

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN DENNIE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 46167

**FILED**

**MAY 05 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 post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On May 7, 2003, the district court convicted appellant, pursuant to a jury verdict, of two counts of battery with the use of a deadly weapon and one count each of invasion of the home while in possession of a firearm, robbery with the use of a deadly weapon, discharging a firearm at or into a structure, and possession of a firearm by an ex-felon.<sup>1</sup> The district court sentenced appellant to serve terms totaling 105 to 468 months in the Nevada State Prison. This court affirmed appellant's conviction on direct appeal.<sup>2</sup> The remittitur issued on May 17, 2005.

On March 26, 2004, while his direct appeal was pending, appellant filed a proper person post-conviction petition for a writ of habeas

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<sup>1</sup>An amended judgment of conviction was filed on July 11, 2003; a second amended judgment of conviction was filed December 4, 2003.

<sup>2</sup>Dennie v. State, Docket No. 41404 (Order of Affirmance, April 21, 2005).

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 January 18, 2005, the district court denied appellant's petition. This court affirmed the denial of appellant's petition.<sup>3</sup>

On June 10, 2005, appellant filed a second 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 February 7, 2006, the district court dismissed appellant's petition as successive and an abuse of the writ. This appeal followed.

Appellant claimed he received ineffective assistance of appellate counsel.<sup>4</sup> 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 had a reasonable

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<sup>3</sup>Dennie v. State, Docket No. 44480 (Order of Affirmance, July 22, 2005).

<sup>4</sup>We note that this claim was not procedurally barred: it was filed within one year after the issuance of the remittitur on direct appeal, and appellant could not have raised the claim in his prior petition because his direct appeal had not been resolved when the prior petition was filed. To the extent appellant independently raised the claims underlying his ineffective assistance of appellate claim, the underlying claims were waived by appellant's failure to raise them on direct appeal, and appellant failed to demonstrate good cause and prejudice for the failure or a fundamental miscarriage of justice. See NRS 34.810(1)(b).

probability of success on appeal.<sup>5</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>6</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>7</sup>

We conclude appellant failed to demonstrate that any of the three issues he claimed counsel should have raised on direct appeal had a reasonable probability of success on appeal.<sup>8</sup>

First, appellant claimed counsel was ineffective for failing to argue that the prosecution coerced appellant's wife into giving false testimony. Our review of the record on appeal reveals no evidence that the prosecution knowingly procured false testimony. Ms. Dennie implicated herself and appellant in the crimes; she agreed to testify to appellant's role in the crimes in exchange for the State's agreement not to prosecute her. Other than a letter purportedly written by Ms. Dennie to appellant, there is no evidence in the record that Ms. Dennie's statement implicating appellant was untrue. In fact, the victim also identified appellant as the perpetrator. There is also no evidence in the record to suggest that the prosecution acted improperly in securing or enforcing Ms. Dennie's agreement to testify; the victim identified Ms. Dennie as being

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<sup>5</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

<sup>6</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>7</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

<sup>8</sup>Although we disagree with the district court's ruling that the claims were procedurally barred, we nevertheless affirm the district court's order because we conclude the claims lacked merit. See Milender v. Marcum, 110 Nev. 972, 977, 879 P.2d 748, 751 (1994).

present during the incident. Appellant's counsel and the prosecutor questioned Ms. Dennie about the agreement during the trial, so the jury was aware of its terms. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed counsel was ineffective for failing to challenge the sufficiency of the evidence supporting his conviction. We conclude there was sufficient evidence to support the conviction.<sup>9</sup> Although no physical evidence tied appellant to the crime scene, the victim and Ms. Dennie both identified appellant as the perpetrator, and our review of the record on appeal indicates the elements of each charge were proven.<sup>10</sup> Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed counsel was ineffective for failing to argue that appellant was sentenced beyond the statutory maximum. Our review of the record indicates appellant was properly sentenced. Appellant contended he should have been sentenced to one to ten years. One to ten years is the proper penalty for home invasion,<sup>11</sup> but if the perpetrator has or gains possession of a deadly weapon during the offense, the proper penalty is two to fifteen years.<sup>12</sup> Appellant was specifically convicted of home invasion while in possession of a firearm, and he was properly sentenced to 35 to 156 months, which is two years, eleven months

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<sup>9</sup>See Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

<sup>10</sup>See NRS 205.067, 193.165, 200.380, 202.285, 200.481, 202.360.

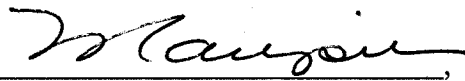
<sup>11</sup>NRS 205.067(2).

<sup>12</sup>NRS 205.067(4).

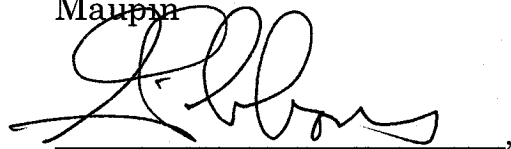
to thirteen years.<sup>13</sup> Accordingly, we conclude the district court did not err in denying this claim.

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.<sup>14</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>15</sup>

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Eighth Judicial District Court Dept. 16, District Judge  
Bryan Dennie  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>13</sup>See id.

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

<sup>15</sup>In light of the foregoing, appellant's "Motion to Hold District Court in Contempt of Court (Under the First Amendment to the U.S. Constitution)," filed in this court on January 30, 2006, is denied.