

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED BLACKWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47071

FILED

SEP 20 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 denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On October 1, 2003, the district court convicted appellant, pursuant to a guilty plea, of two counts of robbery. The district court sentenced appellant to serve two consecutive terms of seventy-two to one hundred and eighty months in the Nevada State Prison. The district court further imposed restitution in the amount of \$143,541.75. This court affirmed the judgment of conviction on direct appeal.¹ The remittitur issued on May 4, 2004.

On November 9, 2004, 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

¹Blackwell v. State, Docket No. 42273 (Order of Affirmance, April 7, 2004).

declined to appoint counsel to represent appellant. On April 4, 2006, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of trial counsel.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, the results of the proceedings would be different.³ In order to establish prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner must demonstrate that he would not have pleaded guilty and would have insisted on going to trial.⁴ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁵ A petitioner must

²To the extent that appellant raised any claims independently from his ineffective assistance of counsel claims, we conclude that those claims were waived as they fell outside the scope of claims permissible in a petition challenging a judgment of conviction based upon a guilty plea. See NRS 34.810(1)(a).

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

⁴Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁵Strickland, 466 U.S. at 697.

prove the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁶

First, appellant claimed that his trial counsel was ineffective for failing to advise him of the potential penalty he faced if he had been convicted of the original charges of kidnapping.⁷ We conclude that appellant failed to demonstrate that he was prejudiced. During the trial proceedings, which were halted when appellant entered his guilty plea, the potential penalty for kidnapping was set forth on the record. Further, trial counsel informed the district court during the hearing on the plea that he had advised appellant of the potential penalties. Appellant failed to indicate how being correctly informed of the potential penalties for kidnapping earlier would have changed his decision to enter a guilty plea.⁸

⁶Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁷Appellant and his co-defendant were originally charged with one count of burglary while in possession of a firearm, one count of first degree kidnapping with a deadly weapon upon a victim over the age of sixty-five years and causing substantial bodily harm, one count of first degree kidnapping with a deadly weapon causing substantial bodily harm, one count of robbery with a deadly weapon upon a victim over the age of sixty-five years, and one count of robbery with a deadly weapon.

⁸It appears that appellant's decision to enter a guilty plea was motivated by his learning that the potential penalties for the kidnapping
continued on next page . . .

Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective because he only visited appellant one time while he was at the detention center. We conclude that appellant failed to demonstrate that he was prejudiced. Appellant's trial counsel testified at the evidentiary hearing that they consulted with appellant over the telephone and through court appearances. Appellant failed to indicate what further in-person contact would have accomplished such that there is a reasonable probability of a different outcome. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to advise appellant that because he entered a guilty plea as an aider and abettor that he would be accountable during the sentencing hearing for his co-defendant's actions. We conclude that appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel testified at the evidentiary hearing that he discussed the relative culpability of appellant vis-à-vis his co-defendant and that this could be considered at sentencing.⁹ The district

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counts were much greater than the penalties he had been advised of prior to trial.

⁹We note that appellant's liability as an aider and abettor was not the State's theory at trial as the State prosecuted appellant as a principal
continued on next page . . .

court in denying this claim specifically found that appellant's sentence was based upon his own actions during the crime and not the actions of the co-defendant. Appellant failed to indicate how further advice in this area would have changed the outcome of the proceedings. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to properly prepare and present mitigating evidence at sentencing. Appellant failed to demonstrate that his trial counsel's performance was unreasonable or that he was prejudiced. Appellant's trial counsel testified at the evidentiary hearing that he argued in mitigation that appellant did not have a violent past and acted under the direction of an older, more dominant relative. Appellant failed to indicate what further facts should have been presented such that there was a reasonable probability of a different outcome at sentencing. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to investigate his prior criminal history. Specifically, appellant complained that the presentence investigation report erroneously stated that he was convicted of eleven counts of theft involving a firearm when in fact it was eleven counts of theft involving a vehicle. Appellant failed to demonstrate that his trial counsel's performance was unreasonable or that

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in the robbery. This language was added pursuant to the plea negotiations.

he was prejudiced. Trial counsel did object to this error during the sentencing hearing. The district court in denying this claim specifically found that the prior conviction was only considered for the fact of the theft and not the particular item stolen. Appellant failed to demonstrate that the district court relied upon any impalpable or highly suspect evidence in sentencing appellant, and therefore, we conclude that the district court did not err in denying this claim.¹⁰

Sixth, appellant claimed that his trial counsel was ineffective for failing to investigate his alleged gang affiliation and object to the State's argument that he acknowledged to the Department of Parole and Probation that he was a member of the East Coast Crips gang. Appellant claimed that he only acknowledged that he was considered to be a member of this gang by the police. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate how further clarification of his alleged gang status would have had a reasonable probability of a different outcome at sentencing. Again, appellant failed to demonstrate that the district court relied upon any impalpable or highly suspect evidence in sentencing appellant, and therefore, we conclude that the district court did not err in denying this claim.¹¹

Seventh, appellant claimed that his trial counsel was ineffective for failing to object to the false accusation at sentencing that he

¹⁰See Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976).

¹¹See id.

savagely beat two men. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Two men were savagely beaten during the robbery committed by appellant and his co-defendant.¹² The record reveals that at least one of the victims identified appellant as having kicked him. Therefore, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for failing to inform the district court that the presentence investigation report falsely attributed the injuries of victim #2 to victim #1. Appellant failed to demonstrate that he was prejudiced. Appellant did not demonstrate that any mistake in describing which victim suffered what injury caused any prejudice. The victims were both injured during the robbery, and appellant failed to indicate how further information in this regard would have resulted in a lesser sentence. Therefore, we conclude that the district court did not err in denying this claim.

Ninth, appellant claimed that his trial counsel was ineffective for failing to refute the aggravating circumstances set forth in the presentence investigation report. Specifically, appellant claimed that the fact that he was on probation when he committed the instant offense

¹²One victim stated during the sentencing hearing that as a result of the force used during the robbery that he had to have forty-seven laser stitches, he suffered three fractured ribs, and he suffered slight brain damage. The record indicates that the other victim had three teeth knocked out during the robbery and suffered a broken nose and black eyes.

should not have been considered an aggravating factor. Appellant further claimed that the aggravating factor that the victim was over the age of 65 was not accurate as only one victim was over the age of 65 during the attack. Finally, appellant argued that the aggravating factor that he denied culpability was incorrect as he entered a guilty plea to the crimes.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that the presentence investigation report erroneously included the fact that he committed the instant offenses while he was on probation; a defendant's inability to comply with the condition of probation that the probationer not commit other offenses is an aggravating factor. The presentence investigation report correctly included as an aggravating factor the older victim reference as one of the victims was over the age of 65. Appellant informed the district court at sentencing that he did not deny culpability. Appellant failed to demonstrate that an objection to any of these factors would have altered the outcome of the proceedings. Therefore, we conclude that the district court did not err in denying this claim.

Tenth, appellant claimed that his trial counsel was ineffective for failing to refute the amount of restitution. Appellant claimed that there was no hearing on the amount of restitution and no documentation was presented about the costs to the victim. Appellant further claimed that the restitution was excessive as it included future expenses and payment to an insurance company. We conclude that appellant failed to

demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The judgment of conviction did not order that restitution be paid to an insurance company.¹³ The presentence investigation report set forth the amount of restitution and how the amount was calculated, and restitution was not awarded to a person or entity not considered to be victim.¹⁴ Again, no insurance company is set forth as a victim for restitution in the presentence investigation report. Further, the amount of restitution does not include an amount for future expenses. Appellant failed to demonstrate that further documentation was required or that his trial counsel was ineffective for failing to challenge the specific amounts of restitution at sentencing. Therefore, we conclude that the district court did not err in denying this claim.

Eleventh, appellant claimed that his trial counsel was ineffective for failing to argue for probation. Appellant failed to demonstrate that he was prejudiced. Appellant's trial counsel testified that probation was not realistic and that he made a tactical decision to argue for concurrent sentences. Appellant failed to demonstrate that he

¹³See Martinez v. State, 115 Nev. 9, 974 P.2d 133 (1999).

¹⁴See NRS 176.033(1)(c); NRS 176.015(5); Martinez, 115 Nev. at 11, 974 P.2d at 134; Norwood v. State, 112 Nev. 438, 441, 915 P.2d 277, 279 (1996). Restitution in the amount of \$143,541.75 included: (1) \$3,800 paid by one victim for replacing his teeth; (2) \$50 paid by the second victim for medication; (3) \$125,000 to the owner of Las Vegas Manufacturing Jewelers for the amount of jewelry never recovered; (4) \$14,387 for the victims' medical expenses; and (5) \$304.75 for the costs of extradition.

would have received probation had counsel argued for probation—probation was unlikely as appellant was on probation when he committed the instant offenses. Therefore, we conclude that the district court did not err in denying this claim.

Twelfth, appellant claimed that his trial counsel was ineffective for failing to use the compulsory process to secure witnesses at sentencing and failing to present character witnesses at sentencing. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant did not identify which witnesses he believed should have been compelled to appear or that he was entitled to compel any witnesses to appear at the sentencing hearing.¹⁵ Although appellant listed a number of family members and his godfather as potential character witnesses, he failed to indicate what potential testimony these witnesses would have offered such that there is a reasonable probability of a different outcome at sentencing. Therefore, we conclude that the district court did not err in denying this claim.

Thirteenth, appellant claimed that his trial counsel was ineffective for not objecting to the language of "aiding and abetting" in the information because it compels appellant to act as a witness against the co-defendant. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The "aiding and abetting" language was added to the information as part of the

¹⁵See NRS 176.015(2).

negotiations, and the record indicates that it was appellant's counsel that sought inclusion of that language. Appellant failed to demonstrate that he would not have entered a guilty plea absent the inclusion of this language. Therefore, we conclude that the district court did not err in denying this claim.

Fourteenth, appellant claimed that his trial counsel was ineffective for failing to object to the district court's failure to impose the sentence recommended by the Department of Parole and Probation and for advising appellant that he would receive a term of two to five years on each count. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant was correctly informed in the guilty plea agreement and during sentencing that sentencing was within the discretion of the district court; thus, any challenge to the district court's failure to impose the sentence recommended by the Department would not have been successful. Appellant's trial counsel testified at the evidentiary hearing that he informed appellant about the maximum potential sentences and he denied advising appellant that he would receive a sentence of two to five years. The written guilty plea agreement correctly informed appellant of the potential sentences he faced by entry of his guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

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.¹⁶ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁷ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹⁸

Appellant claimed that his appellate counsel was ineffective for failing to raise substantial and meritorious issues on direct appeal and failing to communicate with appellant. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant failed to identify the substantial and meritorious issues, and thus, he failed to demonstrate that his appellate counsel was ineffective in the choice of claims to raise on direct appeal. Appellant's appellate counsel testified that based on the limited scope of issues and a clean trial court record that she raised the only issue reasonably available on direct appeal—the sentence constituted cruel and unusual punishment. Appellate counsel further testified that she discussed issues with appellant in writing and on the telephone. To the extent that appellant claimed that his appellate counsel should have challenged the alleged

¹⁶Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (citing Strickland, 466 U.S. 668).

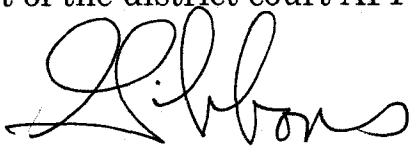
¹⁷Jones v. Barnes, 463 U.S. 745, 751 (1983).


¹⁸Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

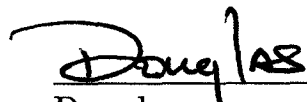
errors in the presentence report, the restitution amount, or the alleged errors relating to his prior conviction and gang status, for the reasons discussed earlier, appellant cannot demonstrate any prejudice. Therefore, we conclude that the district court did not err in denying this claim.

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.


_____, J.
Gibbons


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Alfred Blackwell
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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