

IN THE SUPREME COURT OF THE STATE OF NEVADA

VINCENT M. SANTANA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47600

FILED

FEB 23 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE AND DIRECTING CORRECTION OF
JUDGMENT OF CONVICTION

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; Michelle Leavitt, Judge.

On January 24, 2003, the district court convicted appellant, pursuant to a jury verdict, of failing to change address by a convicted sex offender. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a term of life in the Nevada State Prison without the possibility of parole. This court initially affirmed the judgment of conviction and sentence on direct appeal.¹ Subsequently, however, this court granted a limited rehearing on direct appeal, reversed the judgment of conviction in part, and remanded the matter to the district court for resentencing.² The remittitur issued on March 30, 2005.

¹Santana v. State, Docket No. 40880 (Order of Affirmance, May 11, 2004).

²Santana v. State, Docket No. 40880 (Order Granting Limited Rehearing, May 11, 2004); (Order Denying En Banc Reconsideration, November 4, 2004). This court vacated the sentence, concluding that a

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On May 26, 2005, the district court entered an amended judgment of conviction. The district court again adjudicated appellant a habitual criminal and sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after ten years. Appellant did not file a direct appeal from the amended judgment of conviction.

On March 17, 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 16, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised six claims of ineffective assistance of trial 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, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.³

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sentence of life without the possibility of parole constituted cruel and unusual punishment given the peculiar circumstances under which the offense was committed.

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

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 for failing to object to prejudicial inquiries by the prosecution during jury selection.⁵ Specifically, appellant claimed that his counsel should have objected when the prosecution inquired whether the potential jurors had any children. Appellant failed to demonstrate that he was prejudiced by his counsel's failure to object. The offense for which appellant was being tried did not involve a crime against a minor and appellant failed to demonstrate that the jurors selected to try his case were actually biased. Accordingly, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to object to the prosecution's mischaracterization of evidence during closing arguments.⁶ Specifically, appellant contended that the prosecution's reference to appellant's arrest for domestic violence and brief time in custody for that offense was improper. Appellant failed

⁴Strickland, 466 U.S. at 697.

⁵To the extent that appellant raised this claim in the context of a claim of ineffective assistance of appellate counsel, we conclude that appellant failed to demonstrate that this claim had a reasonable probability of success on appeal, and the district court did not err in denying this claim. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. 668).

⁶To the extent that appellant raised this claim in the context of a claim of ineffective assistance of appellate counsel, we conclude that appellant failed to demonstrate that this claim had a reasonable probability of success on appeal, and the district court did not err in denying this claim. Id.

to demonstrate that his counsel was deficient by failing to object. The prosecution's reference to appellant's arrest for domestic violence was made in response to appellant's counsel's discussion of the arrest during closing arguments. By discussing the arrest in closing arguments, appellant's counsel opened the door for discussion of the arrest by the prosecution.⁷ Further, appellant failed to demonstrate that he was prejudiced. The discussion of appellant's arrest for domestic violence on the day he was evicted from his residence was presented as appellant's defense for failing to timely change his address for his sex offender registration. Accordingly, we conclude the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for compromising appellant's defense and plea of not guilty during closing argument.⁸ Specifically, appellant claimed that his counsel's question "Where's the harm?" during closing argument constituted an improper admission of guilt. Appellant failed to demonstrate that he was prejudiced by his counsel's question. The record reveals that overwhelming evidence was presented at trial that appellant had been evicted from his registered

⁷See Taylor v. State, 109 Nev. 849, 857, 858 P.2d 843, 848 (1993) (Shearing, J., concurring in part, dissenting in part) ("ordinarily inadmissible evidence may be rendered admissible when the complaining party is the party who broached the issue").

⁸To the extent that appellant raised this claim in the context of a claim of ineffective assistance of appellate counsel, we conclude that appellant failed to demonstrate that this claim had a reasonable probability of success on appeal, and the district court did not err in denying this claim. Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (citing Strickland, 466 U.S. 668).

address and did not file a change of address form. When reviewed in context, appellant's counsel's question "Where's the harm?" appears to have been an attempt to mitigate the evidence against appellant. When posing the question, appellant's counsel also noted that the police knew appellant was in jail starting on the date he was evicted from his registered address, and the address where appellant resided after being released from jail was one of appellant's previously registered addresses. Throughout the rest of the closing argument appellant's counsel repeatedly argued that appellant was not guilty of failing to change his address for his sex offender registration because appellant was arrested and jailed on the day he was evicted from his registered address. Appellant's counsel never made an admission of guilt on appellant's behalf. Accordingly, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for refusing appellant's repeated requests to testify on his own behalf. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. The decision on whether a defendant testifies in his own defense at trial is one for the defendant to make.⁹ The record reveals that the district court thoroughly advised appellant of his right to testify and the implications of doing so. Appellant stated that he understood his rights and informed the district court that he was not going to testify. To the extent that appellant challenged his counsel's recommendation not to testify, counsel's advise was strategic in nature and appellant failed to

⁹Lara v. State, 120 Nev. 177, 182, 87 P.3d 528, 531 (2004) (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)).

demonstrate that he was prejudiced by counsel's advice.¹⁰ Accordingly, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to move for a continuance to allow his mother-in-law to testify. Appellant asserted that his mother-in-law would have testified that appellant was not a resident at her home and appellant's squatting and storing of personal property at her home was without her knowledge or consent. Appellant failed to demonstrate that having his mother-in-law testify would have altered the outcome of the trial. The proposed testimony by appellant's mother-in-law would have been cumulative. Testimony was presented at trial that appellant's mother-in-law was not aware of and did not consent to have appellant sleeping in her home and storing personal property there. Accordingly, we conclude the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to call his wife as a witness. Appellant asserted that his wife would have testified that appellant was homeless and only spent an occasional night at her parents' home, without her parents' knowledge or consent. Appellant failed to demonstrate that having his wife testify would have altered the outcome of the trial. The issue presented for the jury to decide was whether appellant failed to timely file a change of address for his sex offender registration. Testimony was presented that even if appellant were homeless he was still required to change his address to indicate that he was transient. Further, overwhelming

¹⁰See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (holding that tactical decisions by counsel are virtually unchallengeable absent extraordinary circumstances).

evidence was presented that appellant moved from his registered address, never filed a change of address and during the time in question repeatedly identified his mother-in-law's address as his own. Accordingly, we conclude the district court did not err in denying this claim.

Appellant also claimed he received ineffective assistance of appellate counsel. 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.¹¹ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹² This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹³

First, appellant claimed that his appellate counsel was ineffective for failing to argue his Apprendi¹⁴ claim better on direct appeal. Specifically, appellant asserted that his appellate counsel should have argued that his habitual criminal adjudication violated Apprendi because the district court considered factors other than his prior convictions when adjudicating him a habitual criminal and deciding his sentence.¹⁵

¹¹Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (citing Strickland, 466 U.S. 668).

¹²Jones, 463 U.S. 745, 751 (1983).

¹³Ford, 105 Nev. at 853, 784 P.2d at 953.

¹⁴Apprendi v. New Jersey, 530 U.S. 466 (2000).

¹⁵We note that appellate counsel raised a similar claim on direct appeal but did not cite Apprendi as authority for the claim.

Appellant failed to demonstrate that he was prejudiced by his counsel's actions. On direct appeal, this court granted a limited rehearing, vacated his sentence and remanded the matter for resentencing.¹⁶ Appellant is not serving a sentence based upon the first sentencing hearing and therefore, appellant cannot demonstrate that he was prejudiced. Accordingly, we conclude the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to "federalize" the claims raised on direct appeal. Appellant failed to demonstrate that his counsel was deficient. The record reveals that appellate counsel raised all but one of appellant's direct appeal claims asserting a violation of state and federal law. The one claim that appellate counsel did not "federalize" challenged appellant's habitual criminal adjudication on the basis that the district court improperly considered factors other than appellant's prior convictions when adjudicating him a habitual criminal. Because appellate counsel was successful on rehearing at having appellant's sentence vacated, appellant failed to demonstrate that he was prejudiced by his counsel's failure to "federalize" this claim. Accordingly, we conclude the district court did not err in denying this claim.

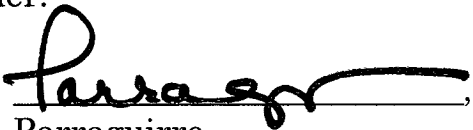
Finally, upon reviewing this appeal we note that the amended judgment of conviction contains a clerical error. Specifically, although appellant was adjudicated as a habitual criminal, the judgment of conviction does not reference the habitual criminal statute under which

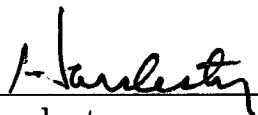
¹⁶Santana v. State, Docket No. 40880 (Order Granting Limited Rehearing, May 11, 2004).


appellant was sentenced.¹⁷ Accordingly, in order to correct the clerical error, the district court shall have 30 days from issuance of the remittitur to enter a second amended judgment of conviction which states that appellant was adjudicated as a habitual criminal and references NRS 207.010(1)(b)(2).¹⁸

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.¹⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED and DIRECT the district court to enter a second amended judgment of conviction consistent with this order.²⁰


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

¹⁷See NRS 176.105(1)(c).

¹⁸See NRS 176.565.

¹⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²⁰We 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.

cc: Hon. Michelle Leavitt, District Judge
Vincent M. Santana
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk