

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN HENRY ROSE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45586

**FILED**

**JAN 11 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 dismissing appellant's proper person post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On January 29, 2004, the district court convicted appellant, pursuant to a jury verdict, of robbery. The district court also adjudicated appellant a habitual felon<sup>1</sup> and sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after ten years. This court affirmed appellant's conviction on direct appeal.<sup>2</sup> The remittitur issued on September 17, 2004.

On March 10, 2005, 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

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<sup>1</sup>NRS 207.012.

<sup>2</sup>Rose v. State, Docket No. 42885 (Order of Affirmance, August 23, 2004).

June 15, 2005, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of counsel and that the State did not establish his guilt. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a jury verdict, a petitioner must demonstrate two things: counsel's deficiency, meaning that counsel's performance fell below an objective standard of reasonableness,<sup>3</sup> and resulting prejudice, meaning a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.<sup>4</sup> The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.<sup>5</sup> Judicial review of counsel's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy.<sup>6</sup>

First, appellant contended his counsel was ineffective for failing to object to presentation of "highly prejudicial" photographs at the preliminary hearing. Our review of the record on appeal reveals the State

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<sup>3</sup>Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

<sup>4</sup>Id. at 694; see also Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984) (adopting the Strickland two-part test for ineffective assistance of counsel).

<sup>5</sup>Strickland, 466 U.S. at 697.

<sup>6</sup>Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001) (citing Strickland, 466 U.S. at 689).

presented and admitted into evidence nine still images from footage taken by the surveillance camera at the store appellant was charged with robbing. The images showed the robbery in progress. The State showed these images to the victim and asked if the images accurately represented the scene and the perpetrator, and the victim said they did. Appellant failed to demonstrate his counsel's performance was objectively unreasonable in this regard. The probative value of the images was not substantially outweighed by the danger of unfair prejudice to appellant.<sup>7</sup> Appellant's counsel also argued to the district court that no evidence tied appellant to the clothing depicted in the images.

Appellant further failed to demonstrate how counsel's failure to object prejudiced him. Testimony at the preliminary hearing established that a mask and clothing similar to those worn by the perpetrator were found in a home appellant had recently lived in, appellant had keys to a door at that location on him when he was arrested, appellant's race, sex, and part of his clothing fit the victim's description of the perpetrator, appellant was arrested approximately forty-five minutes after the crime in a nearby location, and appellant's girlfriend told detectives the stance of the perpetrator as shown in the surveillance footage resembled appellant's, which she said was distinctive. Accordingly, we conclude the district court did not err in determining this claim lacked merit.

Second, appellant contended his counsel was ineffective for failing to object at the preliminary hearing to an identification of appellant

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<sup>7</sup>See NRS 48.035(1).

by the victim. Our review of the record reveals that in his testimony, the victim did not identify appellant as the perpetrator; he only identified appellant as the person the police had asked him if he could identify as the perpetrator shortly after appellant was arrested. In fact, in response to appellant's counsel's cross-examination of the victim, the victim specifically stated he could not identify appellant as the perpetrator. Appellant failed to demonstrate counsel's conduct was objectively unreasonable in this regard. Accordingly, we conclude the district court did not err in determining this claim lacked merit.

Third, appellant contended his counsel was ineffective for failing to keep appellant informed of the charges or the evidence the police claimed to have. Appellant made no specific factual allegations to support this claim that, if true, would have entitled him to relief.<sup>8</sup> Accordingly, we conclude the district court did not err in determining this claim lacked merit.

Fourth, appellant contended his counsel was ineffective for failing to object at the preliminary hearing to comments made by the justice's court. Appellant specifically cites the exchange which followed the justice's court's asking appellant's counsel if he objected to admission of the still images taken from the surveillance footage: "[APPELLANT'S COUNSEL]: 'No objection.' THE COURT: 'I had an objection last night from the district attorney's office to digital photographs because they can be easily altered. The defense offered digital photographs and the district attorney's office didn't want them in evidence.'" Appellant failed to

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<sup>8</sup>See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

demonstrate how this statement prejudiced him. Accordingly, we conclude the district court did not err in determining this claim lacked merit.

Fifth, appellant contended his counsel was ineffective at the sentencing hearing for failing to request a lesser sentence. Our review of the record reveals counsel asked the district court to impose the minimum sentence. Appellant is not entitled to an evidentiary hearing on factual allegations belied by the record.<sup>9</sup> Accordingly, we conclude the district court did not err in determining this claim lacked merit.

Sixth, appellant contended his counsel was ineffective at the sentencing hearing for failing to present live testimony on appellant's behalf. A strategy decision, such as whom to call as a witness, is a tactical decision that is "virtually unchallengeable absent extraordinary circumstances."<sup>10</sup> Appellant did not show any extraordinary circumstances. Appellant failed to demonstrate counsel's performance was objectively unreasonable. Further, appellant failed to show how counsel's performance prejudiced him. Appellant failed to state whom counsel should have called, what those witnesses would have said, or how their testimony would have benefited appellant. Accordingly, we conclude the district court did not err in determining this claim lacked merit.

Seventh, appellant contended his counsel was ineffective for failing to investigate whether another suspect was present near the crime scene. Our review of the record reveals no mention of another suspect

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<sup>9</sup>Id. at 503, 686 P.2d at 225.

<sup>10</sup>Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996), (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)).

other than appellant's assertion in his petition that "evidence was given to counsel that a suspect was in the area [behind the store] and petitioner's counsel never brought this information to the courts or petitioner." Appellant made no specific factual allegations that, if true, would entitle him to relief.<sup>11</sup> Further, appellant failed to state how counsel's failure to investigate prejudiced him. Accordingly, we conclude the district court did not err in determining this claim lacked merit.

Eighth, appellant contended his counsel was ineffective for failing to investigate and/or order DNA testing on hair and saliva found on the mask worn by the perpetrator. Our review of the record reveals the State ordered forensic testing of the saliva and two different sources of DNA were identified, one of which was appellant's. Most of the DNA identified was determined to be appellant's. Our review of the record also reveals appellant's counsel, in seeking a continuance of the trial date, mentioned to the district court "there may be a need for further DNA genetic testing." This statement by counsel suggests he considered ordering further testing but made a tactical decision against it. Absent extraordinary circumstances, tactical decisions by counsel are virtually unchallengeable.<sup>12</sup> Appellant did not state any extraordinary circumstances. Further, appellant failed to show how counsel's actions in this regard prejudiced him. As noted above, appellant's DNA was found on the mask, and there was additional evidence beyond appellant's DNA

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<sup>11</sup>Hargrove, 100 Nev. at 502, 686 P.2d at 225.

<sup>12</sup>Doleman, 112 Nev. at 848, 921 P.2d at 280-81.

to support appellant's guilt. Accordingly, we conclude the district court did not err in determining this claim lacked merit.

Ninth, appellant contended his counsel was ineffective for failing to contest the constitutional validity of appellant's guilty plea to a 1978 Texas robbery conviction, which the State cited as a prior felony for the purposes of NRS 207.012. This court has already ruled that the district court did not err in adjudicating appellant a habitual felon.<sup>13</sup> Once this court has ruled on the merits of an issue, the ruling is the law of the case and the issue will not be revisited.<sup>14</sup> Further, NRS 207.012 does not allow the district court the discretion to dismiss a count brought under NRS 207.012 unless the convictions are not proved. Appellant did not contend the conviction was not proved. Therefore, appellant failed to show his counsel's performance was objectively unreasonable in this regard. Accordingly, we conclude the district court did not err in determining this claim lacked merit.

Appellant also contended the State failed to sufficiently establish his guilt. This claim should have been brought in appellant's direct appeal of his conviction and was waived absent a showing of good cause and actual prejudice.<sup>15</sup> Appellant failed to demonstrate good cause and actual prejudice. Accordingly, we conclude the district court did not err in dismissing this claim.

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<sup>13</sup>Rose v. State, Docket No. 42885 (Order of Affirmance, August 23, 2004).

<sup>14</sup>Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001).

<sup>15</sup>NRS 34.810(1)(b).

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.<sup>16</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.  
Douglas

Becker, J.  
Becker

Parraguirre, J.  
Parraguirre

cc: Hon. Steven P. Elliott, District Judge  
John Henry Rose  
Attorney General  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>16</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).