IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY DEWAYNE HENRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45460

FILED

OCT 11 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On July 17, 2003, the district court convicted appellant, pursuant to a guilty plea, of one count of robbery with the use of a deadly weapon (Count 1), one count of conspiracy to commit robbery (Count 2), and one count of ex-felon in possession of a firearm (Count 3). The district court sentenced appellant to serve in the Nevada State Prison two consecutive terms of forty-eight to one hundred and twenty months for Count 1, a consecutive term of twelve to sixty months for Count 2, and a term of twelve to sixty months for Count 3, to be served concurrently with Count 2. This court affirmed appellant's judgment of conviction on direct appeal.[1] The remittitur issued on March 26, 2004.

On December 13, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On

[1]Henry v. State, Docket No. 41947 (Order of Affirmance, March 1, 2004).

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May 23, 2005, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant contended that his appellate counsel was ineffective.[2] "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."[3] Appellate counsel is not required to raise every non-frivolous issue on appeal.[4] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[5] "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."[6]

Appellant claimed that his appellate counsel was ineffective for failing to argue that the sentences imposed violated his equal protection rights and right to be free from cruel and unusual punishment. Appellant claimed that the sentences were unreasonably disproportionate to the charged offenses as compared to sentences imposed in the immediate jurisdiction and other jurisdictions given the fact that appellant was only nineteen when he committed the crimes, was remorseful and took immediate responsibility for the crimes. Appellant

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[2]To the extent that appellant raised any claims independent from his ineffective assistance of appellate counsel claim, these claims were improperly raised in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. See NRS 34.810(1)(a).

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

[4]Jones v. Barnes, 463 U.S. 745, 751 (1983).

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

[6]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

claimed that his sentences violated equal protection because they were much harsher than the sentence given his co-defendant, and appellant and his co-defendant had similar criminal backgrounds and acted in direct concert in the crimes committed.

Appellant failed to demonstrate that these issues had a reasonable probability of success on appeal, and thus, appellant failed to demonstrate that his appellate counsel was ineffective for failing to present these issues on direct appeal. Appellant failed to demonstrate that his sentences were unreasonably disproportionate to the crimes committed in the instant case.[7] The record reveals that appellant pointed a gun at the victim, threatened to kill the victim if she did not give appellant her purse, hit the victim in the head with the gun causing the victim to require medical treatment for a head wound, and dragged the victim over the length of several parking spaces by the purse that was still over the shoulder of the victim. The district court was presented with the information relating to appellant's age and remorse, and the district court imposed sentences within the statutory limits.[8] Appellant failed to provide any cogent argument that his equal protection rights were violated because he received a different sentence from his co-defendant. The record establishes that appellant's conduct differed from that of his co-defendant, and the district court did not abuse its discretion in

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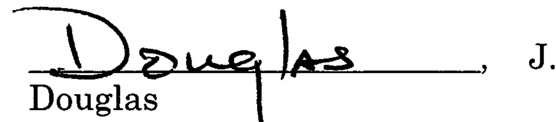
[7]See Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

[8]See NRS 200.380 (providing for a term of not less than two years nor more than fifteen years for robbery); NRS 193.165 (providing for an equal and consecutive term when a deadly weapon is used in the commission of an offense); NRS 199.480 (providing for a term of not less than one year nor more than six years for conspiracy to commit robbery); NRS 202.360 (providing for a term of not less than one year nor more than six years for being an ex-felon in possession of a firearm).

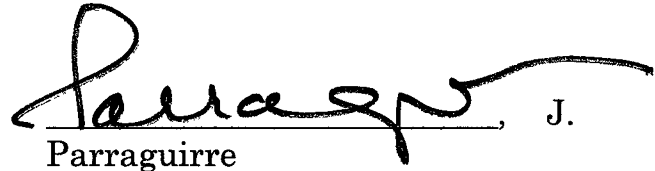
considering each individual defendant at sentencing.[9] Finally, appellant failed to demonstrate that the district court relied on impalpable or highly suspect evidence in sentencing appellant.[10] Therefore, we conclude that the district court properly denied this claim.

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

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[9]See Martinez v. State, 114 Nev. 735, 961 P.2d 143 (1998) (recognizing that the district court may consider a wide variety of information to insure that that punishment fits the crime and the individual defendant).

[10]See Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976).

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

[12]We 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. Steven P. Elliott, District Judge
Anthony Dewayne Henry
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk