

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN MATTHEW VERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45397

FILED

OCT 05 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
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; Michelle Leavitt, Judge.

On September 30, 1999, the district court convicted appellant, pursuant to an Alford¹ plea, of murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life without the possibility of parole in the Nevada State Prison.² This court affirmed the judgment of conviction and sentence on appeal.³ The remittitur issued on November 6, 2000.

On October 28, 1999, 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

¹North Carolina v. Alford, 400 U.S. 25 (1970).

²An amended judgment of conviction was filed on October 19, 1999.

³Vera v. State, Docket No. 35081 (Order of Affirmance, October 9, 2000).

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

In his petition below, appellant contended that his counsel was ineffective.⁴ To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness.⁵ Further, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.⁶ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁷ Further, the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁸

First, appellant claimed in his petition below that counsel was ineffective for failing to properly investigate at the pre-trial stages of his

⁴To the extent that appellant raised any of the following issues independently from his ineffective assistance of counsel claims, we conclude that they fall outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. NRS 34.810(1)(a).

⁵Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁶See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁷Strickland, 466 U.S. at 697.

⁸Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

case. Appellant failed to demonstrate that counsel's performance was ineffective. Bare and naked claims unsupported by any specific factual allegations will not entitle defendant to relief.⁹ Appellant did not specify what counsel could have investigated, or how those investigations would have made a difference in appellant's case and altered his decision to plead guilty. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for not further objecting to a conflict of interest with the State. Specifically, appellant claimed that the initial prosecutor, David Wall, a former attorney with the public defender's office, informed the district attorney's office of confidential information regarding appellant's prison record which led to the district attorney's office seeking the death penalty, and that counsel should have filed additional motions to move the court to disqualify the entire district attorney's office. Appellant failed to demonstrate that counsel was ineffective or that there was an actual conflict.¹⁰ This court already determined that there was no conflict.¹¹ Wall testified during the evidentiary hearing that he did not recall hearing about appellant's case when he worked for the public defender's office. In order to avoid an appearance of impropriety, following the determination by this court, the district court ordered Wall replaced, and the

⁹See Hargrove v. State, 100 Nev. 498, 686 P. 2d 222 (1984).

¹⁰Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); see also Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992).

¹¹Vera v. Eighth Judicial District Court, Docket No. 32408 (Order Granting in Part Petition for Writ of Mandamus, September 25, 1998).

replacement prosecutor testified that he worked in a different division and that he had no contact with Wall regarding appellant's case. The subsequent prosecutor stated that it was his idea to order the prison records, that this was common practice, and that the notice of intent to seek the death penalty was issued prior to the ordering of the prison records. The appellant failed to demonstrate that counsel's performance was deficient or that appellant would have insisted on proceeding to trial had counsel continued to object. Thus, the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for not withdrawing due to a conflict between counsel and the prosecutor. Appellant failed to demonstrate an actual conflict of interest. Counsel stated in an affidavit that he knew Wall personally and held him in the highest regard. "The Sixth Amendment guarantees a criminal defendant the right to conflict-free representation."¹² In order to establish a violation of this right, a defendant must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance."¹³ Appellant failed to demonstrate that there was an actual conflict of interest that adversely affected his lawyer's performance. Mutual respect between counsel does not rise to the level of a conflict of interest. During the evidentiary hearing, the district court questioned counsel regarding the adequacy of representation and found appellant was adequately represented. Thus,

¹²Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993); see also Clark, 108 Nev. 324, 831 P.2d 1374.

¹³Cuyler, 446 U.S. at 350; see also Clark, 108 Nev. 324, 831 P.2d 1374.

appellant failed to demonstrate that counsel's performance was ineffective, and the district court did not err in denying this claim.

Fourth, appellant claimed that his attorney was ineffective for attempting to coerce and induce appellant into pleading guilty. Specifically, appellant claimed that counsel coerced him into pleading guilty with the threat of the death penalty. Appellant failed to demonstrate that counsel's performance was ineffective. Trial counsel stated that he recommended that appellant accept the plea negotiations because of the risk of proceeding to trial and the possibility of receiving a death sentence. During appellant's plea canvass, the district court canvassed appellant on his knowledge of the plea and the risk of proceeding to trial. Counsel's candid advice about the maximum sentence upon trial is not deficient. Therefore, appellant failed to demonstrate that counsel's performance was ineffective. The district court did not err in denying this claim.

Fifth, appellant claimed that counsel was ineffective for failing to object to the notice of intent to seek the death penalty, and that his case did not warrant a sentence of death because it was one drug dealer killing another. Appellant failed to demonstrate that counsel's performance was ineffective. The State presented five aggravating circumstances.¹⁴ Thus, appellant failed to demonstrate that counsel's performance was deficient, and the district court did not err in denying this claim.

Appellant also claimed that appellate counsel was ineffective. "A claim of ineffective assistance of appellate counsel is reviewed under

¹⁴1999 Nev. Stat., ch. 319, section 4, at 1336-37.

the 'reasonably effective assistance' test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).¹⁵ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁶ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹⁷ "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."¹⁸

Specifically, appellant claimed that appellate counsel was ineffective for failing to argue issues regarding the conflict of interest which led to "structural defects." Appellant failed to demonstrate that appellate counsel was ineffective. This court has already reviewed the issue of Wall's disqualification,¹⁹ and determined that Wall was to be disqualified only on the basis of the appearance of impropriety, not because of an actual conflict. This court's previous determination is the law of the case, and such an argument would have been futile.²⁰ Thus, appellant failed to demonstrate that the omitted issue would have a reasonable probability of success on appeal, and the district court did not err in denying this claim.

¹⁵Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

¹⁶Jones v. Barnes, 463 U.S. 745, 751 (1983).

¹⁷Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).


¹⁸Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

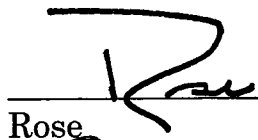
¹⁹See supra note 10.

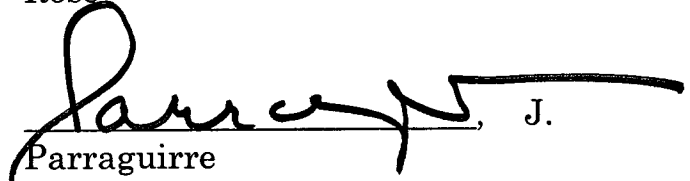
²⁰Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

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.²¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²²


_____, C.J.
Becker


_____, J.
Rose


_____, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
John Matthew Vera
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

²¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²²We 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.