

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIA C. KENDRICK A/K/A MARIA C.
WALKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45731

FILED

DEC 07 2005

ORDER OF AFFIRMANCE

IANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
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; Nancy M. Saitta, Judge.

On April 27, 2004, the district court convicted appellant, pursuant to a jury verdict, of grand larceny, conspiracy to commit burglary, and three counts of burglary. The district court sentenced appellant to serve terms totaling 46 to 276 months in the Nevada State Prison, to run consecutive to a sentence appellant was already serving. This court affirmed appellant's conviction on direct appeal.¹ The remittitur issued December 10, 2004.

On March 25, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court held an evidentiary hearing, but, pursuant to NRS 34.750, declined to appoint counsel to represent

¹Kendrick v. State, Docket No. 43160 (Order of Affirmance, November 15, 2004).

appellant. On August 17, 2005, the district court denied appellant's petition. This appeal followed.

In her petition, appellant contended that she received ineffective assistance of counsel.² 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,³ and resulting prejudice, meaning a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.⁴ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁵ A petitioner must demonstrate the factual allegation underlying her ineffective assistance of counsel claim by a preponderance of the evidence.⁶ The district court's factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁷

²To the extent appellant raised claims other than ineffective assistance of counsel, they were waived by appellant's failure to raise them on direct appeal and appellant failed to demonstrate good cause to excuse her failure. See NRS 34.810(1)(b).

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

⁴Id. 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).

⁵Strickland, 466 U.S. at 697.

⁶Means v. State, 120 Nev. ___, ___, 103 P.3d 25, 33 (2004).

⁷Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant claimed her counsel was ineffective for failing to investigate witnesses that could testify to appellant's alibi. Appellant argued that her fellow residents at a drug treatment facility would place her at the facility at the time the crimes at issue occurred. At the evidentiary hearing, appellant's counsel testified that appellant gave him the name of the facility and the intersection the facility was located at, but not its exact address. Counsel further testified he sent an investigator to that intersection but the investigator could not find the facility. Counsel also testified that the investigator told him there were many such facilities in that area and, because the facilities operated on the basis of anonymity, no one there would be likely to remember appellant. The district court found that appellant had failed to provide counsel with sufficient information to investigate her alibi and that counsel had not been deficient in this regard. Our review of the record on appeal reveals there was evidence to support the district court's finding. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant argued her counsel was ineffective for failing to cross-examine the witnesses. Specifically, appellant claimed at least one of the eyewitnesses said the suspect's hair was braided, but the surveillance video showed the suspect's hair was not braided. At the evidentiary hearing, counsel testified he chose not to cross-examine the witnesses on this point because to do so would alert the State to the discrepancy. Our review of the record indicates that counsel argued the discrepancy in his closing. Counsel's tactical decisions are "virtually

unchallengeable absent extraordinary circumstances."⁸ Appellant failed to demonstrate extraordinary circumstances or that counsel's performance was deficient in this regard. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed her counsel was ineffective for failing to provide her with clothing to wear on the second day of her trial. Our review of the record on appeal reveals that appellant wore the same non-custodial clothing on the first and second days of her trial. Appellant failed to demonstrate how wearing the same clothing on two days of her trial prejudiced her. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed her counsel was ineffective for failing to object to Detective Ray's testimony regarding statements and a demonstration appellant made to Detective Ray in July 2001, prior to the burglaries at issue in this case, regarding appellant's method for burglarizing hotel rooms at the Imperial Palace. Appellant argued the statements and demonstration constituted a confession, that this confession was coerced, and that counsel should have objected based on these grounds. Appellant failed to demonstrate such an objection would have been sustained. Before trial, appellant's counsel moved to bar Detective Ray's testimony. The district court held a proper hearing and determined the evidence would be admitted as a prior bad act because it

⁸Doleman 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).

was probative and not overly prejudicial.⁹ The district court also ordered Ray not to testify to the circumstances surrounding the statements and demonstration, which were that appellant made them after she was arrested for hotel room burglaries and in exchange for Ray's promise not to use the statements against her. For counsel to argue coercion, he would likely have had to reveal these circumstances, which may have been equally or more damaging to appellant's case. This presented a tactical decision for counsel, and counsel's tactical decisions are virtually unchallengeable absent extraordinary circumstances.¹⁰ Appellant failed to demonstrate extraordinary circumstances or that counsel's performance was deficient in this regard. Accordingly, we conclude the district court did not err in denying this claim.

Fifth, appellant claimed her counsel was ineffective for failing to request the videotape of appellant's 2001 demonstration and statements to Detective Ray. At the evidentiary hearing, counsel testified he did not remember when he sought the tape, but that the State advised him it had requested the tape from the Imperial Palace and been informed the Imperial Palace did not have it. Counsel further testified he inspected the State's evidence and did not find such a tape. Appellant failed to demonstrate counsel's performance was deficient in this regard. Accordingly, we conclude the district court did not err in denying this claim.

⁹See Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985); see also Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

¹⁰Doleman, 112 Nev. at 848, 921 P.2d at 280-81.

Sixth, appellant claimed her counsel was ineffective for failing to cross-examine Detective Ray on his testimony that appellant told him she had gone to the Golden Nugget to commit room burglaries, a statement appellant denied making. At the evidentiary hearing, appellant's counsel testified his short cross-examination of Ray was designed to deflect the jury's attention away from Ray's testimony. Counsel's tactical decisions are virtually unchallengeable absent extraordinary circumstances.¹¹ Appellant failed to demonstrate what a cross-examination of Ray would have elicited, or how cross-examination would have benefited her case. Counsel apparently attempted to cast doubt on Ray's testimony in closing argument by emphasizing that Ray did not have appellant's statements in writing. Appellant failed to demonstrate extraordinary circumstances or that counsel's performance prejudiced her. Accordingly, we conclude the district court did not err in denying this claim.

Seventh, appellant claimed her counsel was ineffective for failing to object to testimony by two detectives that they had been told they were participating in surveillance activity to investigate "door push" hotel burglaries. One of the two detectives also stated she had been told the suspects under surveillance were "door pushers." The district court found appellant failed to demonstrate this testimony prejudiced her. Our review of the record on appeal reveals there was evidence to support the district court's finding. Sufficient evidence of appellant's guilt, including the testimony of three eyewitnesses, existed to support her conviction.

¹¹Id.

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

Eighth, appellant claimed her counsel was ineffective for failing to object to testimony by Detective Ray pointing out and referring to two "individuals" in the hotel surveillance footage from the date and time of the burglaries at issue. At the evidentiary hearing, counsel testified he did not object to these statements because he felt Detective Ray could rightfully identify "individuals" he believed were suspects as long as he did not claim appellant was one of those individuals. The district court found appellant failed to demonstrate Ray's testimony prejudiced her. Our review of the record indicates there was evidence to support the district court's finding. Eyewitness testimony placed appellant at the scene, and there was sufficient evidence to support appellant's guilt. Accordingly, we conclude the district court did not err in denying this claim.

Ninth, appellant claimed her counsel was ineffective for failing to object to Detective King's testimony, which placed appellant at the Imperial Palace on September 24, 2002. Appellant failed to show an objection would have been sustained. The district court found King's testimony was not objectionable because King testified from personal knowledge. The district court also found that King's testimony was not prejudicial. Our review of the record on appeal reveals there was evidence to support the district court's findings. Accordingly, we conclude the district court did not err in denying this claim.

Tenth, appellant claimed her counsel was ineffective for failing to order fingerprint analysis of evidence found in the car in which appellant was a passenger when she was arrested. At the evidentiary

hearing, counsel testified he did not have the evidence fingerprinted because it was the State's burden to do so. Counsel further testified he wanted to preserve his ability to argue to the jury that, if appellant's fingerprints were on the evidence, the State would have told them so. Counsel also testified he wanted to avoid producing potentially damaging evidence. Counsel's tactical decisions are virtually unchallengeable absent extraordinary circumstances.¹² Appellant failed to demonstrate any extraordinary circumstances or that counsel's performance was deficient in this regard. Accordingly, we conclude the district court did not err in denying this claim.

Eleventh, appellant claimed her counsel was ineffective for failing to have the Imperial Palace surveillance video from the day of the burglaries enhanced to show she was not one of the "individuals" pointed out by Detective Ray. At the evidentiary hearing, counsel testified that, based on his experience, the footage was already of sufficient quality and that enhancement would not be helpful. Appellant failed to demonstrate that counsel's performance was deficient in this regard. Further, appellant failed to demonstrate how counsel's performance prejudiced her. Eyewitness testimony placed her at the scene, and sufficient evidence existed to support appellant's guilt. Accordingly, we conclude the district court did not err in denying this claim.

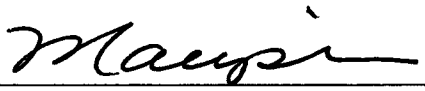
Twelfth, appellant argued her counsel was ineffective for failing to object to the admission of evidence found in the car in which appellant was a passenger when she was arrested. Appellant failed to demonstrate such an objection would have been sustained. Testimony

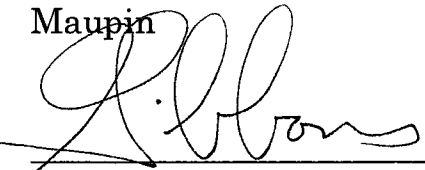
¹²Id.

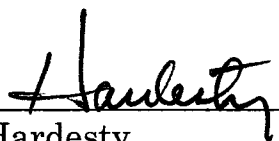
established that appellant was not driving the vehicle and the vehicle did not belong to appellant. Because appellant had no possessory interest in the vehicle, she lacked standing to challenge the legality of the search.¹³ Appellant failed to demonstrate counsel's performance was deficient in this regard. 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.¹⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁵


_____, J.
Maupin


_____, J.
Gibbons


_____, J.
Hardesty

¹³Scott v. State, 110 Nev. 622, 628, 877 P.2d 503, 507-08 (1994).

¹⁴See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁵We 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. Nancy M. Saitta, District Judge
Maria C. Kendrick (aka Maria C. Walks)
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk