


IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES ANTHONY DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47812

FILED

JUL 27 2007

JANEITE M. BLOOM
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

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; Nancy M. Saitta, Judge.

On April 27, 2004, the district court convicted appellant, pursuant to a guilty plea, of one count of first degree murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole. Appellant voluntarily dismissed his direct appeal in this court.¹ On May 11, 2005, an amended judgment of conviction was entered providing appellant with a total of one hundred and thirty-seven days of credit for time served.

On January 21, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹Davis v. State, Docket No. 43345 (Order Dismissing Appeal and Removing Counsel of Record, December 16, 2004).

district court appointed counsel to represent appellant. Post-conviction counsel did not file any written documents. The State filed an opposition to the majority of appellant's claims, but conceded that an evidentiary hearing was necessary on appellant's claim that his direct appeal was dismissed without his consent. On August 18, 2006, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³ A petitioner must prove the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence, and the district court's factual findings

²Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

³Strickland v. Washington, 466 U.S. 668, 697 (1984).

regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁴

First, appellant claimed that his trial counsel was ineffective for failing to investigate the facts of the crime and present expert testimony. Appellant claimed that an investigation would have revealed that the victim was killed by someone other than appellant when appellant was away from the residence. Appellant claimed that an investigation would have established that the three kicks inflicted by appellant did not contribute to her death and that there was not any resistance marks on her body. Appellant believed that an expert should have been called to establish how many times the victim needed to have been struck in the abdomen to cause her injuries. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's investigation claims were based upon speculation and not supported by any evidence during the evidentiary hearing. Trial counsel testified at the evidentiary hearing about the investigation that he had performed in the case, and he testified that the investigation into the areas suggested by appellant was detrimental to

⁴Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

appellant.⁵ The record reveals that the cause of the victim's death was hemoperitoneum due to blunt abdominal trauma. Appellant admitted to the police that he struck the victim in the abdomen. A witness to appellant's striking of the victim testified at the preliminary hearing that the victim did not resist when appellant struck her. Appellant failed to demonstrate that further investigation would have led to a different outcome in the instant case. Therefore, 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 present mitigating factors at sentencing that would have demonstrated that he was guilty of the lesser crime of manslaughter. Appellant appeared to claim that the fact that the victim herself did not call the police and the fact that appellant's new girlfriend called the police were significant facts in assessing his culpability. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant pleaded guilty to first degree murder, and thus, any arguments about the lesser crime of manslaughter would not have changed the outcome at the sentencing hearing. Therefore, we conclude that the district court did not err in denying this claim.

⁵Defendant's exhibits A and B at the evidentiary hearing set forth the areas of investigation pursued by the defense.

Third, appellant claimed that his trial counsel was ineffective for failing to return a copy of the presentence investigation report to him. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had the presentence investigation report been returned to him, and thus, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to investigate an allegation of witness tampering. Appellant claimed that the State paid a witness to leave the jurisdiction. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant provided no proof in support of this claim. Further, appellant failed to identify the witness and what information the witness would have been able to provide to the defense such that there was a reasonable probability of a different outcome. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, at the evidentiary hearing, appellant's post-conviction counsel claimed that trial counsel was ineffective for failing to review appellant's mental health records during the course of his representation. Appellant's post-conviction counsel appeared to suggest that these records would have supported an insanity defense and a claim that appellant was incompetent to enter a guilty plea. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified that he was aware that there was some history of

mental instability and commitment to a facility, but that he did not pursue this as he learned of some potentially damaging information regarding a sexual molestation involving appellant's sister and because appellant's invocation of a speedy trial impacted a deeper investigation. Trial counsel further testified at the evidentiary hearing that he did not believe that an insanity defense was viable in the instant case. Trial counsel testified that he had absolutely no doubt as to appellant's competency to participate in the proceedings. Appellant failed to demonstrate that there was a viable insanity defense ignored by trial counsel as he failed provide any facts or demonstrate that he was in a delusional state at the time of the crime and that he did not know or understand the nature and capacity of his act or appreciate the wrongfulness of his act.⁶ Appellant further failed to demonstrate that he was incompetent to proceed to trial.⁷ A review of transcript of the plea

⁶See Finger v. State, 117 Nev. 548, 27 P.3d 66 (2001) (setting forth the M'Naghten standard for legal insanity—a defendant must be in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act).

⁷See Melchor-Gloria v. State, 99 Nev. 174, 660 P.2d 113 (1983) (holding that the test for competency is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the proceedings against him); see also Dusky v. United States, 362 U.S. 402 (1960).

canvass reveals that appellant answered all questions appropriately. The district court reviewed appellant's mental health records from his institutionalization when he was teenager and concluded that the records did not contain any information that would have altered the outcome of the proceedings. Substantial evidence supports the conclusions of the district court, and thus, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that 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.⁸ Appellate counsel is not required to raise every non-frivolous issue on appeal.⁹ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹⁰

First, appellant claimed that his appellate counsel moved to dismiss the appeal without appellant's consent. Appellant claimed that

⁸Kirksey, 112 Nev. at 998, 923 P.2d at 1107, 1114.

⁹Jones v. Barnes, 463 U.S. 745, 751 (1983).

¹⁰Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

his appellate counsel dismissed the appeal in retaliation for appellant's termination of appellate counsel's services. Appellant claimed that appellate counsel should have allowed him to represent himself on direct appeal. Appellant failed to demonstrate that appellate counsel's performance was deficient or that he was prejudiced. Appellate counsel testified that he received a letter from appellant requesting a withdrawal of the appeal. Appellant specifically indicated in the letter that he wanted to do his time and not risk spending the rest of his life in prison if he were to be successful on appeal in attacking the validity of his guilty plea and receive a new trial.¹¹ Further, appellant had no constitutionally-protected right to represent himself on direct appeal.¹² Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for not allowing appellant to participate in his own defense and because appellate counsel refused to raise a claim of actual innocence. Appellant failed to demonstrate that his appellate counsel's performance

¹¹Appellant testified that he sent the letter only to have appellate counsel remove himself from appellant's appeal. However, the contents of the letter do not indicate that is the purpose of the letter, and appellate counsel was not deficient in taking the letter at face value and not discerning any hidden meaning as testified to by appellant.

¹²See Martinez v. Court of Appeal of California, 528 U.S. 152, 163 (2000); Blandino v. State, 112 Nev. 352, 354, 914 P. 2d 624, 626 (1996).

was deficient or that he was prejudiced. Appellant failed to set forth any issues that would have had a reasonable probability of success on appeal in light of appellant's decision to enter a guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that his guilty plea was unknowingly and involuntarily entered. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and voluntarily.¹³ Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.¹⁴ In determining the validity of a guilty plea, this court looks to the totality of the circumstances.¹⁵

Appellant claimed that he was forced into entering a guilty plea and that he had not read the guilty plea agreement. Appellant further claimed that he did not sign the guilty plea agreement. Appellant failed to carry his burden of demonstrating that his plea was invalid. Appellant affirmatively acknowledged during the plea canvass that he was not forced or threatened into entering a guilty plea in the instant case.

¹³Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

¹⁴Hubbard, 110 Nev. at 675, 877 P.2d at 521.

¹⁵State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

Appellant further affirmatively acknowledged that he had read the guilty plea agreement, "Every single page. Every single line." The record contains a written guilty plea agreement bearing the signature of appellant, the district attorney, and defense counsel. During the plea canvass, appellant affirmatively acknowledged that he signed the guilty plea agreement. Appellant's trial counsel testified at the evidentiary hearing that appellant signed the guilty plea agreement in counsel's presence. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed that he was not provided with Miranda¹⁶ warnings and that his apartment was subject to an illegal search. These claims fell outside the narrow scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea.¹⁷ Moreover, these claims were waived by entry of the guilty plea.¹⁸ Therefore, we conclude that the district court did not err in denying these claims.

¹⁶Miranda v. Arizona, 384 U.S. 436 (1966).

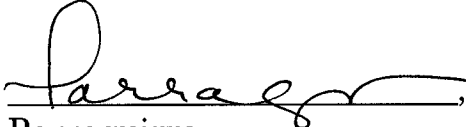
¹⁷See NRS 34.810(1)(a).

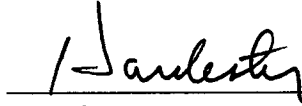
¹⁸See Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987); Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975).

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.


_____, C.J.
Maupin


_____, J.
Parraguirre


_____, J.
Hardesty

cc: Eighth Judicial District Court Dept. 18, District Judge
James Anthony Davis
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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