

IN THE SUPREME COURT OF THE STATE OF NEVADA

ASHLEY WILLIAM BENNETT,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 46324

**FILED**

AUG 29 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
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 June 20, 2002, the district court convicted appellant, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This court affirmed the judgment of conviction on direct appeal.<sup>1</sup> The remittitur issued on November 2, 2004.

On January 3, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant retained counsel to represent him, and counsel supplemented the petition. Pursuant to NRS 34.770, the district court conducted an evidentiary hearing. On November 29, 2005, the district court denied appellant's petition. This appeal followed.

---

<sup>1</sup>Bennett v. State, Docket No. 39864 (Order of Affirmance, October 5, 2004).

Appellant and several others were charged in the shooting death of Joseph Williams. One of appellant's co-defendants, Anthony Wayne Gantt, eventually agreed to plead guilty to a lesser charge and testify against appellant. Gantt testified at appellant's trial.

In his petition, appellant claimed Gantt had recanted his trial testimony. Appellant attached an affidavit from Gantt indicating that appellant was not present at Williams' killing. In Callier v. Warden,<sup>2</sup> this court articulated the standard for assessing whether recanted testimony warrants a new trial:

[I]n evaluating recantation cases, whether in the context of a new trial motion or a habeas petition, the trial court should apply the following standard:

- (1) the court is satisfied that the trial testimony of material witnesses was false;
- (2) the evidence showing that false testimony was introduced at trial is newly discovered;
- (3) the evidence could not have been discovered and produced for trial even with the exercise of reasonable diligence; and
- (4) it is probable that had the false testimony not been admitted, a different result would have occurred at trial.

Only if each component is met should the trial court order a new trial.<sup>3</sup>

After the evidentiary hearing, the district court ruled this claim was barred because appellant failed to raise it in a motion for a new trial within the two year limitation of NRS 176.515. However, this claim may also be brought in a post-conviction petition for a writ of habeas

---

<sup>2</sup>111 Nev. 976, 901 P.2d 619 (1995).

<sup>3</sup>Id. at 990, 901 P.2d at 627-28.

corpus, as appellant did in this case.<sup>4</sup> Nevertheless, we conclude the district court reached the right result.<sup>5</sup> After a review of the trial record, we conclude that Gantt's affidavit is not newly discovered evidence; appellant conceded he obtained the affidavit before August 2002, but he did not present it to the trial court until January 2005. We further conclude it is not probable that a different result would have occurred at trial if Gantt had not testified as he did. Pamela Neal also identified appellant as one of Joseph Williams' killers, and the jury was capable of assessing her credibility.<sup>6</sup> Accordingly, we conclude the district court did not err in denying this claim.

Appellant also contended that he received ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.<sup>7</sup> The court need not address both components of the inquiry if the

---

<sup>4</sup>See, e.g., Callier, 111 Nev. 976, 901 P.2d 619. We encourage the district court to fully analyze the Callier factors and state its analysis in its findings of fact and conclusions of law or on the record in order to expedite our review of its decision.

<sup>5</sup>See Milender v. Marcum, 110 Nev. 972, 977, 879 P.2d 748, 751 (1994) (holding that this court may affirm the district court's decision on grounds different from those relied upon by the district court).

<sup>6</sup>See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

<sup>7</sup>Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

petitioner makes an insufficient showing on either one.<sup>8</sup> A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.<sup>9</sup> The district court's factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>10</sup>

First, appellant claimed trial counsel, Melinda Simpkins,<sup>11</sup> was inexperienced and was therefore unable to properly examine witnesses or elicit responses to present crucial evidence to rebut the State's charge that he and several others murdered Joseph Williams. Specifically, appellant claimed Simpkins was unable to elicit from witness Golden that his trial testimony regarding the suspects' clothing differed from the description he gave in his voluntary statement shortly after the killing. This claim is belied by the record,<sup>12</sup> which indicates that after Golden testified that the suspects were wearing white T-shirts, Ms. Simpkins confronted him with his voluntary statement, which said the suspects wore grey T-shirts. Mr. Golden responded that "It is possible that I couldn't remember the colors." Accordingly, we conclude the district court did not err in denying this claim.

---

<sup>8</sup>Strickland, 466 U.S. at 697.

<sup>9</sup>Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

<sup>10</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

<sup>11</sup>Ms. Simpkins tried the case as second-chair to lead counsel, Scott Bindrup. Mr. Bindrup testified at the evidentiary hearing that he was present for all stages of the trial, except for a half-hour period during final jury selection. Our review of the record indicates that Mr. Bindrup conducted the cross-examination of two eyewitnesses, Anthony Gantt and Pamela Neal, and of the lead detective, Detective Bodnar.

<sup>12</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Second, appellant claimed Simpkins and Bindrup did not interview his alibi witnesses before trial. Appellant failed to demonstrate counsel's performance was deficient or prejudiced him. At the evidentiary hearing, Simpkins testified that she interviewed the alibi witnesses, and that she probably discussed those interviews with Bindrup but did not specifically recall doing so. Appellant failed to demonstrate how Bindrup's interviewing the witnesses would have changed the outcome of his trial. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed Bindrup was ineffective for failing to cross-examine Pamela Neal regarding whether she believed appellant was involved in her cousin Eric Bass's murder, and therefore whether she had a motive to falsely accuse appellant of Williams' murder. Appellant failed to demonstrate that counsel's performance was deficient. At the evidentiary hearing, Bindrup testified that he made a tactical decision not to raise this with Neal because he felt it would prejudice appellant before the jury to be associated with another murder. Counsel's tactical decisions are "virtually unchallengeable absent extraordinary circumstances,"<sup>13</sup> which are not present here. Accordingly, we conclude 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

---

<sup>13</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)).

probability of success on appeal.<sup>14</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>15</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>16</sup>

First, appellant claimed appellate counsel was ineffective for failing to argue that a co-defendant, Lailoni Morrison, was given more latitude in cross-examination of Neal, which led to Morrison being convicted of second-degree murder, rather than first-degree murder as appellant was. Appellant failed to demonstrate counsel's performance was deficient. At the evidentiary hearing, appellant's appellate counsel, Christopher Oram, testified that his understanding regarding the difference in Morrison's and appellant's trials came from discussions with their respective counsel. Oram also testified he did not believe he could cite to any facts outside the record of appellant's case to support a direct appeal claim and thought the claim was more appropriately brought in a petition for a writ of habeas corpus. Generally, counsel is barred from citing facts outside the record on appeal.<sup>17</sup> Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed appellate counsel was ineffective for failing to argue that the district court violated appellant's right to equal protection when it limited his ability to cross-examine Pamela Neal but

---

<sup>14</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. 668).

<sup>15</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>16</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

<sup>17</sup>See NRAP 28(e); see generally State Dep't Taxation v. Kelly-Ryan, Inc., 110 Nev. 276, 282, 871 P.2d 331, 336 (1994).

allowed Lailoni Morrison more latitude to cross-examine her.<sup>18</sup> Appellant failed to allege that he is a member of a protected class or that he was treated differently than Morrison based on his membership in a protected class.<sup>19</sup> Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed appellate counsel was ineffective for failing to argue that the district court erred in giving a jury instruction on conspiracy. Appellant did not object to the instruction at trial, so such a claim would only have been reviewed by this court on direct appeal if the district court's giving the instruction constituted plain error. Appellant failed to specify how the instruction harmed him.<sup>20</sup> We are therefore unable to conclude that the district court's giving of the instruction

---

<sup>18</sup>We note that our review of the record does not reveal a significant difference in the latitude given to Morrison and appellant. Judge Douglas, who presided over both trials, instructed both defendants that the dismissal before appellant's trial of Pamela Neal's criminal charges in an unrelated case could be made known to the jury, but the details of those charges could not. Those charges allegedly stemmed from Neal's attempt to gain information or exact revenge after allegedly learning that Morrison, appellant, and others were involved in Bass' death. Morrison's counsel cross-examined Neal more thoroughly about whether she believed Morrison killed Bass, whereas Bindrup testified at the evidentiary hearing that he chose not to question her extensively on whether she believed appellant was involved in Bass' death to avoid prejudice to appellant. That was a strategic decision, not a result of differing rulings by Judge Douglas in the two trials.

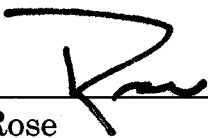
<sup>19</sup>See generally Plyler v. Doe, 457 U.S. 202, 213 (1982) (holding that the "Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.").


<sup>20</sup>See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

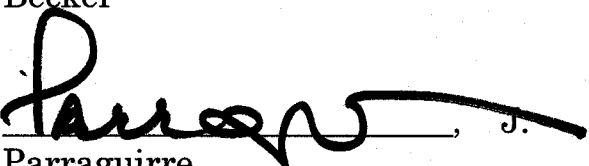
constituted plain error.<sup>21</sup> Accordingly, we conclude the district court did not err in denying this claim.

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>22</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>23</sup>

 \_\_\_\_\_, C.J.  
Rose

 \_\_\_\_\_, J.  
Becker

 \_\_\_\_\_, J.  
Parraguirre

---

<sup>21</sup>The State charged appellant with murder and included conspiracy as a theory of liability. This was sufficient to place appellant on notice that the State may have presented evidence of conspirator liability. See Randolph v. State, 117 Nev. 970, 977, 36 P.3d 424, 429 (2001).

<sup>22</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>23</sup>We 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. In light of this decision, appellant's motion for the appointment of counsel is denied.



cc: Hon. Michelle Leavitt, District Judge  
Ashley William Bennett  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk