


IN THE SUPREME COURT OF THE STATE OF NEVADA

LAWRENCE GREEN A/K/A  
LAWRENCE DEAN GREEN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 47857

**FILED**

APR 23 2007

JANETTE 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 appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

On August 13, 2004, the district court convicted appellant, pursuant to a jury verdict, of two counts of burglary and two counts of grand larceny. Pursuant to NRS 207.010(1)(b), the district court sentenced appellant as a habitual criminal to serve four concurrent terms of life in the Nevada State Prison with the possibility of parole after ten years has been served. This court affirmed appellant's sentence and judgment of conviction on direct appeal.<sup>1</sup> The remittitur issued on March 15, 2006.

On April 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

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<sup>1</sup>Green v. State, Docket No. 43721 (Order of Affirmance, February 16, 2006).

district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On July 13, 2006, the district court denied appellant's petition. This appeal followed.

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

First, appellant claimed that his trial counsel was ineffective for failing to investigate and prepare for trial. Specifically, appellant claimed that his counsel failed to investigate and discover that appellant did not receive earlier trespass citations from the Albertson's grocery store chain as alleged by the State. This court previously held in appellant's direct appeal that the introduction of the previous trespasses was at most harmless error and this court specifically noted there was overwhelming evidence of appellant's guilt.<sup>4</sup> Accordingly, appellant necessarily failed to demonstrate that he was prejudiced by counsel's performance. Thus, the district court did not err in denying this claim.

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

<sup>3</sup>Strickland, 466 U.S. at 697.

<sup>4</sup>Green v. State, Docket No. 43721 (Order of Affirmance, February 16, 2006).

Second, appellant claimed that his trial counsel was ineffective for failing to review video surveillance tapes from the grocery stores. Appellant failed to demonstrate that counsel's performance was deficient. The State explained to the court that there were no surveillance tapes available to review, and no surveillance tapes were introduced at trial. Joseph Rogers, security personnel for Albertson's, testified that Albertson's did not have cameras set-up to watch shoplifters. Thus, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to secure discovery and preliminary hearing transcripts to enable him to conduct proper cross-examination, specifically regarding the trespass citations and the surveillance videos. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced by counsel's conduct. Counsel cross-examined witnesses regarding the trespasses and the surveillance video tapes. Appellant did not specify what counsel should have done different during cross-examination that would have resulted in a different outcome at trial. As discussed above, there were no video tapes to secure, and appellant was not prejudiced by introduction of the prior trespasses. Thus, the district court did not err in denying this claim.

Fourth, appellant claimed that counsel was ineffective for failing to consult with appellant until the eve of trial. Appellant failed to demonstrate that he was prejudiced by counsel's performance, and that if counsel would have consulted more with appellant that the outcome of the trial would have been different. Thus, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to request that witnesses be excluded from the courtroom, pursuant to NRS 50.155. Specifically, appellant claimed that counsel should have requested that Officers Alley and Goodwin be excluded prior to their testimony. Appellant failed to demonstrate that he was prejudiced by counsel's conduct. We have previously held that prejudice is presumed when a violation of NRS 50.155 occurs unless the record demonstrates a lack of prejudice.<sup>5</sup> Officer Goodwin did not testify, so he would not have been required to be excluded under NRS 50.155. Officer Alley testified as to a statement that appellant made. Even had Officer Alley not testified, the State presented sufficient evidence of appellant's guilt. Thus, appellant was not prejudiced by counsel's failure to request the exclusion of witnesses, and the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to make an opening statement. Appellant failed to demonstrate that counsel's failure to give an opening statement prejudiced his defense. Trial counsel argued against the adequacy of the State's evidence through cross-examination of the State's witnesses and an ample closing argument. Tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances.<sup>6</sup> Thus, the district court did not err in denying this claim.

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<sup>5</sup>Evans v. State, 112 Nev. 1172, 1188, 926 P.2d 265, 276 (1996).

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

Seventh, appellant claimed that his trial counsel was ineffective for failing to object or request a mistrial based upon witnesses references to prior bad acts, and specifically, Albertson's previous trespass citations of appellant. As discussed above, this court previously held that appellant was not prejudiced by the introduction of appellant's trespass citations. 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.<sup>7</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>8</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>9</sup>

First, appellant claimed that appellate counsel was ineffective for failing to argue that the district court erred in denying his motion to sever counts. Appellant failed to demonstrate that this issue would have had a reasonable likelihood of success. NRS 173.115 permits joinder of criminal counts if the counts are based on the same transaction or constitute part of a common scheme or plan. If "evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be

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<sup>7</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. 668).

<sup>8</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>9</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

severed."<sup>10</sup> Prejudice created by a failure to sever is "more likely to warrant reversal in a close case because it may 'prevent the jury from making a reliable judgment about guilty or innocence.'"<sup>11</sup>

Appellant's two related cases were part of a common scheme or plan. Appellant entered the Albertson's grocery store twice within five days, filled his cart with expensive meat products and other items, placed the merchandise in Albertson's plastic bags, attempted to take the cart of merchandise out of the store, and stated that he stole the merchandise because he was disabled and was attempting to "make a living." Further, appellant's case was not a close call. Thus, 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 his pretrial writ of habeas corpus. In his pretrial petition, appellant argued that he was illegally imprisoned because the State failed to present any credible evidence at the preliminary hearing that the grocery items exceeded \$250. Appellant failed to demonstrate that this issue had a reasonable chance of success on appeal. The finding of probable cause at a preliminary hearing may be based on slight or even marginal evidence.<sup>12</sup> Witnesses testified at the preliminary hearing of the value of the

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<sup>10</sup>Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1343 (1989) (citing Robinson v. United States, 459 F.2d 847, 855 (D.C.Cir. 1972)).

<sup>11</sup>Tabish v. State, 119 Nev. 293, 305, 72 P.3d 584, 591-92 (2003) (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)).

<sup>12</sup>Sheriff v. Badillo, 95 Nev. 593, 594, 600 P.2d 221, 222 (1979).

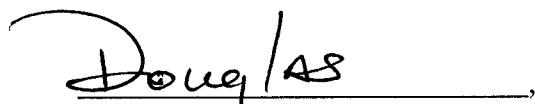
merchandise for each incident and they exceeded \$300. Thus, the district court did not err in denying this claim.

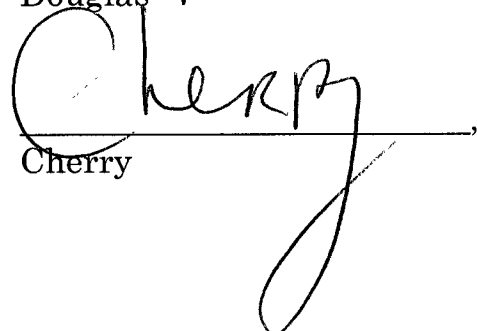
Last, appellant claimed that the district court abused its discretion in denying appellant's pretrial petition for a writ of habeas corpus, and that the district court erred in allowing the security guards to present records because it was not established that they were custodians of records pursuant to NRS 51.135. These claims are waived; they should have been raised on direct appeal and appellant did not demonstrate good cause for his failure to do so.<sup>13</sup> 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>14</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Cherry

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<sup>13</sup>See NRS 34.810(1)(b).

<sup>14</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Valerie Adair, District Judge  
Lawrence Green  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk