

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY SCOTT HERMANSKI A/K/A  
ROBERT JAMES DAY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 47011

**FILED**

**JUL 13 2006**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT  
JUDGMENT OF CONVICTION

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Appellant was prosecuted, sentenced, and convicted under the name Robert James Day. However, appellant's real name is Gregory Scott Hermanski. On March 15, 2001, a jury convicted appellant of robbery with the use of a deadly weapon and burglary while in possession of a deadly weapon. The district court entered a judgment of conviction on May 18, 2001. Based on the prior convictions of the true Robert James Day, the district court adjudicated appellant a habitual criminal and sentenced him to a maximum of 300 months and a minimum of 120 months in the Nevada State Prison.

On June 8, 2001, appellant filed a timely notice of appeal, and on November 15, 2001, this court affirmed the judgment of conviction in

part and remanded in part. Although we affirmed the conviction, we remanded for corrections to the sentence and judgment of conviction.<sup>1</sup>

Subsequent to our order of remand, it was discovered that appellant was not Robert James Day, but rather Gregory Scott Hermanski. The district court vacated appellant's sentence and conducted another sentencing hearing. On December 26, 2002, the State filed a notice of intent to seek punishment of appellant as a habitual felon pursuant to NRS 207.012, based on appellant's prior convictions. On April 30, 2003, the district court adjudicated appellant a habitual felon and sentenced him to serve two concurrent life sentences in the Nevada State Prison without the possibility of parole. The amended judgment of conviction was entered on May 16, 2003. This court affirmed the amended judgment of conviction on appeal.<sup>2</sup> The remittitur issued on July 27, 2004.

On July 13, 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 March 3, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must

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<sup>1</sup>Day v. State, Docket No. 38028 (Order of Affirmance in Part and Remand in Part, November 15, 2001).

<sup>2</sup>Hermanski v. State, Docket No. 41405 (Order of Affirmance, July 1, 2004).

demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that there is a reasonable probability of a different outcome in the proceedings.<sup>3</sup> The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.<sup>4</sup>

First, appellant claimed that his trial counsel was ineffective for failing to advise the district court during the trial that his name was really Gregory Scott Hermanski and advising him to admit to the prior convictions. Appellant claimed that his trial counsel knew or should have known his true name and that the jury's decision was based upon appellant's perjured testimony that Robert James Day's convictions were his. Appellant claimed that if his true name had been known that he would never have testified at trial.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that his trial counsel knew or should have known that his name was Gregory Scott Hermanski. Appellant was aware at all times of his true name and his failure to reveal his true name to the district court can only be imputed to him. Appellant cannot be heard to complain that the jury convicted him under a false identity that he assumed.<sup>5</sup> Further, appellant failed to demonstrate that there was a reasonable probability of

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<sup>3</sup>Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>4</sup>Strickland, 466 U.S. at 697.

<sup>5</sup>See Rhyne v. State, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002) (recognizing that a defendant who invited the error would be estopped from raising the error as a claim on appeal).

a different outcome if he had not testified at trial—appellant was positively identified by the victim of the robbery and found to be in possession of an amount of money similar to that taken during the robbery a short time after the robbery.<sup>6</sup> Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his counsel at resentencing was ineffective for failing to challenge the validity of the prior convictions used to adjudicate him a habitual felon and failing to argue for a sentence lesser than life without the possibility of parole. Appellant claimed that counsel should have presented as mitigating evidence the fact that he has a mental illness, he was fifty-one years old, and he was terminally ill with hepatitis C and in need of a liver transplant.

Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that any of the prior convictions were invalid, and thus, he failed to demonstrate that any challenge to the prior convictions would have been successful. Appellant failed to demonstrate that any potential arguments that counsel could have made would have had a reasonable probability of a different sentencing outcome. The presentence investigation report sets forth appellant's date of birth and indicates that appellant's "lengthy history of psychiatric difficulties" was a mitigating factor. Therefore, we conclude that the district court did not err in denying this claim.

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<sup>6</sup>The victim testified that approximately \$1000 was taken. Appellant was found in possession of approximately \$1000 in the area of the crime shortly after the crime had occurred. When appellant was initially stopped by a police officer, he fled from the police officer upon mention of a "robbery."

Next, appellant 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.<sup>7</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>8</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>9</sup>

First, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court abused its discretion in denying his motion for a new trial. Appellant failed to demonstrate that he was prejudiced. Appellant failed to indicate what arguments should have been made, and thus, appellant failed to demonstrate that this issue had any reasonable probability of success on appeal. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel should have filed a reply brief setting forth more argument on the issue of whether the State had violated his due process rights by allowing appellant to testify under a false name. Appellant claimed that the State knew his true name at the time of trial. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's claim that the State knew that appellant was

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<sup>7</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing to Strickland v. Washington, 466 U.S. 668 (1984)).

<sup>8</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>9</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

testifying under a false name is only speculation, and he failed to demonstrate that the State actually knew appellant was committing perjury during the trial. Appellant further failed to demonstrate that any further arguments on this issue would have changed the outcome of the appeal. Therefore, we conclude that the district court did not err in denying this claim.

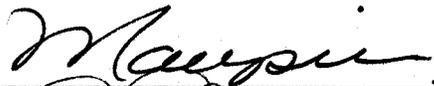
Third, appellant claimed that his appellate counsel was ineffective for failing to argue on appeal that Robert James Day's convictions were used during the second sentencing proceeding and that the judgment of conviction set forth that he was adjudicated a habitual criminal pursuant to NRS 207.010 for the crime of burglary while in possession of a deadly weapon when the State only provided notice that they were seeking adjudication under NRS 207.012.

Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that Robert James Day's prior convictions were used or relied upon by the district court in the second sentencing proceeding. Further, the record demonstrates that appellant was provided notice that the State was seeking adjudication as a habitual felon under NRS 207.012. It appears from this court's review of the record on appeal that the amended judgment of conviction contains a clerical error when it sets forth that appellant was sentenced as a habitual criminal pursuant to NRS 207.010 on the count of burglary while in possession of a deadly weapon. Because the felonies of both robbery with the use of a deadly weapon and burglary while in possession of a deadly weapon qualify for habitual felon treatment under NRS 207.012 and because the State provided notice that this was the statute under which they were seeking habitual felon adjudication, it appears that reference to NRS 207.010 in

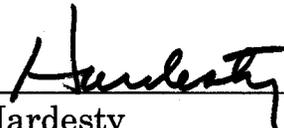
relation to the burglary count is a clerical error.<sup>10</sup> In order to curtail any further confusion in this regard, we remand this matter to the district court for the limited purpose of correcting the judgment of conviction to read that appellant was adjudicated a habitual felon under NRS 207.012 for both the robbery and burglary counts.

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>11</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction as instructed.

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Hardesty

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<sup>10</sup>See NRS 207.012(2).

<sup>11</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Jennifer Togliatti, District Judge  
Gregory Scott Hermanski  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk