IN THE SUPREME COURT OF THE STATE OF NEVADA

CLYDE BIBBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47279

FILED

NOV 13 2006

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Clyde Bibby's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Bibby was convicted, pursuant to a jury verdict, of one count each of conspiracy to commit robbery (count I), burglary while in the possession of a firearm (count II), robbery with the use of a deadly weapon (count III), failure to stop on the signal of a police officer (count IV), and possession of a controlled substance (count V). The district court sentenced Bibby to serve a prison term of 12-36 months for count I, a concurrent prison term of 28-72 months for count II, two consecutive prison terms of 36-120 months for count III, a consecutive prison term of 12-48 months for count IV, and a concurrent prison term of 12-34 months for count V. This court affirmed the judgment of conviction and sentence on direct appeal.[1]

[1]Bibby v. State, Docket No. 40777 (Order of Affirmance, November 21, 2003).

On July 29, 2004, Bibby filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court rejected all of Bibby's claims that were, or could have been, raised in his direct appeal,[2] and appointed counsel to represent Bibby on the surviving ineffective assistance of counsel claims. On December 9, 2005, counsel filed a supplemental brief in support of Bibby's petition, which the State opposed. The district court heard arguments from counsel, and on May 14, 2006, entered an order denying Bibby's petition. This timely appeal follows.

Bibby contends that the district court erred by finding that he did not receive ineffective assistance of trial and appellate counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that there was a reasonable probability that the outcome would have been different.[3] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[4] "[A] habeas corpus petitioner must

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[2]See Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); see also NRS 34.810(1)(b).

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

[4]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."[5] And the district court's factual findings respecting a claim of ineffective assistance of counsel are entitled to deference upon appellate review.[6]

First, Bibby contends that trial counsel rendered ineffective assistance by failing to object to a comment made by a State witness about his post-arrest silence, and that appellate counsel was ineffective for failing to raise the issue in his direct appeal. The following exchange occurred during the prosecutor's questioning of Officer Kenny Delzer:

> Q: Now, after finding the substance that you testified positive for meth, what did you do with regard to the scene?
>
> A: Well, you don't test at the scene, so. You test once we get to jail. But, anyways, what you do is while I'm waiting the other officer is – I'm not really a primary officer on this whole scene, I'm a secondary officer. Primary officer showed up at the scene, obviously take the report and get – collect evidence at the scene.
>
> I happened to capture one of the suspects from the robbery. So, I'm sitting there and Detective Richter came out, Mirandized them, asked them any questions that he could. Not want to answer questions, which is fine. I then continued to, basically, do a declaration of arrest, which is a standard form that we do whenever we place somebody under arrest. Give them the basic probable cause of why we arrested somebody, the reason.

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

[6]See Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004).

(Emphasis added.) Bibby claims that counsel were ineffective for failing to challenge Officer Dezler's comment, and that as a result, he is entitled to a new trial.

The district court found that trial counsel's decision not to object was reasonable. Officer Dezler's brief testimonial comment was unsolicited by the State, a mere passing reference, and not designed to draw any meaning from Bibby's post-arrest silence.[7] Bibby cannot demonstrate that Officer Dezler's comment amounted to plain error requiring the reversal of his conviction.[8] Moreover, Bibby cannot demonstrate that there was a reasonable probability of either a different outcome had trial counsel objected or success had the issue been raised on direct appeal. Therefore, we conclude that the district court did not err in rejecting this claim.

Second, Bibby contends that trial counsel rendered ineffective assistance by failing to investigate and obtain the surveillance videotape of the robbery, and by failing to request a jury instruction regarding the presumption that the unpreserved evidence from the videotape would have been favorable to the defense.[9] Bibby's contention is belied by the

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[7]See Sampson v. State, 121 Nev. ___, ___, 122 P.3d 1255, 1261 (2005).

[8]See Knight v. State, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000); Morris v. State, 112 Nev. 260, 264, 913 P.2d 1264, 1267-68 (1996).

[9]See Bass-Davis v. Davis, 122 Nev. ___, ___, 134 P.3d 103, 105 (2006) (clarifying Reingold v. Wet 'n Wild, Inc., 113 Nev. 967, 944 P.2d 800 (1997) and holding that "a permissible inference that missing evidence would be adverse applies only when evidence is negligently lost or destroyed").

record.[10] The surveillance videotape was the subject of two separate defense motions – a motion to dismiss and a motion in limine. At one point, prior to the start of trial, defense counsel informed the district court, "You know, we have witnesses ourselves and that we'll be able to establish our defense through our witnesses. So, I mean the whole topic of the video we'd rather not even get into it. We don't think it's pertinent." Further, Bibby's contention that the district court erred in denying his motion to dismiss was raised by appellate counsel and rejected by this court. Regarding Bibby's post-conviction claim, the district court found that trial counsel "made a well considered, reasoned choice regarding the video surveillance available to the defense in this case." We agree and conclude that the district court did not err in rejecting this claim.[11]

Third, Bibby contends that trial counsel rendered ineffective assistance by failing to investigate the rifle used during the commission of the robbery. Bibby argued at trial that he was coerced into committing the robbery by an unknown assailant wielding a rifle. Bibby also contends that counsel was ineffective for failing to raise the issue on appeal.

The district court found that "[t]rial counsel's failure to investigate the true owner of the rifle in this case was not prejudicial to Defendant." Evidence adduced at trial contradicted Bibby's claim that he

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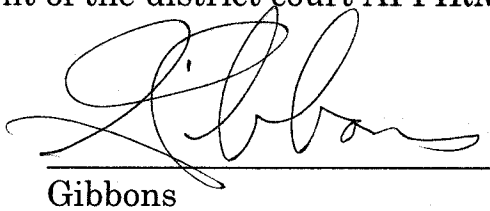
[10]Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[11]See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (stating that "trial counsel must make a sufficient inquiry into the information that is pertinent to his client's case"); see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (holding that the tactical decisions of trial counsel are "virtually unchallengeable absent extraordinary circumstances").

was not an active participant during the robbery and the jury rejected Bibby's defense theory of duress. On direct appeal, this court rejected Bibby's challenge to the sufficiency of the evidence. Even if the owner of the rifle had been found, we conclude that, especially in light of the overwhelming evidence of Bibby's guilt, the outcome of the trial would not have been different. Therefore, we conclude that the district court did not err in rejecting this claim.

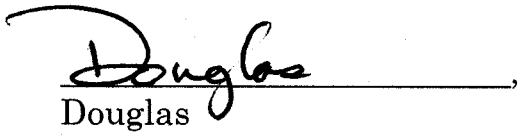
Having considered Bibby's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.[12]



_____, J.
Gibbons

_____, J.
Maupin



_____, J.
Douglas

[12]We also conclude that Bibby has not demonstrated that the district court erred as a matter of law in rejecting these claims without conducting an evidentiary hearing. See NRS 34.770; Mann v. State, 118 Nev. 351, 354-55, 46 P.3d 1228, 1230 (2002); Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

cc: Hon. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk