

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD DEWAYNE ARMSTRONG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46279

FILED

MAY 25 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; Jackie Glass, Judge.

On October 23, 2003, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary, two counts of attempted murder with the use of a deadly weapon, two counts of first-degree murder with the use of a deadly weapon, and one count of battery with the use of a deadly weapon. The district court sentenced appellant to serve a term of 72 to 180 months in the Nevada State Prison on the burglary count, two consecutive terms of 96 to 240 months for each attempted murder count, two consecutive terms of life without the possibility of parole for each first-degree murder count, and one term of 48 to 120 months for the battery count. All of the terms were imposed to run consecutively. This court affirmed appellant's judgment of conviction.¹ The remittitur issued on December 7, 2004.

¹Armstrong v. State, Docket No. 42408 (Order of Affirmance, November 9, 2004).

On June 15, 2005, 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 November 2, 2005, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his trial counsel was ineffective.² 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 that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.³ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁴

First, appellant contended that his trial counsel was ineffective for failing to promote appellant's theory of self-defense, or other defenses that might have excused, reduced, or mitigated the charges. Appellant failed to demonstrate that his counsel was ineffective. Selection

²To the extent that appellant raised any of the following issues independently from his ineffective assistance of counsel claims, we conclude that they fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. NRS 34.810(1)(a).

³Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁴Strickland v. Washington, 466 U.S. 668, 697 (1984).

of a theory of defense that is supported by the evidence is a strategic decision. Defense counsel's strategic decisions in achieving the defendant's objective are "virtually unchallengeable absent extraordinary circumstances."⁵ Extraordinary circumstances are not present here. The only eyewitnesses, appellant's children, testified at the preliminary hearing and presented strong evidence against appellant, which was supported by the nature of the crimes and the injuries inflicted. The evidence did not support appellant's theories, or demonstrate that trial counsel was deficient for failing to present those theories. Appellant failed to demonstrate that had these unsupported theories been promoted by counsel, appellant would have refused to plead guilty and would have proceeded to trial. Thus, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to investigate. Specifically, appellant claimed that his counsel would not interview the children because they were the State's witnesses. Appellant failed to demonstrate that his counsel was deficient. A State's witness is not required to talk to defense counsel. The children testified at the preliminary hearing, and thus, appellant and his trial counsel were aware of the children's potential testimony in front of a jury. Even had the children agreed to speak with defense counsel, appellant failed to demonstrate that his counsel was ineffective for failing to interview the children, what information could have been gleaned from such an interview, or how such an interview would have resulted in

⁵Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

appellant proceeding to trial. Thus, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to withdraw as counsel after presenting appellant's motion for withdrawal of plea. Appellant claimed that by presenting that motion, counsel created a conflict. Appellant also claimed that counsel coerced him into pleading guilty, and therefore, he entered his guilty plea involuntarily. These claims were decided on direct appeal and appellant was barred by the doctrine of the law of the case from re-raising these issues.⁶ Thus, the district court did not err in denying these claims.

Fourth, appellant claimed that trial counsel was ineffective for failing to object to Judge Bell accepting appellant's plea when Judge Bell had been the district attorney at the beginning of appellant's case. Judge Bell specifically addressed the basis for disqualification prior to accepting appellant's plea, and stated that he would not be participating in the sentencing of appellant or any other contested matter. Judge Bell then asked the parties how they would prefer to proceed. Defense counsel stated that he had discussed the issue with his client and they had agreed to waive any conflict. Judge Bell specifically asked appellant if he agreed to Judge Bell proceeding, and appellant stated that he did. We conclude that this colloquy demonstrated that appellant waived disqualification.⁷ Thus, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to give competent legal advice. "[A] guilty plea cannot be

⁶See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

⁷See Turner v. State, 114 Nev. 682, 687, 962 P.2d 1223, 1226 (1998).

attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys in criminal cases.'"⁸ Appellant failed to demonstrate that his counsel was not competent within the range of competence demanded of attorneys in criminal cases. Appellant benefited from the plea agreement that counsel had negotiated for him by avoiding the risk of the death penalty. Thus, the district court did not err in denying this claim.

Appellant also claimed that his appellate counsel was ineffective. 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.⁹ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁰ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹¹

Appellant claimed that his appellate counsel was ineffective for not arguing that Judge Bell had a conflict of interest because he was previously the district attorney, and therefore, was acting unethically in accepting appellant's plea. As discussed above, appellant specifically

⁸Strickland, 466 U.S. at 687 (quoting McMann v. Richardson, 397 U.S. 759, 770-71 (1970)).

⁹Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (citing to Strickland, 466 U.S. 668).

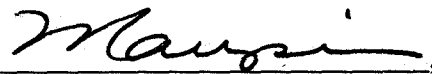
¹⁰Jones v. Barnes, 463 U.S. 745, 751 (1983).

¹¹Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

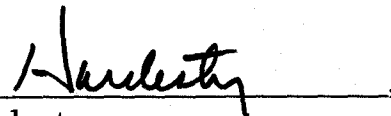
waived the disqualification of Judge Bell. Thus, the district court did not err in denying this claim.

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.¹² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Gibbons


_____, J.
Hardesty

cc: Honorable Jackie Glass, District Judge
Richard Dewayne Armstrong
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).