

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES BARRON A/K/A FORTUNE
RUSHTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47772

FILED

APR 06 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
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; Sally L. Loehrer, Judge.

On August 30, 2004, the district court convicted appellant, pursuant to a jury verdict, of one count of conspiracy to commit robbery, one count of burglary while in possession of a firearm, and four counts of robbery with the use of a deadly weapon. The district court sentenced appellant to serve a term of 35 to 156 months in the Nevada State Prison for the conspiracy count; 35 to 156 months for the burglary count; and four terms of 35 to 156 months for the robbery counts, followed by equal and consecutive terms of 35 to 156 months for the deadly weapon enhancements. The conspiracy, burglary and first robbery counts were imposed to run consecutively, while the additional robbery counts were imposed to run concurrently to the first robbery count. This court

affirmed appellant's judgment of conviction on direct appeal.¹ The remittitur issued on March 1, 2005.

On March 2, 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 the district court declined to appoint counsel to represent appellant. Following an evidentiary hearing, the district court denied appellant's petition on September 11, 2006. This appeal followed.

Appellant filed his petition one year and one day after the remittitur issued for his direct appeal. Thus, appellant's petition was untimely filed.² Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.³ Appellant did not attempt to demonstrate good cause.

The district court denied appellant's petition on the merits and seemingly ignored the procedural bars. Under the facts in this case we conclude that appellant's petition was procedurally barred and should have been denied on that basis. We affirm the district court's denial of

¹Barron v. State, Docket No. 43787 (Order of Affirmance, February 3, 2005).

²See NRS 34.726(1).

³See id.

appellant's petition because the district court reached the correct result.⁴ Moreover, as a separate and independent ground to deny relief, we conclude the district court did not err in determining that the claims lacked merit for the reasons discussed below.

In his petition, appellant contended that his trial counsel was ineffective.⁵ 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.⁶ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁷ A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by

⁴See Milender v. Marcum, 110 Nev. 972, 879 P.2d 748 (1994) (holding that this court may affirm the district court's decision on grounds different from those relied upon by the district court).

⁵To 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).

⁶Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁷Strickland, 466 U.S. at 697.

a preponderance of the evidence.⁸ Further, the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁹

First, appellant claimed that his trial counsel was ineffective for failing to adequately review discovery. Specifically, appellant claimed that counsel failed to investigate whether appellant's co-defendants were negotiating a plea with the State and whether that would have a negative effect on appellant's trial. Appellant's claim is not supported by the record and appellant failed to demonstrate that he was prejudiced. During the evidentiary hearing, trial counsel testified that he did not start representing appellant until after appellant and his co-defendants had entered guilty pleas and appellant wanted to withdraw that plea. Appellant and trial counsel were aware of what appellant's co-defendants' plea negotiations consisted of. Furthermore, appellant failed to demonstrate that his counsel's performance, or that the negotiated sentences that his co-defendants received, in any way rendered the jury's verdict unreliable. Thus, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel failed to investigate viable defenses. Specifically, appellant claimed that counsel should have put his co-defendant, Robert Fletcher, on the stand because

⁸Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

⁹Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Fletcher had previously stated that he did not see appellant with a gun and appellant's fingerprints were not on the weapon. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Counsel testified at the evidentiary hearing that he had reviewed Fletcher's statement and had decided that his testimony would have been damaging to appellant's case and thus, decided not to call Fletcher to the stand. A counsel's strategic or tactical decisions are "virtually unchallengeable absent extraordinary circumstances."¹⁰ Appellant failed to demonstrate extraordinary circumstances, and thus, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel failed to investigate and present his alibi witness. Specifically, appellant claimed that counsel did not present Twana Rankin, who would have testified that appellant was with her during the time of the crime. Appellant failed to demonstrate that counsel's performance was deficient. Counsel testified at the evidentiary hearing that he did not present the alibi witness because the State possessed a videotape of appellant entering the crime scene which clearly presented an image of appellant's face. Additionally, counsel testified that appellant had admitted committing the crime to him, and that he could not then present false testimony stating otherwise. Thus, the district court did not err in denying this claim.

¹⁰Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000).

Fourth, appellant claimed that counsel was ineffective for failing to prevent the deadly weapon enhancement because this was not presented to the jury in violation of Apprendi v. New Jersey.¹¹ Appellant failed to demonstrate that counsel's performance was deficient. The jury determined that appellant had used a deadly weapon in the commission of a robbery, and therefore, the deadly weapon enhancement did not violate Apprendi. Thus, the district court did not err in denying this claim.

Next, appellant 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.¹² Appellate counsel is not required to raise every non-frivolous issue on appeal.¹³ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹⁴

Appellant claimed that his appellate counsel was ineffective for only presenting one erroneous argument on direct appeal. Appellant

¹¹530 U.S. 466 (2000).

¹²Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. 668).


¹³Jones v. Barnes, 463 U.S. 745, 751 (1983).

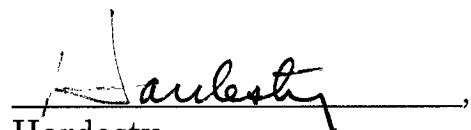
¹⁴Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

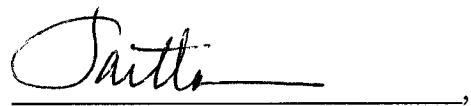
did not specify what other claims counsel should have presented.¹⁵ Thus, the district court did not err in denying this claim.

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


Parraguirre, J.


Hardesty, J.


Saitta, J.

¹⁵Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

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

¹⁷We 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.

cc: Hon. Sally L. Loehrer, District Judge
Charles Barron
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk