IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN KENNEDY,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Respondent.

No. 47368

FILED

NOV 28 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. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

On November 10, 2003, the district court convicted appellant, pursuant to a jury verdict, of attempted burglary. The district court adjudicated appellant a small habitual criminal and sentenced appellant to serve a term of five to twenty years in the Nevada State Prison. This court affirmed appellant's judgment of conviction on direct appeal.[1] The remittitur issued on January 17, 2006.

On January 19, 2006, 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

[1]Kennedy v. State, Docket No. 42471 (Order of Affirmance, December 20, 2005).

conduct an evidentiary hearing. On May 4, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his trial counsel was ineffective.[2] 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.[3] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[4]

First, appellant claimed that his trial counsel was ineffective because counsel was inexperienced. Appellant failed to demonstrate that counsel was deficient or that counsel's performance was such that the jury's verdict was rendered unreliable. Although his trial counsel was fairly inexperienced, counsel was supervised by experienced trial attorney Steven McGuire, who conducted the opening argument and much of the cross-examination of the State's witnesses. Appellant failed to demonstrate that the lack of experience prejudiced him. Thus, the district court did not err in denying this claim.

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[2]To the extent that appellant raised any of the underlying issues independently from his ineffective assistance of counsel claims, we conclude that they are waived; they should have been raised on direct appeal and appellant did not demonstrate good cause for his failure to do so. See NRS 34.810(1)(b).

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

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

Second, appellant claimed that his trial counsel was ineffective for failing to object to prior convictions used to adjudicate appellant a habitual criminal. This claim is belied by the record.[5] Counsel moved and objected to the use of one prior conviction because that conviction had resulted in a suspended sentence. Counsel additionally argued that appellant's prior convictions were non-violent property crimes and that the district court should exercise discretion and refuse to adjudicate appellant a habitual criminal. This court previously held that the district court's adjudication of appellant as a habitual criminal was proper.[6] Thus, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to object to the district court issuing an Allen[7] instruction. This claim is belied by the record.[8] Defense counsel objected to further instruction to the jury. The district court's instruction was not unduly coercive and properly informed the jury that each juror must reach their

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[5]Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

[6]See Kennedy v. State, Docket No. 42471 (Order of Affirmance, December 20, 2005).

[7]Allen v. U.S., 164 U.S. 492 (1896); see also Staude v. State, 112 Nev. 1, 6, 908 P.2d 1373, 1377 (1996) (setting forth that instructions to the jury when the jury appears deadlocked should ensure that juries are informed each member has a duty to adhere conscientiously to his or her own honest opinion and to not sacrifice this for the sake of reaching a verdict).

[8]Hargrove, 100 Nev. at 503, 686 P.2d at 225.

own conclusion.[9] Thus, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to object to appellant's two-hour absence during trial. Appellant failed to demonstrate that counsel's performance resulted in an unreliable jury verdict. It is not apparent from the record that appellant was absent from any of the trial, except for when the district court addressed questions that the jury had during deliberations. Appellant failed to specify any time period where he was absent, and whether there was a reasonable probability of a different outcome had he not been absent. Thus, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to object to prosecutorial misconduct. Specifically, appellant claimed that counsel failed to object to improper questioning of his alibi witness. This court previously held on direct appeal that the State properly cross-examined appellant's alibi witness. Therefore, appellant cannot demonstrate that his counsel was ineffective and we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that counsel was ineffective for failing to move for a judgment of acquittal or a motion for a new trial. Appellant failed to demonstrate that counsel's performance was deficient. Appellant failed to demonstrate that the motions would have been meritorious and that there was a reasonable probability of a different

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[9]Staude, 112 Nev. at 6-7, 908 P.2d at 1376-77.

outcome in the proceedings. Thus, the district court did not err in denying these claims.

Appellant also 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.[10] Appellate counsel is not required to raise every non-frivolous issue on appeal.[11] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[12]

Appellant contended that his appellate counsel was ineffective for failing to challenge the under-representation of Native Americans in the jury venire due to systematic exclusion as evidenced by the absence of Native Americans on appellant's jury. Our review of the record on appeal reveals that the district court did not err in denying appellant relief on this claim. Appellant has the burden of establishing a prima facie violation of the fair-cross-section requirement.[13] To demonstrate a prima facie violation, appellant must demonstrate

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

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

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

[13]Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 275 (1996).

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process.[14]

Appellant failed to satisfy this three-part test. Appellant failed to demonstrate that Native American individuals were systematically excluded from the venire or the jury-selection process, or that the percentage of Native Americans within the venire was not fair and reasonable in proportion to the number of such persons in the community. Thus, the district court did not err in denying this claim.

Appellant further contended that (1) his adjudication as a habitual criminal was an abuse of discretion and violated his Due Process rights; (2) the photographic lineup was impermissibly suggestive; (3) the district court erred in rejecting appellant's proffered jury instructions; (4) there was insufficient evidence to convict appellant of attempted burglary; (5) the district court erred in denying appellant's motion to hire an expert witness on eyewitness identification, and (6) cumulative errors violated appellant's right to a fair trial. This court considered and rejected these claims on direct appeal. The doctrine of the law of the case prevents relitigation of these issues.[15] Thus, the district court did not err in denying these claims.

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[14]Duren v. Missouri, 439 U.S. 357, 364 (1979); see also Evans, 112 Nev. at 1186, 926 P.2d at 275.

[15]Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

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.[16] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[17]

Becker, J.
Becker

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. Steve L. Dobrescu, District Judge
Kevin Kennedy
Attorney General George Chanos/Carson City
White Pine County District Attorney
White Pine County Clerk

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

[17]We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.