IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE W. LUSTER, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46872

FILED

JUL 05 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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; John S. McGroarty, Judge.

On May 1, 1998, the district court convicted appellant, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon (count one), discharging a firearm at or into a structure (count two), burglary while in possession of a firearm (count three), conspiracy to commit first-degree kidnapping (count four), first-degree kidnapping with the use of a deadly weapon (count five), extortion with the use of a deadly weapon (count six), two counts of coercion with the use of a deadly weapon (counts seven and eight), robbery with the use of a deadly weapon (count nine), and child endangerment (count ten). The district court sentenced appellant to serve two consecutive terms of life without the possibility of parole in the Nevada State Prison for count one, two consecutive terms of life with the possibility of parole for count five, consecutive terms totaling 28 to 71 years for counts two, three, four, six, seven, eight, and nine, and 12 months in Clark County Detention Center for count ten, to be served concurrently with the sentence for count nine. This court affirmed

appellant's conviction on direct appeal.[1] The remittitur issued on January 25, 2000.

On December 27, 2000, 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, the district court declined to appoint counsel to represent appellant. An evidentiary hearing was held on April 27, 2005 and continued on May 4, 2005. On March 24, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant 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.[2] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[3] A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.[4]

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[1]Luster v. State, 115 Nev. 431, 991 P.2d 466 (1999).

[2]Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[3]Strickland, 466 U.S. at 697.

[4]Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

The district court's factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal.[5]

First, appellant claimed his trial counsel was ineffective at a pre-trial hearing on appellant's motion to suppress evidence for failing to adequately argue the State violated Brady v. Maryland[6] by not preserving a water bottle as evidence. Appellant failed to demonstrate counsel's performance was deficient or prejudiced him. This court has previously ruled that the Brady claim lacked merit,[7] and counsel was therefore not deficient for failing to argue it differently before the trial court. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed his trial counsel was ineffective at a pre-trial hearing on appellant's motion to suppress evidence for failing to adequately argue against the applicability of the "plain view" doctrine to evidence seized during a search of appellant's house. Appellant failed to demonstrate counsel's performance was deficient or prejudiced him. This court has previously ruled that the application of the plain view doctrine to the search and seizure was proper,[8] and counsel was therefore not deficient for failing to argue it differently before the trial court. Accordingly, we conclude the district court did not err in denying this claim.

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

[6]373 U.S. 83 (1963).

[7]Luster, 115 Nev. 431, 991 P.2d 466.

[8]Id.

Third, appellant claimed trial counsel was ineffective for failing to object based on relevancy to the admission at trial of a shotgun seized during a search of appellant's house. Appellant failed to demonstrate that counsel's performance prejudiced him. The district court had ruled before trial that the shotgun was admissible. Counsel solicited testimony during trial that established the shotgun was not linked to any of the charged crimes. Appellant failed to demonstrate that the jury would not have found him guilty had counsel objected to the shotgun's admission. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed trial counsel was ineffective for failing to object to identifications of appellant by the kidnapping victim and four eyewitnesses to the homicide, who each testified at trial. Appellant failed to demonstrate counsel's performance was deficient. The identification relevant and was not more prejudicial than probative.[9] Counsel properly cross-examined each witness and attacked the reliability of the identifications. Accordingly, we conclude the district court did not err in denying this claim.

Fifth, appellant claimed trial counsel was ineffective for failing to object to testimony regarding the contents of a note given to the victim by his kidnapper because neither the original nor a copy of the note was admitted at trial. Investigating detectives testified that the kidnapper gave the victim a note consisting of two pager numbers and asked the victim to call him at either number if the victim located a person the kidnapper was looking for. Detectives also testified that their

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[9]See NRS 48.035(1).

investigation revealed both numbers belonged to appellant. Appellant failed to demonstrate that counsel's performance prejudiced him. Sufficient other evidence existed to support the jury's finding that appellant was the kidnapper: the kidnap victim identified appellant by his face and voice, the home the victim was held in was being rented by appellant, and appellant's fingerprints were found on the victim's vehicle, which was used to transport the victim. Accordingly, we conclude the district court did not err in denying this claim.

Appellant also claimed two detectives gave false testimony at trial. This claim was waived by appellant's failure to argue it on direct appeal.[10] Appellant failed to demonstrate good cause and prejudice sufficient to overcome this procedural bar.[11] Accordingly, we conclude the district court did not err in denying this claim.

Next, appellant claimed the district court erred by allowing a handgun into evidence at trial despite its lack of relevance. This claim was waived by appellant's failure to argue it on direct appeal.[12] Appellant failed to demonstrate good cause and prejudice sufficient to overcome this procedural bar.[13] Accordingly, we conclude the district court did not err in denying this claim.

Appellant also contended 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

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[10]See NRS 34.810(1)(b).

[11]See id.

[12]See id.

[13]See id.

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.[14] Appellate counsel is not required to raise every non-frivolous issue on appeal.[15] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[16]

First, appellant contended appellate counsel was ineffective for failing to argue that the trial court erred in admitting the shotgun and a handgun at trial. Appellant failed to demonstrate counsel's performance was deficient or prejudiced him. Even if the weapons were not relevant, any error would have been harmless; counsel elicited testimony at trial that neither the handgun nor the shotgun was tied to the charged crimes. Appellant failed to demonstrate that the jury would not have found him guilty if the weapons had not been admitted. As stated above, sufficient evidence supported appellant's conviction for the kidnapping-related charges. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant contended appellate counsel was ineffective for failing to argue that the State committed prosecutorial misconduct by allowing Detectives Chandler and Hardy, who executed the search of appellant's house pursuant to a search warrant regarding the homicide, to give false testimony at trial regarding obtaining and executing the search

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

[15]Jones v. Barnes, 463 U.S. 745, 751 (1983).

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

warrant. Appellant failed to demonstrate counsel's performance prejudiced him. This court ruled in appellant's direct appeal that the search was proper and the evidence was lawfully seized under the "plain view" exception to the warrant requirement.[17] Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant contended appellate counsel was ineffective for failing to argue that the identifications of appellant by the kidnapping victim and four eyewitnesses to the homicide were improper because they were tainted and/or otherwise unreliable. Appellant failed to demonstrate counsel's performance was deficient. As stated above, the testimony regarding the witnesses' identifications of appellant was relevant and not more prejudicial than probative.[18] Counsel properly cross-examined each witness and attacked the credibility of the identifications. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant contended appellate counsel was ineffective for failing to argue that testimony regarding the contents of the kidnapper's note to the victim was improper because neither the original note nor a copy was admitted at trial. Even assuming the testimony should not have been admitted, any error would have been harmless, as sufficient evidence existed to support the jury's finding of guilt. Accordingly, we conclude the district court did not er in denying this claim.

Finally, appellant also claimed that this court erred in denying his request for rehearing following the affirmance of his

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[17]Luster, 115 Nev. 431, 991 P.2d 466.

[18]See NRS 48.035(1).

conviction on direct appeal. This claim was improperly raised before the district court and therefore 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.[19] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

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

[19]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).