IN THE SUPREME COURT OF THE STATE OF NEVADA

RAMON J. GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48123

FILED

SEP 06 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; Michelle Leavitt, Judge.

On November 3, 2003, the district court convicted appellant Ramon Garcia, pursuant to a jury verdict, of two counts of burglary with a firearm, two counts of robbery with a deadly weapon, two counts of first-degree kidnapping with the use of a deadly weapon, conspiracy to commit burglary, one count of conspiracy to commit robbery, one count of attempted robbery with a deadly weapon, and three counts of false imprisonment with a deadly weapon. The district court sentenced Garcia to serve a minimum prison term equaling twenty-six years and a maximum prison term of four consecutive life sentences. This court reversed Garcia's convictions for false imprisonment and conspiracy to commit robbery, and affirmed his remaining convictions on direct appeal.[1]

On April 13, 2006, Garcia filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The

[1]Garcia v. State, 121 Nev. 327, 113 P.3d 836 (2005).

State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent Garcia or to conduct an evidentiary hearing. On October 25, 2006, the district court denied in part the petition. This appeal followed.

In his petition, Garcia contended that his trial counsel was ineffective.[2] 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.[3] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[4]

First, Garcia claimed that trial counsel was ineffective for failing to move to sever his trial from his brother's trial. Garcia claimed that the trials should have been severed because Garcia and his brother, Juan Garcia, looked alike, which made misidentification more likely. Garcia also claimed that the joint trial affected his decision to testify,

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[2]To the extent that Garcia 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 Garcia did not demonstrate good cause for his failure to do so. See NRS 34.810(1)(b).

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

[4]Strickland, 466 U.S. at 697.

resulting in a Bruton violation,[5] because he did not want to assist in the criminal prosecution of his brother.

Garcia failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. "A defendant is entitled to a severed trial if he presents a sufficient showing of facts demonstrating that substantial prejudice would result from a joint trial."[6] Garcia did not demonstrate the he was substantially prejudiced by the joint trial or that a joint trial was improper.[7] Despite Garcia's assertions about the potential for misidentification, there were significant differences in Garcia's and his brother's physical appearances. Further, the State's witness Fernando Lozada, who Garcia alleged exonerated him at trial, testified at trial that he was one hundred percent certain that Garcia was the man who robbed him at gunpoint. Finally, Garcia failed to show that he was prevented from testifying merely because he did not want to implicate his brother and also failed to show that a Bruton violation occurred.[8] Therefore, we conclude that the district court did not err in denying this claim.

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[5]Bruton v. United States, 391 U.S. 123 (1968).

[6]See Rowland v. State, 118 Nev. 31, 44, 39 P.3d 114, 122 (2002); NRS 174.165(1).

[7]See Tabish v. State, 119 Nev. 293, 301-09, 72 P.3d 584, 589-94 (2003); Rowland, 118 Nev. at 44-46, 39 P.3d at 122-23.

[8]In Bruton, the United States Supreme Court held that the admission of a non-testifying co-defendant's confession inculpating the other defendant in a joint trial constituted a violation of the Confrontation Clause. 391 U.S. at 135. In the petition, Garcia failed to identify the inculpatory statement or explain how his constitutional right to

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Second, Garcia claimed that his trial counsel was ineffective for failing to challenge the illegal search of the vehicle in which his brother was traveling when arrested. Garcia claimed that the firearms discovered inside the vehicle and the evidence discovered in a subsequent search of his apartment should have been excluded pursuant to the fruit of the poisonous tree doctrine. Garcia failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. The record indicates that Garcia's brother consented to a search of the vehicle. Garcia was not in the vehicle when it was stopped or searched, and Garcia did not assert an ownership interest in the vehicle. Therefore, Garcia did not have standing to challenge the search of the vehicle.[9] Accordingly, the district court did err in denying this claim.

Third, Garcia claimed that defense counsel was ineffective for failing to challenge Garcia's arrest for lack of probable cause. Garcia claimed that he was arrested based on the mere fact that he was living in an apartment with his brother. Garcia failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. The record indicates that there was probable cause to arrest Garcia.[10] In particular,

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confrontation was violated. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[9]See Scott v. State, 110 Nev. 622, 627-28, 877 P.2d 503, 507 (1994); see also Rakas v. Illinois, 439 U.S. 128 (1978).

[10]State v. McKellips, 118 Nev. 465, 472, 49 P.3d 655, 660 (2002) ("Probable cause to arrest 'exists when police have reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution to believe that [a crime] has been

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two victims identified Garcia, in a photographic lineup, as one of the perpetrators of the robbery. Several items taken during the robberies were recovered in the apartment that Garcia shared with his brother. Given this evidence, there is no indication that a challenge to the probable cause in support of the arrest would have been successful. Thus, the district court did not err in denying this claim.

Fourth, Garcia claimed that defense counsel was ineffective for failing to challenge the victim's initial pretrial identification of Garcia at a photographic line-up. Specifically, Garcia claimed that defense counsel was not present at the identification, and the State's witness Lozada did not identify Garcia as the man who robbed him. Garcia failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Counsel is not required to be present at a photographic identification and Garcia's Sixth Amendment right to counsel had not attached at that point.[11] Garcia further failed to demonstrate that a challenge to the legality of the pretrial identifications had a reasonable likelihood of success. Accordingly, the district court did not err in denying this claim.

Next, Garcia 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 resulted in

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. . . committed by the person to be arrested.'") (quoting Doleman v. State, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991)).

[11]See Barone v. State, 109 Nev. 1168, 866 P.2d 291 (1993).

prejudice such that the omitted issue would have a reasonable probability of success on appeal.[12]

Garcia claimed that appellate counsel was ineffective for failing to file a petition for rehearing challenging this court's decision in his direct appeal. In the opinion in his direct appeal, this court stated that Garcia "ordered the two victims outside the building to the back of a truck, where he held them for 15 minutes at gunpoint." (Emphasis added.) Garcia argued that appellate counsel should have argued that this court relied on the erroneous fact that the victims were moved outside the building in determining that the convictions for first-degree kidnapping were not incidental to the robbery.[13]

Garcia has failed to show that appellate counsel's performance was deficient or that he was prejudiced. In Mendoza v. State, this court held that dual convictions for first-degree kidnapping and robbery are appropriate including "where the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in an associated offense . . . .[or] where the restraint or movement of the victim substantially exceeds that required to complete

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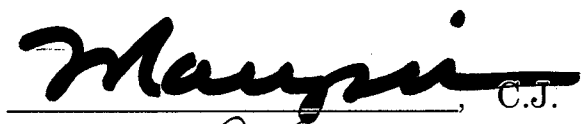
[12]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. 668).

[13]Garcia, 121 Nev. at 336, 113 P.3d at 842; see also NRS 200.310(1) ("A person who willfully seizes, confines, inveigles, entices . . . conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person . . . for the purpose of committing sexual assault, extortion or robbery upon or from the person . . . is guilty of kidnapping in the first degree which is a category A felony.").

the associated crime charged."[14] In this case, Garcia and his accomplices held the victims at gunpoint for fifteen minutes, took them into a backroom, ordered them to lie facedown, and bound them with duct tape. The movement and restraint exceeded that required to commit the robbery and stood alone with independent significance from the act of robbery itself. The fact that the victims were moved inside and not outside the building was not material and did not affect our conclusion that dual convictions for kidnapping and robbery were appropriate.[15] Accordingly, 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 Garcia is not entitled to relief and that briefing and oral argument are unwarranted.[16] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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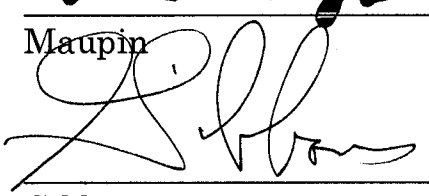

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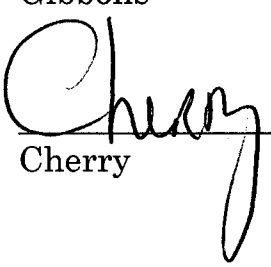
Gibbons



_____, J.
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[14]122 Nev. 267, 275-76, 130 P.3d 176, 180-81 (2006).

[15]See NRAP 40(c).

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

cc: Hon. Michelle Leavitt, District Judge
Ramon J. Garcia
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk