellant was taking the bottle away from the victim. Appellant failed to demonstrate that such fingerprints would have likely been present, or that counsel acted unreasonably by failing to have the beer bottle from the scene analyzed for fingerprints. Appellant failed to demonstrate that the presence of such fingerprints would have altered the outcome of the trial. Thus, appellant failed to demonstrate that counsel was ineffective, and the district court did not err in denying this claim.

Seventh, appellant claimed that counsel was ineffective for failing to challenge the habitual criminal proceedings. This claim is belied

by the record.⁹ Counsel specifically argued that appellant's present conviction and prior convictions should not expose him to habitual criminal sentencing, especially given the fact that the victim had recanted her statement just prior to appellant's sentencing. Thus, appellant failed to demonstrate that counsel's performance was ineffective, and the district court did not err in denying this claim.

Eighth, appellant claimed that counsel was ineffective for failing to request that appellant's habitual criminal determination be submitted to the jury as required pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000). Appellant failed to demonstrate that counsel was ineffective. Apprendi specifically excludes from its holding a sentencing enhancement involving an increased penalty based upon the fact of a prior conviction.¹⁰ We conclude that the district court did not err in denying this claim.

Finally, appellant claimed that counsel was ineffective for not producing the victim to testify at the hearing for a new trial. Appellant failed to demonstrate that counsel was ineffective. Counsel produced the victim's affidavit recanting her earlier statement regarding appellant's use of a bottle as a weapon. The district court found that it was unlikely that the jury would have found the victim credible and that the victim's testimony would not have made a difference in the outcome of the trial.

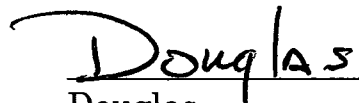
⁹See Hargrove, 100 Nev. at 503, 686 P.2d at 225.


¹⁰530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

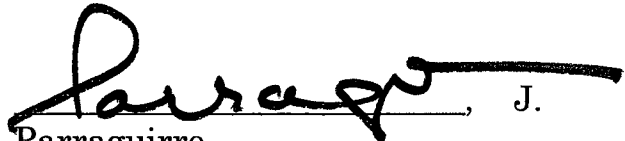
Thus, appellant failed to demonstrate that counsel's performance prejudiced his case, and the district court did not err in denying this claim.

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.¹²

 _____, J.
Douglas

 _____, J.
Rose

 _____, J.
Parraguirre

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

¹²We 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. Donald M. Mosley, District Judge
Robert N. Wordlaw
Attorney General
Clark County District Attorney David J. Roger
Clark County Clerk