

IN THE SUPREME COURT OF THE STATE OF NEVADA

HARVEY DEANDRE MCDANIEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46128

FILED

JUL 05 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
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 28, 2004, the district court convicted appellant, pursuant to a guilty plea, of robbery, victim sixty-five years of age or older. After conviction but before sentencing, appellant filed a motion to withdraw his plea, claiming he had pleaded guilty because he did not believe he would receive a fair trial due to publicity surrounding the murder of appellant's victim in a subsequent robbery. The motion was denied. The district court sentenced appellant to serve two consecutive terms of 60 to 156 months in the Nevada State Prison. This court affirmed appellant's conviction on direct appeal.¹ The remittitur issued May 31, 2005.

On August 18, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹McDaniel v. State, Docket No. 44155 (Order of Affirmance, May 5, 2005).

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 October 12, 2005, the district court denied appellant's petition. This appeal followed.

First, appellant claimed his guilty plea was involuntary because the State withheld evidence in violation Brady v. Maryland.² Appellant claimed the State withheld from him blood evidence that was recovered from the crime scene and told him the evidence had been consumed in testing. We have stated, "Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment."³ To establish a Brady violation, three components must be met: (1) the evidence is favorable to the defendant; (2) the evidence was withheld by the State either intentionally or unintentionally; and (3) the evidence was material to the defense, *i.e.*, prejudice ensued.⁴ Appellant failed to establish the evidence would have been favorable. The State's testing established that the blood was in all likelihood appellant's. Appellant also failed to establish that blood did remain when he sought it and that it was withheld from him. Accordingly, we conclude the district court did not err in denying this claim.

²373 U.S. 83 (1963).

³State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (quoting Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000)).

⁴See id.

Second, appellant claimed the district court's participation in the plea negotiations coerced him into pleading guilty.⁵ Appellant failed to demonstrate he would not have pleaded guilty in the absence of the district court's few comments. In fact, appellant actually rejected the State's offer after the district court's comments about the offer. Appellant only agreed to the offer after the district court denied his motion for a trial continuance. Further, even though appellant was before a different judge when he sought to withdraw his guilty plea, appellant did not claim the judge who heard the entry of his plea had coerced him into doing so by participating in the plea negotiations. Appellant only claimed he had not felt he would get a fair trial due to the publicity surrounding the murder of the victim. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed the district court conducted an insufficient plea canvass that rendered his guilty plea invalid. Specifically, appellant claimed his plea canvass did not establish the lack of coercion in entering the plea, an understanding of the charge and its elements, or a factual statement establishing guilt. Appellant did not establish that he actually was coerced, did not understand the elements of the charge, or did not admit to the facts supporting his guilt. Further, this court has already concluded that appellant's guilty plea was valid and that appellant was "thoroughly canvassed" by the district court when he entered his guilty plea.⁶ This ruling is now the law of the case and the

⁵See Standley v. Warden, 115 Nev. 333, 337, 990 P.2d 783, 785 (1999).

⁶McDaniel v. State, Docket No. 44155 (Order of Affirmance, May 5, 2005).

issue will not be revisited.⁷ Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed his sentencing under the older victim enhancement was an expansion of his sentence beyond the statutory maximum based on facts not submitted to a jury, in violation of Apprendi v. New Jersey.⁸ This claim fell outside the scope of issues permissible in a post-conviction petition for a writ of habeas corpus where the conviction was based upon a guilty plea.⁹ Further, the claim lacked merit. Appellant admitted to the facts used to enhance his sentence.¹⁰ Accordingly, we conclude the district court did not err in denying this claim.

Appellant also claimed he received ineffective assistance of trial counsel. 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 two things: counsel's deficiency, meaning counsel's performance fell below an objective standard of reasonableness,¹¹ and resulting prejudice, meaning a reasonable probability that, but for

⁷Pellegrini v State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001).

⁸530 U.S. 466 (2000).

⁹NRS 34.810(1)(a).

¹⁰See Blakely v. Washington, 542 U.S. 296, 303 (2004) (holding that "statutory maximum" is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant).

¹¹Strickland v. Washington, 466 U.S. 668, 687-688 (1984); see also Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984) (adopting the Strickland two-part test for ineffective assistance of counsel).

counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.¹² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.¹³

First, appellant claimed trial counsel was ineffective for failing to investigate the State's violation of Brady by suppressing blood evidence. Appellant failed to demonstrate counsel's performance was deficient. Appellant failed to establish that the blood evidence was favorable to him. Further, appellant failed to demonstrate he would not have pleaded guilty had counsel investigated this issue. Appellant received a substantial benefit from the agreement: in exchange for appellant's guilty plea, the State dismissed a charge of burglary while in possession of a firearm and agreed not to pursue a deadly weapon enhancement. We therefore conclude appellant's counsel was not ineffective in this regard. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed trial counsel was ineffective for failing to object to the district court's participation in plea negotiations. Appellant failed to demonstrate he would not have pleaded guilty had counsel objected to the district court's comments. Appellant received a substantial benefit from the agreement. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed trial counsel was ineffective for allowing him to plead guilty to robbery, victim 65 years of age or older,

¹²Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

¹³Strickland, 466 U.S. at 697.

because he robbed a commercial establishment, not a person. Appellant failed to demonstrate counsel's performance was deficient in this regard. NRS 200.380 defines robbery as "the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury. . ." (emphasis added). Our review of the record on appeal reveals that the jewelry appellant took was the personal property of the victim, the victim was 65 years of age or older, appellant took the jewelry while the victim was present, and appellant took the jewelry both by threatening the victim with a deadly weapon and by smashing the jewelry cases open with his fist. These facts support the charge to which appellant pleaded guilty and the age-of-victim enhancement. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed trial counsel was ineffective for failing to interview a number of people appellant claimed would provide him with an alibi for the time of the crime. Appellant asserted counsel did not interview those witnesses, but provided no support for this assertion. Further, appellant failed to demonstrate that he would not have pleaded guilty had counsel interviewed the witnesses: appellant provided no evidence other than his assertion that, if interviewed, these witnesses would have given him an alibi. We therefore conclude appellant's counsel was not ineffective in this regard. Accordingly, we conclude the district court did not err in denying this claim.

Fifth, appellant claimed trial counsel was ineffective for failing to consult with him, form a working relationship with him, or update him on evidentiary or investigative issues, but provided no specific factual allegations that would entitle him to an evidentiary hearing on

this claim.¹⁴ Accordingly, we conclude the district court did not err in denying this claim.

Sixth, appellant claimed trial counsel was ineffective for failing to impeach the victim at the preliminary hearing by questioning her identification of appellant as the perpetrator of the robbery. Appellant failed to demonstrate he would not have pleaded guilty had counsel so impeached the victim. We therefore conclude appellant's counsel was not ineffective in this regard. Accordingly, we conclude the district court did not err in denying this claim.

Seventh, appellant claimed trial counsel was ineffective for failing to contest a line-up identification procedure during which the victim identified appellant as the perpetrator. This claim is belied by the record.¹⁵ Counsel filed a motion to suppress the identification. Accordingly, we conclude the district court did not err in denying this claim.

Eighth, appellant claimed trial counsel was ineffective for failing to seek suppression of evidence obtained from a search and seizure. Appellant failed to state which search or seizure was improper or why either should have been suppressed.¹⁶ Accordingly, we conclude the district court did not err in denying this claim.

Ninth, appellant claimed trial counsel was ineffective for failing to file discovery motions. Appellant failed to state what motions

¹⁴See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

¹⁵See id. at 503, 686 P.2d at 225 (holding a petitioner is not entitled to an evidentiary hearing on claims which are belied by the record).

¹⁶See id. at 502, 686 P.2d at 225.

counsel should have filed and what result such motions would have produced.¹⁷ Accordingly, we conclude the district court did not err in denying this claim.

Tenth, appellant claimed trial counsel was ineffective for failing to seek dismissal of the charges before trial based on the State's alleged Brady violation. Appellant failed to demonstrate counsel's performance was deficient. As stated above, appellant failed to demonstrate a Brady violation occurred. Accordingly, the district court did not err in denying this claim.

Appellant also claimed he received ineffective assistance of appellate counsel. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.¹⁸ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁹ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.²⁰

First, appellant claimed appellate counsel was ineffective for failing to raise a Brady claim on direct appeal. Appellant failed to demonstrate that the blood evidence existed when he sought it, the State

¹⁷See id.

¹⁸Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing to Strickland v. Washington, 466 U.S. 668 (1984)).

¹⁹Jones v. Barnes, 463 U.S. 745, 751 (1983).

²⁰Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

withheld it from him, and it would have been favorable to him; thus, appellant failed to demonstrate a Brady claim had a reasonable probability of success on appeal. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed appellate counsel was ineffective for failing to raise an Apprendi claim on direct appeal. Appellant claimed the district court sentenced him to the older victim sentencing enhancement without submitting the fact of the victim's age to a jury. Appellant failed to demonstrate prejudice. Under Apprendi, any fact, other than a prior conviction, that increases a sentence beyond the statutory maximum must be found by a jury beyond a reasonable doubt.²¹ "Statutory maximum" is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.²² In this case, appellant admitted when he entered his plea that the victim was over sixty-five years of age. The district court could therefore properly sentence appellant under the relevant enhancement.²³ Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed counsel was ineffective for failing to raise a claim based on the district court's participation in plea negotiations on direct appeal. Appellant claimed the district court participated in the plea negotiations to such an extent that the district court coerced appellant into accepting the plea agreement. Appellant failed to demonstrate prejudice. Our review of the record reveals that the district

²¹Apprendi, 530 U.S. at 490.

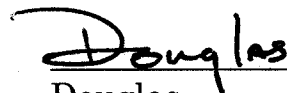
²²Blakely, 542 U.S. at 303.

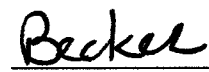
²³1999 Nev. Stat. ch. 18, § 1, at 42 (NRS 193.167).

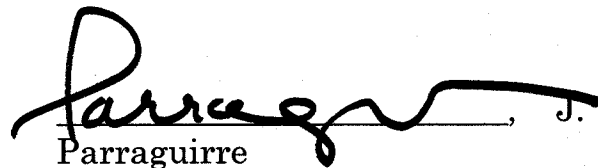
court did not participate in the plea negotiations beyond facilitating the negotiations or making an isolated comment about the offer.²⁴ Further, appellant did not establish coercion. In fact, appellant actually rejected the State's offer after the district court made the comments appellant objected to in his petition; appellant then changed his mind and agreed to the offer after the district court denied his motion for a trial continuance. 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.²⁵ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Becker


_____, J.
Parraguirre

²⁴See Standley, 115 Nev. at 337, 990 P.2d at 785.

²⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Michelle Leavitt, District Judge
Harvey Deandre McDaniel
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Clark County District Attorney David J. Roger
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