

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE J. SMITH, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47591

FILED

NOV 17 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Edwards*
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; Stewart L. Bell, Judge.

On April 23, 2003, the district court convicted appellant, pursuant to a jury verdict, of one count of possession of stolen property.¹ The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a term of ten to twenty-five years in the Nevada State Prison. This court affirmed the judgment of conviction on appeal.²

On April 13, 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 conduct an evidentiary hearing. On June 29, 2006, the district court denied appellant's petition. This appeal followed.

¹Appellant was found not guilty of the crime of possession of a stolen vehicle.

²Smith v. State, Docket No. 41309 (Order of Affirmance, March 22, 2006).

In his petition, appellant contended that he received ineffective assistance of trial counsel.³ 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.⁴ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁵

First, appellant claimed that trial counsel was ineffective for failing to locate or interview potential witnesses. The only witness specifically identified by appellant was Carl Mullins.⁶ Appellant believed that Carl Mullins would have been a key witness because he allegedly told the police that he knew the location of the stolen property. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. A review of the record on appeal reveals that neither side was able to locate Mullins at the time of trial, and appellant failed to demonstrate that counsel was deficient in his efforts. Appellant

³To the extent that appellant raised any of the underlying claims independently from his ineffective assistance of counsel claims, those claims were waived as appellant failed to raise them on direct appeal and failed to demonstrate good cause for his failure to do so. See NRS 34.810(1)(b).

⁴Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁵Strickland, 466 U.S. at 697.

⁶The record contains different versions of Mullins' first name—Carl, Carlos, Karl.

did not demonstrate that Mullins' alleged statement to police that he knew the whereabouts of the stolen property would have had a reasonable probability of altering the outcome of the trial. A statement from Mullins, the passenger in the stolen van, that Mullins knew the location of the property did not necessarily exonerate appellant. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to conduct an investigation into the credibility of the State's witnesses. Appellant failed to specifically identify the witnesses or indicate what further investigation would have revealed such that there was a reasonable probability of a different outcome at trial. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to call Officer Garcia to the stand to question him about an inventory sheet of the stolen items. Appellant claimed that because he testified at trial that the allegedly stolen items were in the van at the time it was recovered that an inventory sheet would reveal that the victim lied when he testified that the van was empty. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The record does not support appellant's assertion that a formal inventory sheet was prepared by Officer Garcia. Rather, the record indicates that Officer Garcia discussed the contents missing from the van with the victim at the time it was recovered. The police report contains statements about the items the victim stated were missing from the van, and the victim testified about the missing items. Appellant's own testimony indicated that there were items in the van at the time that he was driving the van. Although appellant testified that the items were still

present when he fled the van, the victim testified that his satellite equipment and tools were missing when the van was recovered and returned to him. It was for the jury to determine the credibility of the witnesses.⁷ Under these facts, appellant failed to demonstrate that calling Officer Garcia to the stand would have had a reasonable probability of altering the outcome of the trial. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to protect his right to be convicted by a jury and not the judge. Appellant did not offer any supporting facts or cogent argument in support of this claim.⁸ Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to object to prosecutorial misconduct. Specifically, appellant claimed that trial counsel should have objected to: (1) statements that appellant had stolen the vehicle even though the grand larceny (auto) charge had been dropped before trial; and (2) statements that nothing was in the van when it was recovered even though appellant testified that boxes were in the van when he fled from it. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. These arguments accurately reflected testimony

⁷See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

⁸See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

presented at trial.⁹ Thus, appellant failed to demonstrate that an objection would have been successful or that there was a reasonable probability of a different outcome at trial. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to reveal a conflict of interest. Appellant failed to provide any specific facts or cogent argument in support of this claim.¹⁰ Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for failing to adequately cross-examine the victim. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel extensively cross-examined the victim. Appellant failed to specifically identify what further cross-examination should have been conducted such that there was a reasonable probability of a different outcome at trial. Therefore, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that trial counsel was ineffective for failing to investigate material that trial counsel knew the State would rely upon at trial. Appellant failed to provide any specific facts or cogent

⁹At trial the victim testified that appellant was the individual who had stolen the van from in front of the victim's customer's residence. The victim further testified that his satellite equipment and tools were missing from the van when it was recovered. Although appellant testified that he did not steal the van and that the boxes were in the van when he fled from the van, nothing prevented the prosecutor from commenting on testimony that contradicted appellant's testimony.

¹⁰See id.

argument in support of this claim.¹¹ Therefore, we conclude that the district court did not err in denying the claim.

Ninth, appellant claimed that trial counsel was ineffective for undermining appellant's trial testimony by arguing during closing arguments that there was no evidence that the stolen property existed and that there was no testimony that appellant possessed the van. Appellant noted that he testified to both the existence of boxes in the back of the van and that he was in possession of the van. Appellant failed to demonstrate that he was prejudiced by trial counsel's argument. Notably, appellant was found not guilty of the charge of possession of a stolen vehicle. Thus, trial counsel's argument relating to possession of the van did not prejudice appellant. Appellant failed to demonstrate that there was a reasonable probability that the results of the trial would have been different had trial counsel not argued that there was no evidence that the stolen property existed. The jury was presented with testimony from the victim about the items missing from the stolen van, appellant's testimony that the boxes were in the van when he fled from it, and trial counsel's concern as to why there was not a formal inventory listing the contents of the van or an invoice from the victim demonstrating his actual losses. The jury was properly instructed that arguments were not evidence, and it was for the jury to determine the credibility of the witnesses.¹² Therefore, we conclude that the district court did not err in denying this claim.

¹¹See id.

¹²See Bolden, 97 Nev. 71, 624 P.2d 20.

Tenth, appellant claimed that trial counsel was ineffective for failing to object to the State's constant references to appellant having stolen the van. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant did not specifically identify the instances, but to the extent that appellant was referring to the prosecutor's closing arguments, the prosecutor did not commit any error. The victim testified at trial that appellant was the individual who stole the van. Although appellant testified that he did not steal the van and testimony from at least one of the police officers indicated that the victim was unsure that appellant was the man who stole the van, the prosecutor was permitted to comment on testimony that supported the State's theory of the case.¹³ It was up to the jury to determine the credibility of the witnesses.¹⁴ Therefore, we conclude that the district court did not err in denying this claim.

Eleventh, appellant claimed that trial counsel was ineffective for asking the jury to convict appellant of the lesser related offense of a taking a vehicle without the owner's consent. Appellant failed to demonstrate that he was prejudiced. Notably, appellant was found not

¹³The victim positively identified appellant as the man who was in the van when the victim and his co-workers found the van hours after it had been stolen. Although the victim positively identified appellant at the trial as the individual who stole the van, at least one of the police officers testified that the victim was not sure that appellant was the individual who actually stole the van. The victim's customer testified that appellant looked "similar" to the man who stole the victim's van from in front of the residence.

¹⁴See id.

guilty of the crime of possession of a stolen vehicle, and thus, appellant failed to demonstrate that he suffered any prejudice as the result of this argument. Therefore, we conclude that the district court did not err in denying this claim.

Twelfth, appellant claimed that trial counsel was ineffective for waiting until the jury was empanelled and the remaining jurors dismissed before making a Batson¹⁵ challenge. Appellant failed to demonstrate that there was a reasonable probability of a different result if the challenge had been raised before the jury had been empanelled. In deciding a Batson objection, the trial court must engage in a three-step analysis: (1) the opponent of a peremptory challenge must make a prima facie case of racial discrimination; (2) the burden of production then shifts to the proponent of the strike to give a race neutral explanation; and (3) the trial court must then decide whether the opponent of the challenge has proven purposeful discrimination.¹⁶ In the instant case, appellant's trial counsel argued that all of the African-American jurors, three jurors, had been removed. However, of the three jurors identified by counsel, only one of the jurors was removed by the State with a peremptory strike.¹⁷ Even assuming without deciding that this argument amounted to a showing of

¹⁵Batson v. Kentucky, 476 U.S. 79 (1986).

¹⁶See Kaczmarek v. State, 120 Nev. 314, 332, 91 P.3d 16, 29-30 (2004) (following Purkett v. Elem, 514 U.S. 765, 767-68 (1995)).

¹⁷We note that two of the jurors identified by counsel had been removed by the court for cause—one individual who stated that they could not be impartial and a second individual who did not show up for the second day of jury selection. The record reveals that only one peremptory challenge was actually subjected to a Batson challenge.

prima facie racial discrimination, the State provided a race neutral explanation—the juror stricken had previously been accused of a crime. The district court determined that the State had provided a race neutral explanation for the peremptory strike, and we conclude that the record supports the district court's determination. Thus, appellant failed to demonstrate that the timing of the Batson challenge made a difference in the outcome of the proceedings, and we conclude that the district court did not err in denying this claim.

Next, appellant claimed that he received ineffective assistance of appellate counsel.¹⁸ 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.¹⁹ Appellate counsel is not required to raise every non-frivolous issue on appeal.²⁰ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.²¹

¹⁸To the extent that appellant raised any of the underlying claims independently from his ineffective assistance of counsel claims, those claims were waived as appellant failed to raise them on direct appeal and failed to demonstrate good cause for his failure to do so. See NRS 34.810(1)(b).

¹⁹Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing to Strickland, 466 U.S. 668).

²⁰Jones v. Barnes, 463 U.S. 745, 751 (1983).

²¹Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, appellant claimed that his appellate counsel was ineffective for failing to raise numerous issues on appeal. Specifically, appellant identified the following omitted issues: (1) judicial coercion; (2) insufficient evidence existed to charge appellant with possession of stolen property; and (3) the district court erred in denying numerous presentence motions.²² Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that any of these potential issues had a reasonable probability of success on appeal. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for filing two opening briefs raising different claims. Appellant failed to demonstrate that he was prejudiced. It appears that the second opening brief was stricken pursuant to a consent to strike it. Appellant failed to demonstrate that there was a reasonable probability of a different outcome on appeal had appellate counsel not filed a second brief or had appellate counsel litigated the claims in the second brief. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed: (1) the district court erred in denying his motion for a continuance; (2) the district court erred in permitting the State to present various arguments; and (3) the district court erroneously admitted prior bad act evidence. These claims were considered and rejected in the direct appeal. The doctrine of the law of the case prevents

²²Appellant failed to provide any specific facts or cogent argument about additional issues counsel omitted on appeal. See Hargrove, 100 Nev. 498, 686 P.2d 222.

further litigation of these claims and cannot be avoided by a more detailed and precisely focused argument made upon reflection of the prior proceedings.²³ Therefore, we conclude that the district court did not err in denying these claims.

Next, appellant claimed: (1) the district court erred in telling the jury that appellant had incriminated himself; (2) the district court erred in appointing a former law clerk to represent appellant on appeal; (3) the district court erred in acting deliberately and deceptively to discriminate against appellant; (4) the State expressed its personal opinion that appellant had fabricated his defense; (5) the State used perjured testimony from the victim; (6) the State hid the fact that the police officer knew the property was never stolen; (7) the State erred in commenting that no police inventory existed on the record; (8) the State erred in arguing that the State only had to prove that the victim owned the property and the value of the property; (9) insufficient evidence was presented that appellant actually possessed or sold the alleged stolen property; (10) his sentence was excessive and disproportionate to the crime and was based upon the district court's bias and prejudice; (11) an unlawful conspiracy existed to convict appellant; (12) the jury's verdicts were inconsistent in that they found appellant guilty of possessing stolen property but not guilty of possessing a stolen vehicle; (13) the State unfairly narrowed the cross-section of potential jurors; (14) the crime scene analyst failed to adequately process the van; (15) several jury instructions given were misleading; (16) the chain of custody was broken

²³See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

when the van was returned to the victim; and (17) the prosecutor allegedly argued that appellant should be convicted because the color of his "skin was a sin."²⁴ These claims were waived as they were not raised on direct appeal, and appellant did not provide good cause for his failure to do so.²⁵ Therefore, we conclude that the district court did not err in denying these claims.

Next, appellant claimed that the State withheld evidence of the location of Carl Mullins and failed to produce the inventory sheet. Appellant claimed that the witness and the inventory sheet would have proved his innocence. The record belies appellant's claim.²⁶ As discussed earlier, the record indicates that the State could not locate Mullins at the time of trial and no formal inventory document existed beyond the statements contained in the police report. Therefore, we conclude that the district court did not err in denying these claims.

²⁴We note that the record does not contain any such statement from the prosecutor. Appellant is cautioned that he may be referred for the forfeiture of credit when he submits a document containing "allegations or information presented as fact for which evidentiary support is not available or is not likely to be discovered after further investigation." See NRS 209.451(1)(d)(3).

²⁵See NRS 34.810(1)(b). Further, we note that appellant did not specifically argue that either his trial or appellate counsel were ineffective for failing to challenge or raise these issues. Because appellant failed to specifically raise these claims in his grounds as ineffective assistance of counsel claims, the district court did not err in declining to consider them as such.


²⁶See Hargrove, 100 Nev. 498, 686 P.2d 222.

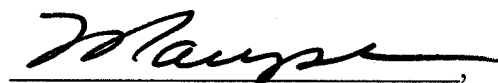
Next, appellant claimed that he was not provided with a complete record of the proceedings and this court conducted an inadequate appellate review on direct appeal. These claims were not appropriately raised in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction and sentence.²⁷ Therefore, we conclude that the district court did not err in denying these claims.

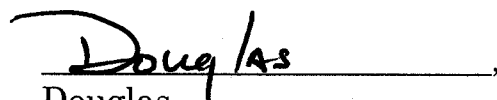
Finally, appellant claimed that cumulative error warrants reversal. Because appellant failed to demonstrate any error, he necessarily failed to demonstrate cumulative error warranted reversal of his conviction and sentence.

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.²⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Maupin


_____, J.
Douglas

²⁷See NRS 34.724.

²⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Stewart L. Bell, District Judge
Willie J. Smith Jr.
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk