

IN THE SUPREME COURT OF THE STATE OF NEVADA


KEITH B. WARD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 47422

**FILED**

**FEB 28 2007**

ORDER OF AFFIRMANCE

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

This is an appeal from the denial of a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Appellant Keith B. Ward was convicted, pursuant to a jury verdict, of three counts of attempted robbery with the use of a deadly weapon, three counts of battery with intent to commit a crime, and one count of burglary. He was adjudicated a habitual criminal and sentenced to serve seven concurrent terms of life with the possibility of parole after 10 years. This court affirmed the judgment of conviction and sentence in part on direct appeal and remanded in part for correction of a clerical error in the judgment of conviction.<sup>1</sup>

Ward filed a proper person postconviction petition for a writ of habeas corpus. The district court appointed counsel to represent Ward, and counsel supplemented the petition. After hearing argument but

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<sup>1</sup>Ward v. State, Docket No. 41804 (Order Affirming in Part and Remanding in Part to Correct Judgment of Conviction, September 15, 2004).

without conducting an evidentiary hearing, the district court denied the petition.<sup>2</sup> This appeal followed.

Ward argues he received ineffective assistance of trial and appellate counsel. 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. The petitioner also must demonstrate prejudice such that trial counsel's errors were so severe that they rendered the jury's verdict unreliable.<sup>3</sup> To show prejudice based on appellate counsel's performance, the petitioner must show that the omitted issue had a reasonable probability of success on appeal.<sup>4</sup>

Ward argues his trial counsel was ineffective for failing to meet with him before trial, conduct an investigation, request a continuance to prepare for trial after being appointed 40 days before the trial date, hire an investigator or expert, call witnesses, file motions, and file a presentence memorandum after requesting a continuance to do so. Ward failed to state sufficient facts to support any of these claims. A petitioner is not entitled to an evidentiary hearing on bare or naked claims for relief that are unsupported by any specific factual allegations.<sup>5</sup>

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<sup>2</sup>Judge Bell heard argument and denied the petition; Judge Pavlikowski signed the order denying the petition. Ward raises no claim relating to this in his briefs.

<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>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

<sup>5</sup>Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Further, Ward failed to state how counsel's alleged deficient performance in these regards prejudiced him. The district court did not err in denying these claims.

Ward next argues that his trial counsel was ineffective for failing to file a motion to ensure that the jury, not the judge, or the trial judge rather than a different judge, would determine whether he should be considered a habitual criminal. Ward's three convictions, two of armed robbery and one of possession of a controlled substance, made him eligible for habitual criminal treatment. Ward relies on Apprendi v. New Jersey<sup>6</sup> to support his argument, but Apprendi specifically exempts prior convictions from the facts that must be submitted to a jury in order to constitutionally exceed the statutory maximum sentence. Ward cites no authority for the proposition that a discretionary decision such as a habitual criminal finding must be made by the jury. In his direct appeal, we concluded that Ward had no constitutional right to be sentenced by the judge who presided over his trial. Accordingly, the district court did not err in denying these claims.

Next, Ward argues that his trial counsel was ineffective at sentencing for failing to argue that his prior convictions were stale and should not be considered and for failing to argue the "type, nature, and date" of his prior convictions. The remoteness of a conviction is a consideration within the sentencing court's discretion under NRS 207.010.<sup>7</sup> Our review of the record indicates that counsel argued that the

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<sup>6</sup>530 U.S. 466 (2000).

<sup>7</sup>Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

court should consider the 17-year gap between the armed robbery convictions and the possession of a controlled substance conviction; however, the record also reveals that Ward was in prison during that time and the possession of a controlled substance occurred while he was in prison. He was on parole when he committed the instant offenses as well as two other armed robberies. The district court was aware of the time frame of all the offenses. Ward fails to state what other facts about these convictions counsel should have argued or how those arguments might have resulted in a more lenient sentence. The district court did not err in denying these claims.

Ward also claims that his trial counsel was ineffective for failing to ensure that he was sentenced by the judge who presided over his trial. He claims that counsel failed in this regard by requesting a continuance of his sentencing from the trial judge, who then became unavailable. He claims that counsel failed again on June 23, 2003, when he informed the State off the record that he agreed to another continuance and then left the courtroom, which allowed the State to "shop" for the sentencing judge by requesting a continuance to a date when the trial judge would still be unavailable. Ward also claims his counsel was ineffective at sentencing for failing to argue that Ward's sentencing by a judge other than the trial judge violated his constitutional rights. Ward failed to demonstrate that counsel's performance in any of these respects prejudiced him. In his direct appeal, we concluded that Ward had no constitutional right to be sentenced by the judge who presided over his trial. Ward also failed to explain why the trial judge might have given him a more lenient sentence. The district court did not err in denying these claims.

Next, Ward argues that his appellate counsel was ineffective for failing to argue that the State improperly engaged in "judge-shopping" and improperly requested a continuance without his counsel present on June 23, 2003, as described above. The minutes of the June 23 hearing indicate that the Division of Parole and Probation needed to make changes to the presentence investigation report and the State advised the court that the parties had stipulated to a one-week continuance. Ward failed to explain why it was improper for the State to request a continuance without his counsel present after obtaining his counsel's stipulation to do so or to agree to one continuance and then refuse to agree to another continuance a week later. As we have already held that Ward had no right to be sentenced by the trial judge, he cannot successfully claim that his appellate counsel was ineffective for failing to raise these arguments. The district court did not err in denying these claims.

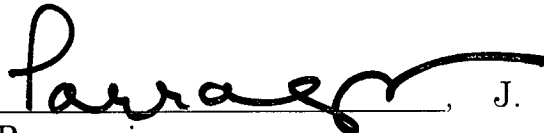
Ward also argues that his appellate counsel was ineffective for failing to support with cogent authority his argument that Ward had a constitutional right to be sentenced by the trial judge. On direct appeal, we noted that various circuit courts of appeals have held there is no constitutional right to be sentenced by the judge who presided over the trial. The cases Ward cites now, which are state cases relying on state statutes and rules, do not persuade us that we might have resolved this claim differently on direct appeal had appellate counsel cited those same cases. The district court did not err in denying this claim.

Finally, Ward argues that his appellate counsel was ineffective for failing to federalize his arguments. He fails to state which claims should have been raised as federal claims or upon what grounds

they should have been raised.<sup>8</sup> Thus, the district court did not err in denying this claim.

Having reviewed Ward's arguments and concluded he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Parraguirre

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

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Stewart L. Bell, District Judge  
Karen A. Connolly, Ltd.  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>8</sup>Hargrove, 100 Nev. at 502, 686 P.2d at 225.