

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN NEWBERG,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 47808

**FILED**

APR 06 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. Rubeau*  
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; Michael A. Cherry, Judge.

On May 21, 2003, the district court convicted appellant, pursuant to a jury verdict, of one count of attempted sexual assault with a minor under the age of sixteen, two counts of use of minor in producing pornography, six counts of sexual assault of a minor under the age of sixteen, three counts of open or gross lewdness, and one count of possession of visual presentation depicting sexual conduct of a person under the age of sixteen. The district court sentenced appellant to serve concurrent and consecutive terms of life in the Nevada State Prison, with the possibility of parole. This court affirmed appellant's judgment of conviction on direct appeal.<sup>1</sup> The remittitur issued on April 12, 2005.

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<sup>1</sup>Newberg v. State, Docket No. 41475 (Order of Affirmance, March 17, 2005).

On March 3, 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 September 27, 2006, the district court denied appellant's petition. This appeal followed.

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

First, appellant claimed that his trial counsel were ineffective for failing to attack or challenge the search warrant as overbroad. Appellant appeared to be claiming that a videotape of appellant allegedly sexually assaulting unidentified women did not establish probable cause sufficient to justify a search warrant.

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<sup>2</sup>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).

<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>Strickland, 466 U.S. at 697.

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>5</sup>

"Probable cause" requires trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are seizable and will be found in the place to be searched.<sup>6</sup>

Appellant failed to specify why the search warrant was overbroad or not supported by probable cause. Police officers had received information from appellant's ex-girlfriend, Sharon Santoro, that she suspected that her former boyfriend was raping women and filming it. Officers obtained a VHS videotape which showed appellant involved in what appeared to be sexual assault on more than one woman. Further, Santoro supplied officers with the names of two women who alleged that appellant had sexually assaulted them and filmed the acts. There was probable cause to believe that Newberg was in possession of further videotapes either in his residence or his vehicle. Thus, the search warrant was not overbroad and was supported by probable cause. The warrant

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<sup>5</sup>See also Nev. Const. art. 1, § 18.

<sup>6</sup>Keese v. State, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994) (citing Carroll v. United States, 267 U.S. 132 (1925)).

specified the place to be searched and the items to be seized, and appellant failed to demonstrate that the warrant was not supported by probable cause.<sup>7</sup> Appellant failed to demonstrate that had counsel challenged the search warrant as overbroad that the challenge would have been successful or the outcome of the trial would have been different. Thus, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel were ineffective for failing to challenge the chain of custody of evidence seized. This claim is belied by the record.<sup>8</sup> Trial counsel did file a motion to suppress evidence of the mini-cassette that contained the taped assault of the minor victim based on a break of the chain of custody. The district court determined that the chain of custody had appropriately been established. Appellant failed to demonstrate that had counsel persisted with the chain of custody challenge that the challenge would have been successful or there would have been a different outcome in his trial.<sup>9</sup> Thus, the district court did not err in denying this claim.

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<sup>7</sup>U.S. Const. amend. IV; Nev. Const. art. 1, § 18; Wright v. State, 112 Nev. 391, 396-97, 916 P.2d 146, 149-50, (1996), overruled on other grounds by Lexington v. Washoe County, 114 Nev. 306, 956 P.2d 84 (1998); see also Keesee, 110 Nev. 997, 879 P.2d 63.

<sup>8</sup>Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

<sup>9</sup>To the extent that appellant claimed that a chain of custody was not established for the mini-cassette found in his vehicle, the evidence on that mini-cassette was not at issue in this trial, nor was that evidence presented to the jury. The taped assault of the minor was contained on one of the mini-cassettes found in appellant's briefcase located in his bedroom closet.

Third, appellant claimed that counsel were ineffective for failing to proficiently present arguments for the lesser offense of statutory sexual seduction. Appellant failed to demonstrate that his counsels' performance was deficient or that he was prejudiced. The jury was presented with the defense theory that the minor in this case consented to the sexual acts and was instructed on the elements of statutory sexual seduction. However, the jury was presented with the videotape of the assault and the minor's testimony. It is for the jury to determine the weight and credibility to give conflicting testimony.<sup>10</sup> Appellant failed to specify what further arguments counsel should have made such that there was a reasonable probability of a different outcome at trial. Thus, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel were ineffective for failing to object to evidence that was presented regarding appellant's sexual contact with the victim subsequent to the acts charged, or to obtain a jury instruction, a caution, or admonishment for this evidence. Appellant failed to demonstrate that his counsels' performance was deficient. Pursuant to the defense theory of statutory sexual seduction, defense counsel presented the evidence of, and elicited testimony regarding, the subsequent sexual encounter as a strategic move to demonstrate the minor's consent of the sexual acts. Counsel's strategic or tactical decisions are "virtually unchallengeable absent extraordinary

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<sup>10</sup>See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

circumstances."<sup>11</sup> Appellant failed to demonstrate any such extraordinary circumstances. Thus, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel were ineffective for failing to object to the exclusion of prior bad acts from jury consideration. Specifically, appellant appeared to claim that the jury should have been able to consider prior sexual acts he committed on the minor when she was seven-years-old to show a prior consenting relationship. Appellant failed to demonstrate that his trial counsels' performance was deficient or that he was in any way prejudiced by the exclusion of this evidence. The record indicates that the minor would have testified that appellant forced her to perform fellatio upon him when the minor was seven-years-old, and the district court denied admissibility based on the prejudicial value to appellant of the information.<sup>12</sup> Appellant failed to demonstrate that had the jury been presented with this evidence that the outcome of his trial would have been different. Thus, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel were ineffective for failing to withdraw due to a conflict of interest. Additionally, appellant argued that his counsel were ineffective for failing to withdraw after he moved for their dismissal prior to sentencing. Appellant failed to demonstrate that his trial counsels' performance was deficient. Counsel moved the district court for permission to withdraw due to a conflict of

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<sup>11</sup>Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

<sup>12</sup>See NRS 48.035.

interest that arose after appellant's trial was complete and while appellant's direct appeal was pending in this court. Appellant failed to demonstrate that there was a conflict of interest during appellant's trial. Furthermore, appellant failed to specify any persuasive reason that counsel should have withdrawn prior to sentencing. Thus, the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel were ineffective for failing to move the district court for a new trial after the jury was exposed to news reporters in the hallway prior to their deliberations. Appellant failed to demonstrate that his trial counsels' performance was deficient or that he was prejudiced. Appellant previously submitted a similar claim to this court in his direct appeal. On the fifth day of appellant's trial, a juror came forward admitting that she had been exposed to extrinsic evidence.<sup>13</sup> The juror was questioned by both sides, and the district court, confident that the juror could perform her duties aptly, denied appellant's challenge for her removal. On direct appeal, this court held that, in light of all the circumstances, the brief exposure to extrinsic evidence would not have affected the hypothetical juror or the jury's verdict, and the district court did not err in denying the challenge to replace the juror.<sup>14</sup> Unlike that claim, in this claim appellant did not specify what the jury allegedly heard that would have influenced their deliberations or that had counsel moved for a new trial, the motion would

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<sup>13</sup>The juror admitted that she had seen the words "serial rapist" on the bottom of a television screen before the television could be shut off.

<sup>14</sup>Newberg v. State, Docket No. 41475 (Order of Affirmance, March 17, 2005).

have been successful, especially given that the district court had just previously found no prejudice where the exposure to extrinsic evidence was specifically particularized. Thus, the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel were ineffective for failing to challenge the admission of edited, taped telephone conversations that appellant made to relatives while he was in jail awaiting his preliminary hearing and trial. Additionally, appellant claimed that counsel did not prepare a defense once the tapes were admitted. Appellant failed to demonstrate that his trial counsels' performance was deficient or that he was prejudiced. Counsel argued in the district court that the taped phone calls should be suppressed because the State presented them in an untimely fashion pursuant to NRS 174.285. However, the district court found that the evidence was not presented in bad faith and allowed extra time for defense counsel to examine the taped phone calls. Appellant failed to demonstrate that had counsel persisted in objecting to the admission of the tapes, the tapes would not have been admitted. Furthermore, appellant failed to demonstrate what counsel should have presented once the tapes were admitted that would have resulted in a different outcome in his trial. Thus, the district court did not err in denying this claim.

Ninth, appellant claimed that his trial counsel were ineffective for failing to object to prosecutors "testifying" to multiple sex acts during closing argument. Specifically, appellant appeared to claim that the State was allowed to influence the jury to reach a verdict of guilty for multiple counts of sexual assault when there was no evidence presented demonstrating such. Because this court already determined on direct



appeal that the State properly explained why the "duration of the breaks in the sexual conduct justified the imposition of separate counts" and that the jury was properly instructed that brief interruptions of sexual assault would not support multiple charges,<sup>15</sup> appellant necessarily failed to demonstrate prejudice. Thus, the district court did not err in denying this claim.

Tenth, appellant claimed that his trial counsel were ineffective for failing to object to the convictions for use of a minor in producing pornography and possession of visual presentation depicting sexual conduct of a person under the age of sixteen as a violation of double jeopardy. Specifically, appellant claimed that these convictions were in violation of double jeopardy because in order to produce the pornography, appellant had to possess the pornography, and thus, the possession counts are lesser included offenses of producing pornography. Appellant failed to demonstrate that his counsels' performance was deficient or that he was prejudiced. This court has held that the crime of possession of child pornography is not a lesser-included offense to the production of child pornography.<sup>16</sup> Appellant's convictions were therefore not in violation of double jeopardy, and appellant failed to demonstrate that had counsel objected the challenge would have been successful or the outcome of his trial would have been different. Thus, the district court did not err in denying this claim.

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<sup>15</sup>Id.

<sup>16</sup>Wilson v. State 121 Nev. 345, 359, 114 P.3d 285, 295 (2005).

Eleventh, appellant claimed that his trial counsel were ineffective for failing to attack police and prosecutorial coaching, tampering with, and coercion of key witness's testimony. Additionally, appellant claimed that counsel were ineffective for their failure to investigate. Appellant presented only bare and naked claims for relief that were unsupported by any specific factual allegations.<sup>17</sup> Thus, the district court did not err in denying these claims.

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.<sup>18</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>19</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>20</sup>

First, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred in denying appellant's motion to represent himself prior to sentencing. Appellant failed to demonstrate that his appellate counsels' failure to raise this

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<sup>17</sup>Hargrove, 100 Nev. at 502, 686 P.2d at 225.

<sup>18</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. 668).

<sup>19</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>20</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

claim prejudiced him. A trial court may deny a request for self-representation that is untimely, equivocal, made solely for purpose of delay, or if the defendant abuses the right by disrupting the judicial process.<sup>21</sup> Appellant failed to demonstrate that he unequivocally requested self-representation. Therefore, the district court did not err in denying appellant's request to represent himself. Thus, appellant failed to demonstrate that this issue had a reasonable probability of success on appeal, and the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred in denying the suppression of the mini-cassettes found in appellant's briefcase. Appellant failed to demonstrate that appellate counsels' performance was deficient or that he was prejudiced. As discussed above, the search warrant was not overly broad and was supported by probable cause. Testimony from police officers at the scene of the search established the chain of custody of the tapes recovered from appellant's briefcase. Thus, appellant failed to demonstrate that this issue had a reasonable probability of success on appeal and therefore, the district court did not err in denying this claim.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that (1) the district court erred by denying his motion for a new trial based on the jury's exposure to the news media prior to its deliberation; (2) that the admission of testimony regarding subsequent sexual acts were prejudicial; (3) that his conviction for possession of child pornography was a lesser-included offense to the

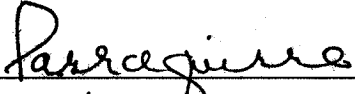
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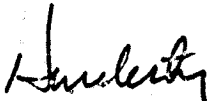
<sup>21</sup>Tanksley v. State, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1997).

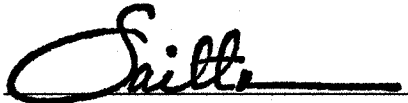
production of child pornography convictions and thus violated double jeopardy. As discussed above, these issues had no merit, and therefore, appellant failed to demonstrate that these issues had a reasonable probability of success on appeal. Thus, the district court did not err in denying these claims.

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.<sup>22</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Eighth Judicial District Court, Department Seventeen  
Steven Lee Newberg  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>22</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).