

IN THE SUPREME COURT OF THE STATE OF NEVADA


TADARYL WILLIAMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47965

FILED

MAR 08 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

On August 27, 2003, the district court convicted appellant, pursuant to a jury verdict, of three counts of battery constituting domestic violence (felony), one count of battery with the use of a deadly weapon and one count of assault with a deadly weapon. The district court sentenced appellant to serve multiple consecutive and concurrent terms totaling 48 to 240 months in the Nevada State Prison. This court affirmed the judgment of conviction and sentence on direct appeal.¹ The remittitur issued on November 30, 2004.

On May 22, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹Williams v. State, Docket No. 41944 (Order of Affirmance, November 4, 2004).

State moved to dismiss the petition as untimely. 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 August 25, 2006, the district court dismissed appellant's petition. This appeal followed.

Appellant filed his petition approximately one and one-half years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.² Appellant's petition was procedurally barred absent a demonstration of good cause for the delay.³ A petitioner can demonstrate good cause exists if he demonstrates that the delay was not the fault of the petitioner, and dismissal of the petition as untimely will unduly prejudice the petitioner.⁴

In an attempt to demonstrate good cause for the delay, appellant argued that his counsel failed to inform him that this court affirmed his conviction on direct appeal. Appellant asserted that he only found out about the order of affirmance on April 10, 2006, after he inquired about the status of his appeal from the clerk of this court. Appellant argued that his appellate counsel's failure to timely comply with the rules of this court during his direct appeal supports his claim that his appellate counsel refused all contact with him and failed to inform him of the outcome of his appeal. Appellant attached a copy of this court's docket

²See NRS 34.726(1).

³See id.

⁴See id.

sheet for his direct appeal to his petition in support of his claim. The docket sheet was dated April 7, 2006.

Even assuming that appellant established that the delay in filing his petition was not his fault, appellant failed to demonstrate that he would be unduly prejudiced by the dismissal of his petition because appellant's claims lacked merit as demonstrated below. Accordingly, we conclude that the district court did not err in dismissing appellant's petition as untimely.

In his petition, appellant claimed that he received ineffective assistance of appellate counsel.⁵ 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.⁶ Appellate counsel is not required to raise every non-frivolous issue on appeal.⁷ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.⁸

⁵To the extent that appellant raised any of these claims independently from his ineffective assistance of appellate counsel claims, we conclude that they are waived, and appellant failed to demonstrate good cause for failing to raise the claims earlier. See NRS 34.810(1)(b).

⁶Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing to Strickland v. Washington, 466 U.S. 668 (1984)).

⁷Jones v. Barnes, 463 U.S. 745, 751 (1983).

⁸Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, appellant claimed that his appellate counsel was ineffective for failing to challenge the district court's denial of his request to have the jury instructed on his defense theory of accident for the charge of battery with the use of a deadly weapon. Appellant argued that, because evidence was presented that the stabbing of the victim was accidental rather than intentional, the jury should have been instructed regarding accident.

Appellant failed to demonstrate that his appellate counsel was deficient or that he was prejudiced. "[A] defendant has a right to have the jury instructed on his theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be."⁹ Under NRS 175.161(3), either party may present a proposed instruction and request that it be given. If the court thinks the instruction is correct and pertinent, it must be given.¹⁰ Here, the record reveals that contrary to appellant's assertion, appellant neither presented any proposed jury instructions nor requested that any additional jury instructions be given. Appellant failed to demonstrate that the district court had a duty to instruct the jury regarding accident absent a request from appellant to do so. Further, the jury was properly instructed that battery with the use of a deadly weapon was any willful and unlawful use of force or violence upon the person of another with the use of a deadly weapon.¹¹ Appellant

⁹McCraney v. State, 110 Nev. 250, 254, 871 P.2d 922, 925 (1994).

¹⁰NRS 175.161(3).

¹¹See NRS 200.481(1)(a).

failed to demonstrate that this claim had a reasonable probability of success on appeal. Therefore, we conclude the district court did not err by dismissing this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to raise a claim regarding bias at the sentencing hearing that resulted from an error contained in the presentence investigation report (PSI). Specifically, appellant claimed that the PSI incorrectly indicated that he had a prior conviction for homicide. Appellant alleged that when he informed the judge of the error, the judge "made a bias [sic] comment regarding this matter."

Appellant failed to demonstrate that his appellate counsel was deficient or that he was prejudiced. The record reveals that the PSI incorrectly stated that appellant had a prior conviction for homicide. Appellant, however, failed to demonstrate that his sentence was based on the error in the PSI or the error biased him. Rather, it appears that the district court based its sentencing determination on appellant's history of violence. At the sentencing hearing, appellant informed the district court that he was only convicted of attempted murder and the State confirmed appellant's representation. When imposing sentence, the judge indicated that had this been appellant's only incident she might have sentenced appellant differently, but the judge was concerned with appellant's history of violence where appellant used a weapon. The judge went on to say: "And, you know, you made a distinction that you weren't convicted of a homicide, and that just appears to be fortunate in that no one was actually killed." The judge concluded by saying that appellant's prior incident was "an extreme act of violence, using a weapon," and rather than learning

from his mistake in that situation, upon discharge from that sentence he entered into the instant relationship and repeated his pattern of violence with this victim. Appellant never asserted that his prior conviction did not include the use of a weapon or was not violent in nature. Appellant failed to demonstrate that the district court's remark about his prior conviction established bias by the district court. Because appellant failed to demonstrate that he was biased by inclusion of the error in the PSI, we conclude that the error was harmless. Thus, appellant failed to demonstrate that this claim had a reasonable probability of success on appeal, and we conclude the district court did not err in dismissing this claim.

Third, appellant claimed that his appellate counsel was ineffective for refusing to speak to appellant about the grounds appellant wanted raised in his direct appeal. It appears that the additional claims appellant wished to have raised in his direct appeal were his claims regarding the denial of a jury instruction and the error in the PSI. As noted above, these claims did not have a reasonable probability of success on appeal and therefore appellant failed to demonstrate that his counsel was deficient for failing to discuss these claims with him. Accordingly, we conclude the district court did not err in dismissing this claim.

Fourth, appellant claimed that his appellate counsel was ineffective because counsel was threatened with sanctions by this court for counsel's conduct in his direct appeal. Although appellate counsel was cautioned by this court during the direct appeal that sanctions could be imposed if appellate counsel did not comply with the rules of this court, appellant failed to demonstrate that this resulted in poor representation

by counsel on direct appeal. Appellate counsel filed all documents requested by this court, and this court reviewed the appeal on its merits. Appellant failed to demonstrate that he was prejudiced by appellate counsel's conduct on appeal, and we conclude the district court did not err in dismissing this claim.

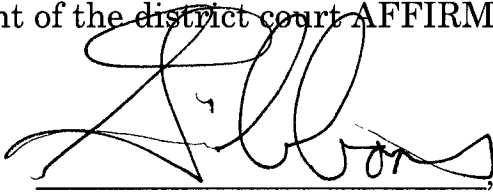
Fifth, appellant claimed that his appellate counsel was ineffective for having a conflict of interest. Appellant asserted that his appellate counsel was "furious" because counsel was cautioned with sanctions and this resulted in a conflict of interest. Appellant failed to demonstrate that cautioning appellate counsel with sanctions resulted in a conflict of interest and appellant failed to demonstrate any actual conflict of interest with his appellate counsel. Accordingly, we conclude the district court did not err in dismissing this claim.

Sixth, appellant claimed that his appellate counsel was ineffective for failing to notify him that this court affirmed his direct appeal. Because appellant failed to identify any meritorious claims that could have been raised in a timely post-conviction petition for a writ of habeas corpus, we conclude that appellant failed to demonstrate that he was prejudiced by appellate counsel's failure to notify him of the entry of the order of affirmance in his direct appeal. Accordingly, we conclude that the district court did not err in dismissing this claim.

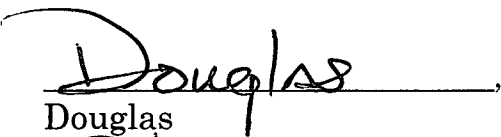
For the reasons stated above, we conclude that appellant failed to demonstrate that the dismissal of his appeal as untimely would unduly prejudice him. Accordingly, we conclude the district court did not err in dismissing appellant's petition as untimely.

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.¹² Accordingly, we

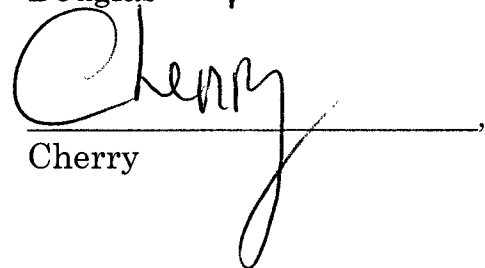
ORDER the judgment of the district court AFFIRMED.¹³



Gibbons J.



Douglas J.



Cherry J.

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

¹²See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹³We 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.