

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOHER MACK, AKA,
CHRISTOPHER D. MACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47282

FILED

OCT 10 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Rubano*
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; Jackie Glass, Judge.

On October 10, 2003, the district court convicted appellant, pursuant to a jury verdict, of two counts of burglary while in possession of a firearm, four counts of robbery with the use of a deadly weapon, one count of attempted robbery with the use of a deadly weapon, and one count of first-degree kidnapping with the use of a deadly weapon. The district court sentenced appellant to serve terms totaling 224 to 972 months in the Nevada State Prison for the burglary, robbery and attempted robbery counts, plus two consecutive terms of life with the possibility of parole after five years served for the first-degree kidnapping with the use of a deadly weapon count. On direct appeal, this court affirmed in part, reversed in part and remanded for the district court to vacate the kidnapping count.¹ The remittitur issued on March 11, 2005.

¹Mack v. State, Docket Nos. 42073 and 42149 (Order Affirming in Part, Reversing in Part, and Remanding, February 14, 2005). This court reversed appellant's kidnapping conviction, holding that it was incidental to the robbery.

On December 29, 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 April 4, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that 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.² Appellate counsel is not required to raise every non-frivolous issue on appeal.³ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.⁴

First, appellant claimed that appellate counsel did not argue or fully support claims surrounding his confession and the district court's denial of his motion to suppress. Specifically, appellant claimed that appellate counsel failed to (1) investigate the State's false claim that appellant signed a waiver of rights pursuant to his interrogation, (2) argue or properly support the claim that appellant invoked his right to remain silent, (3) argue that detectives only read appellant his Miranda⁵ rights in regards to the robbery that took place on December 1, 2001, not

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

³Jones v. Barnes, 463 U.S. 745, 751 (1983).

⁴Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

⁵Miranda v. Arizona, 384 U.S. 436 (1966).

for the robbery that occurred on November 25, 2001, and (4) adequately support the claim of coerced confession. Appellant failed to demonstrate that appellate counsel was ineffective. Counsel argued in appellant's direct appeal that appellant's confession was coerced and should have been suppressed. This court previously determined in appellant's direct appeal that he was advised of his Miranda rights and under the totality of the circumstances, appellant's confession was freely and voluntarily given.⁶ Appellant failed to demonstrate that additional argument regarding his confession would have had a reasonable probability of success on appeal. Thus, the district court did not err in denying these claims.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that appellant's sentence was illegal because, contrary to NRS 189.007, the criminal complaint charged him with two offenses in one count when it charged him with the use of a deadly weapon in the same count as the primary offense. Appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. When a deadly weapon is used during the commission of a crime, "the use of a deadly weapon" does not create a separate offense but an additional penalty for the primary offense.⁷ Thus, the district court did not err in denying this claim.

Third, appellant claimed that appellate counsel was ineffective for failing to argue that the failure of two of the victims, Stephan Anderson and Jarrad Coombs, to testify at the preliminary hearing or trial

⁶Mack v. State, Docket Nos. 42073 and 42149 (Order Affirming in Part, Reversing in Part, and Remanding, February 14, 2005).

⁷See NRS 193.165(2).

was in violation of appellant's Sixth Amendment and Fourteenth Amendment confrontation rights. Appellant also claimed that one of the victims, Mark Brown, could not identify appellant. Appellant failed to demonstrate that appellate counsel was ineffective. Coombs' and Anderson's statements were never admitted during appellant's trial, thus, appellant's confrontation rights were not at issue as to those victims.⁸ All the other victims testified and appellant was given the opportunity to confront them. Although Brown could not identify appellant, two victims present during the November 25, 2001 robbery, where Brown was also present, did identify appellant. Appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Last, appellant claimed that his appellate counsel was ineffective for failing to argue that the jury was improperly instructed on use of a deadly weapon, which effectively made the jury's finding mandatory rather than discretionary. Appellant failed to demonstrate that counsel's performance was deficient or that this claim had a reasonable probability of success on appeal. The State introduced evidence that appellant pointed a gun at the victims. The jury was properly instructed on the definition of a deadly weapon pursuant to NRS 193.165(5) and found that appellant used a deadly weapon in the commission of robbery and attempted robbery beyond a reasonable doubt. Thus, the district court did not err in denying this claim.

⁸Flores v. State, 121 Nev. ___, 120 P.3d 1170 (2005).

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.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Honorable Jackie Glass, District Judge
Christopher D. Mack
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).