

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN L. SCOTT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45564

FILED

APR 18 2006

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; John S. McGroarty, Judge.

On June 4, 2002, the district court convicted appellant, pursuant to a jury verdict, of one count of possession of a stolen vehicle (Count 1), two counts of possession of a debit or credit card without the cardholder's consent (Counts 2 and 3), and one count of failure to stop on signal of a police officer (Count 4). The district court adjudicated appellant a habitual criminal and sentenced appellant to serve the following terms in the Nevada State Prison: for Count 1, a term of life with the possibility of parole; for Count 2, a term of life with the possibility of parole, to run consecutively to Count 1; for Count 3, a term of life with the possibility of parole, to run concurrently to Count 2; and for Count 4, a term of life with the possibility of parole, to run consecutively to Count 3. On appeal, this court reversed appellant's conviction for failure to stop on

09-14-06 Order: Correction made on page 10 of the Order of Affirmance filed April 18, 2006. JCR

06-08153

signal of police officer and affirmed his remaining convictions.¹ The remittitur issued on June 29, 2004. Appellant unsuccessfully sought post-conviction relief through motions to correct an illegal sentence and a motion for a new trial.²

On September 3, 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 district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On August 1, 2005, the district court denied appellant's petition. This appeal followed.³

Ineffective assistance of trial counsel:

In his petition, appellant raised six claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial

¹Scott v. State, Docket No. 39654 (Order Affirming in Part, Reversing in Part and Remanding, April 6, 2004).

²Scott v. State, Docket No. 45410 (Order Affirming, Dismissing in Part and Remanding for Entry of Corrected Judgment of Conviction, August 24, 2005); Scott v. State, Docket No. 43724 (Order of Affirmance, January 20, 2005); Scott v. State, Docket No. 41027 (Order of Affirmance, October 13, 2003).

³To the extent that appellant appeals from the decisions denying a motion to recuse, "affidavit of bias and prejudice," "judicial notice," "notice to court," "prosecutorial misconduct pursuant to S.C.R. 203," request to reply to the State's opposition and motion to strike the State's opposition to the petition, we conclude that the district court did not abuse its discretion in denying these documents.

counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.⁴ A petitioner must further establish there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.⁵ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁶

First, appellant claimed that his trial counsel was ineffective for failing to preserve evidence. Specifically, appellant asserted his trial counsel should not have permitted the State to return the stolen vehicle and should have investigated the return of the vehicle. Appellant failed to demonstrate that his trial counsel was deficient in this regard. The record on appeal reveals that appellant's trial counsel could not have prevented the return of the vehicle because the rightful owners retrieved their vehicle on the date appellant was arrested. Further, appellant failed to demonstrate that retention of the vehicle or investigation of the return of the vehicle would have altered the outcome of his trial. Both registered owners testified at trial that the vehicle returned to them was their vehicle and they did not give appellant permission to drive the vehicle. Further, numerous witnesses identified appellant as the occupant of the

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

⁵Id.

⁶Strickland, 466 U.S. at 697.

vehicle. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed his trial counsel was ineffective for failing to obtain a copy of the 9-1-1 transmission and allowing the original to be destroyed. Appellant asserted that the transmission was exculpatory because it contained a description of the suspect, which did not correspond to his appearance at the time of his arrest. Appellant failed to demonstrate that his trial counsel was deficient in this regard. The record on appeal reveals that appellant's counsel requested a copy of the 9-1-1 transmission but was informed that the transmission had been destroyed or taped over pursuant to standard procedure. Further, appellant failed to demonstrate that retention of the 9-1-1 transmission would have altered the outcome of his trial. Although appellant claimed that the description provided on the transmission did not correspond to his appearance at the time he was arrested, appellant acknowledged that he never heard the 9-1-1 transmission. Additionally, the officer who provided the description of the suspect testified at trial and positively identified appellant as the individual he pursued. Accordingly, we conclude the district court did not err in denying this claim.⁷

⁷To the extent that appellant also raised this claim in the context of a claim of ineffective assistance of appellate counsel, appellant failed to demonstrate that his appellate counsel was ineffective and we conclude the district court did not err in denying this claim. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996).

Third, appellant claimed his trial counsel was ineffective for failing to investigate his case prior to trial. Specifically, appellant asserted his trial counsel should have investigated a conspiracy between two of the State's witnesses. Appellant asserted that information of the conspiracy would have enabled his trial counsel to expose perjury by those witnesses at trial. Appellant failed to demonstrate that his counsel was deficient in this regard. Appellant failed to demonstrate that such an investigation would have provided information that the State's witnesses conspired to testify against appellant. Appellant also failed to demonstrate that such an investigation would have altered the outcome of his trial because appellant failed to demonstrate that the State's witnesses perjured themselves at trial. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed his trial counsel was ineffective for failing to file a pre-trial writ of habeas corpus challenging the indictment for two counts of possession of a credit or debit card without the cardholder's consent. Appellant argued that no evidence was presented at the preliminary hearing in support of these counts. This claim is belied by the record.⁸ The record reveals that Officer Blackwell testified at the preliminary hearing that he was the evidence custodian for this case and that among the items retrieved from appellant were a credit card and a

⁸See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (petitioner is not entitled to an evidentiary hearing on claims belied by the record).

debit card issued in the name of another individual. Accordingly, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to object to or cross-examine the State's witnesses about perjury. Specifically, appellant asserted that Michael McGee's written statement regarding the incident was written by Jessie Hardwick and contained fraudulent statements. Appellant failed to demonstrate that his counsel was ineffective. The record reveals that McGee's written statement was not entered into evidence at the trial and was not presented to the jury. Further, McGee did not testify at trial. Therefore, appellant's counsel was unable to object to or cross-examine any witnesses regarding McGee's written statement. Accordingly, we conclude the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to point out to the jury that his attire when he was apprehended did not match the clothing described by the witnesses. Appellant failed to demonstrate that such a statement by his counsel would have altered the outcome of his trial. Several witnesses testified regarding the clothing appellant was wearing at the time of the incident. These witnesses further testified that from the time the pursuit of appellant began they only lost sight of appellant for a short period of time before appellant was apprehended. The actual clothing appellant was wearing when he was apprehended was presented to the jury for inspection. Any discrepancies between the descriptions of the clothing and the actual clothing were

minor, and the evidence against appellant was overwhelming. Accordingly, we conclude the district court did not err in denying this claim.

Ineffective assistance of appellate counsel:

In his petition, appellant also raised nine claims of ineffective assistance of appellate counsel. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington."⁹ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁰ "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."¹¹

First, appellant claimed that his appellate counsel was ineffective for failing to argue that the judge abused his discretion at sentencing. Appellant contended that the judge only had jurisdiction to impose one habitual criminal enhancement, the judge failed to find it was "just and proper" to adjudicate him a habitual criminal, and the habitual criminal enhancement was too harsh because his prior convictions were for non-violent property crimes.

⁹Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

¹⁰Jones v. Barnes, 463 U.S. 745 (1983).

¹¹Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal. The habitual criminal statute "makes no special allowance for non-violent crimes."¹² Further, there is no requirement that a sentencing court make a particularized finding that it is "just and proper" to adjudicate a defendant a habitual criminal.¹³ Rather, this court will look to the record as a whole to ascertain if the sentencing court properly exercised its discretion when adjudicating a defendant a habitual criminal.¹⁴ Our review of the record as a whole does reveal that the district court properly exercised its discretion.¹⁵ Finally, appellant's conviction for three distinct primary offenses justified three enhanced sentences as a habitual criminal.¹⁶ Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the judge was biased at sentencing. Appellant contended that at sentencing the judge stated "Bring on your post-conviction." Appellant further contended that comments he

¹²Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

¹³Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000).

¹⁴Id.

¹⁵See id.

¹⁶See Odoms v. State, 102 Nev. 27, 33, 714 P.2d 568, 572 (1986); NRS 207.010(1)(b).

overheard the judge make, after appellant's sentencing and at the proceedings for other individuals, regarding the judge's home being burglarized, demonstrated clear bias on the part of the judge because appellant was convicted of credit card theft.

Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal. The record reveals that the district court informed appellant at sentencing that he could challenge his conviction in a post-conviction proceeding after the sentencing had been completed, but the judge did not state "Bring on your post-conviction." Further, there is nothing in the record to support appellant's claims that the judge was biased against appellant or that any purported bias negatively affected appellant's sentence. The record reveals that the judge was provided with certified copies of seven prior felony convictions and the judge exercised his discretion in adjudicating appellant a habitual criminal. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that his conviction was based on perjury by a police officer at trial. Appellant contended that Officer Aker committed perjury when he testified regarding appellant's attire at the time of apprehension, when he testified that he saw appellant in the stolen vehicle and when he testified that he moved around the patrol vehicle to stand in front of the stolen vehicle. Appellant asserted that Officer Aker

was the State's key witness and impeachment of this testimony would have resulted in a different outcome at trial.

Appellant failed to demonstrate that his appellate counsel was ineffective for failing to raise this claim because appellant failed to demonstrate that Officer Aker committed perjury. Minor discrepancies between Officer Aker's testimony regarding his perception of appellant's attire and the actual appearance of the attire does not constitute perjury by Officer Aker. Further, the record reveals that Officer Aker's testimony at trial regarding his position with relation to the stolen vehicle, and that he saw appellant in the stolen vehicle, was consistent with ^{the} all reports filed *in this matter* ~~by Officer Aker~~ and with Officer Aker's testimony at the preliminary hearing. Accordingly, we conclude the district court did not err in denying this claim.

JCR
9-14-06

Fourth, appellant claimed his appellate counsel was ineffective for failing to argue that the prosecutor committed misconduct. Appellant contended that prosecutor Hendricks (1) allowed tainted evidence to be presented to the jury, (2) permitted a State's witness to commit perjury at trial, (3) attempted to introduce an incorrect description of appellant's attire at the time of apprehension, (4) misled the court at sentencing regarding the filing of an amended information, (5) misrepresented the date he filed a motion to admit prior bad acts, (6) used unethical tactics to deny appellant direct review of the lower court, (7)

knew about Brady¹⁷ violations but allowed them to occur, and (8) denied appellant his right to a speedy trial. Appellant failed to demonstrate that his appellate counsel was ineffective for failing to raise this claim. Issues one through four are not supported by the record, and appellant failed to demonstrate that issues five through eight would have had a reasonable probability of success on appeal. Accordingly, we conclude the district court did not err in denying this claim.

Fifth, appellant claimed that his appellate counsel was ineffective for failing to argue that the return of the stolen vehicle was improper. Appellant contended that the police improperly returned the stolen vehicle to the owners without first taking a photograph of the vehicle as required under NRS 52.385. Appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. NRS 52.385(1) permits, but does not require, a peace officer or law enforcement agency to take a photograph of property evidencing a crime prior to returning the property to the rightful owner. Accordingly, we conclude the district court did not err in denying this claim.

Sixth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erroneously denied appellant's motion for self-representation. Appellant failed to demonstrate that this claim would have had a reasonable probability of

¹⁷Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the State must disclose evidence favorable to the defense if the evidence is material to either guilt or punishment).

success on appeal. "District courts have discretion to deny self-representation requests when they are made in an untimely fashion."¹⁸ The record reveals that appellant submitted a motion for self-representation on the morning scheduled for trial. Appellant specifically requested that he be granted leave to represent himself with the assistance of counsel. The district court denied appellant's motion for self-representation and ordered the trial to proceed with counsel. Appellant failed to demonstrate that the district court abused its discretion in denying appellant's untimely motion.¹⁹ Accordingly, we conclude the district court did not err in denying this claim.

Seventh, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erroneously denied his first writ petition. Appellant contended that the district court treated the writ petition as a motion for a new trial and improperly denied the motion as untimely filed. Appellant failed to demonstrate that his counsel was ineffective for failing to raise this claim. The record reveals that the district court initially ruled that the motion was untimely, but then proceeded to deny the motion on its merits. This court affirmed the denial

¹⁸Harris v. State, 113 Nev. 799, 803, 942 P.2d 151, 154 (1997) (citing Lyons v. State, 106 Nev. 438, 443, 796 P.2d 210, 213 (1990)).

¹⁹See Lyons v. State, 106 Nev. at 445, 796 P.2d at (holding that the district court has discretion to deny a motion for self-representation made shortly before or on the day of trial).

of that motion on appeal.²⁰ Accordingly, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that his appellate counsel was ineffective for failing to argue that he was denied his right to a speedy trial. Appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. In determining whether the right to a speedy trial has been violated, the court should weigh four factors: (1) the "[l]ength of delay;" (2) "the reason for the delay;" (3) "the defendant's assertion of his right;" and (4) "the prejudice to the defendant."²¹ The record reveals that hearings on pending motions had to be conducted before trial could begin and that the trial was continued for a few weeks because the court's calendar was full. There is no indication that the motions were filed in a deliberate attempt to delay the trial or that appellant was prejudiced by the short delay.²² Accordingly, we conclude the district court did not err in denying this claim.

Ninth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erroneously denied his request for counsel at sentencing. Appellant failed to demonstrate that this claim had a reasonable likelihood of success on appeal.

²⁰Scott v. State, Docket No. 41027 (Order of Affirmance, October 13, 2003).

²¹Barker v. Wingo, 407 U.S. 514, 530 (1972).

²²See Bailey v. State, 94 Nev. 323, 324, 579 P.2d 1247, 1248 (1978).

On April 8, 2002, the district court conducted a Faretta²³ canvass, specifically informed appellant that he would be facing adjudication as a large habitual criminal, granted appellant's motion for self-representation for the sentencing hearing, and scheduled the sentencing hearing for April 17, 2002. On the morning of the sentencing hearing appellant requested the appointment of counsel. The district court denied appellant's request and attempted to proceed with the sentencing hearing. Appellant became so disruptive he had to be removed from the courtroom and the sentencing hearing was rescheduled. Two days prior to the rescheduled sentencing hearing, appellant moved for the appointment of counsel for the purposes of appeal. That motion specifically stated appellant wished to "withdraw his appointment of self-representation" so he could have counsel appointed to assist him with his appeal. At the rescheduled sentencing hearing, appellant reminded the district court that he had filed the motion for the appointment of counsel. The district court denied appellant's motion for counsel as it may have pertained to the sentencing hearing, finding that appellant filed the motion with a dilatory intent.²⁴ The district court stated that requesting self-representation then requesting the appointment of counsel was a ploy

²³Faretta v. California, 422 U.S. 806 (1975).

²⁴Appellant was appointed counsel to represent him on direct appeal.

appellant used over and over and the court was not going to let appellant use the court system in that manner.²⁵

When denying the request for the appointment of counsel that was presented during the first scheduled sentencing hearing, the district court explained that appellant had already been granted leave to represent himself. Appellant interrupted the explanation, however, and the district court was prevented from providing further explanation.

The fact that appellant had already been granted leave to represent himself was not sufficient cause for denying the request for counsel.²⁶ Nevertheless, the record reveals that appellant's request for the appointment of counsel was untimely because it was not presented until after the sentencing hearing commenced. This was a sufficient basis for denying the request for counsel.²⁷ Additionally, it appears that the motion was presented for the purposes of delay. The record reveals that appellant

²⁵In a prior case heard by the same judge, district court case number C155320, appellant had also moved for self-representation, been granted self-representation, changed his mind and moved for the appointment of counsel.

²⁶See Robinson v. Ignacio, 360 F.3d 1044, 1059 (9th Cir. 2004); see also Beals v. State, 106 Nev. 729, 731, 802 P.2d 2, 4 (1990) (holding that a sentencing hearing is a critical stage of the criminal proceeding at which appellant has a Sixth Amendment right to be assisted by counsel).

²⁷See Arajakis, 108 Nev. at 982, 843 P.2d at 804 (holding that the district court did not abuse its discretion in denying a motion to retract a waiver of counsel that was filed on the date of sentencing).

intentionally and repeatedly engaged in delay tactics at the preliminary hearing and at the trial. Presenting a request for counsel with a dilatory intent is also sufficient reason for denying the request for counsel.²⁸ We therefore conclude that the district court did not err in denying the request for counsel that was presented on the day of sentencing.

The rescheduled sentencing hearing took place three weeks after the first scheduled sentencing hearing. At this hearing, the district court specifically indicated that it believed appellant had made the request for counsel with a dilatory intent and denied the request for counsel on that basis. As noted above, the record corroborates this conclusion. Accordingly, we conclude that the district court did not err in declining to appoint counsel to represent appellant at the rescheduled sentencing hearing.²⁹

Appellant failed to demonstrate that his deprivation of counsel claim had a reasonable likelihood of success on appeal. Accordingly, we conclude the district court did not err in denying this claim.

Cumulative error:

Appellant also claimed that the cumulative effect of trial and appellate counsel's errors warrant reversal of his conviction. However,

²⁸Cf. Lyons v. State, 106 Nev. at 446, 796 P.2d at 214-15 (stating that a specific finding of dilatory intent is a separate and distinct basis for the denial of a request for self-representation).

²⁹Appellant may not benefit from his poor conduct.

because appellant did not demonstrate that his trial or appellate counsel erred, he necessarily failed to establish a claim of cumulative error. Accordingly, we conclude 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.³⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.³¹

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

³⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

³¹We 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: Eighth Judicial District Court Department 16
Steven L. Scott
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Clark County District Attorney David J. Roger
Clark County Clerk