

IN THE SUPREME COURT OF THE STATE OF NEVADA


LAWRENCE LINDSEY AUSTIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48156

FILED

FEB 01 2008

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

This is a proper person appeal from a district court order denying appellant Lawrence Lindsey Austin's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Austin was convicted, pursuant to a jury verdict, of conspiracy to commit robbery (count I), burglary while in the possession of a firearm (count II), and robbery with the use of a deadly weapon (counts IV and VIII). The district court sentenced Austin to serve a prison term of 24-60 months for count I, a concurrent prison term of 35-156 months for count II, a concurrent prison term of 35-156 months for count IV with an equal and consecutive prison term for the use of a deadly weapon, and two consecutive prison terms of 34-156 months for count VIII. Austin was ordered to pay \$1,280 in restitution. This court affirmed Austin's conviction and sentence on direct appeal.¹

On July 11, 2006, Austin filed a timely proper person petition for a writ of habeas corpus in the district court. The State opposed the

¹Austin v. State, Docket No. 43132 (Order of Affirmance and Limited Remand to Correct the Judgment of Conviction, September 9, 2005).

petition. The district court did not conduct an evidentiary hearing, and on December 8, 2006, and October 24, 2007, entered orders denying Austin's petition. This timely appeal followed.

Austin raised several issues in his petition that were addressed by this court in his direct appeal. Specifically, Austin contended that (1) the photographic and physical lineups presented to the witnesses for identification purposes were impermissibly suggestive; (2) the district court failed to properly instruct the jury to deliberate anew after replacing a dismissed juror with an alternate; (3) the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt; and (4) several instances of prosecutorial misconduct violated his right to due process. We will not revisit Austin's arguments: the doctrine of the law of the case prevents further litigation of these issues and "cannot be avoided by a more detailed and precisely focused argument."²

Next, Austin contended that he received ineffective assistance of trial and appellate counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that there was a reasonable probability that the outcome would have been different.³ "To establish prejudice based on the deficient assistance of

²Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

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

appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal.”⁴

First, Austin contended that trial counsel was ineffective for failing to object to the pretrial identification procedures used by the State. On direct appeal, we concluded, considering the totality of the circumstances, that the identification procedures were not impermissibly suggestive,⁵ and that the witnesses’ identification of Austin was reliable.⁶ Therefore, Austin failed to demonstrate that there was the likelihood of a different result had counsel objected. Accordingly, we conclude that the district court did not err by rejecting this claim.

Second, Austin contended that trial counsel was ineffective for failing “to file any motion in regards to the [m]ultiplicitous or [d]uplicitous charges and robbery counts.” We disagree. Austin was charged by criminal information with five counts of robbery with the use of a deadly weapon. In each of the five counts, a different Mountain Hams employee, present during the commission of the offense, was listed as the victim. Austin was found guilty of two counts of robbery with the use of a deadly weapon, counts IV and VIII. In count IV, the victim was the catering director, who was ordered, at gunpoint, to open the safe; she subsequently handed Austin approximately \$1,280. In count VIII, the victim was the owner of the store, who was also threatened at gunpoint. This court has

⁴Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

⁵See Cunningham v. State, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997); see also Simmons v. United States, 390 U.S. 377, 383 (1968).

⁶See Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980); see also Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

affirmed such convictions in the past, holding that evidence of the unlawful taking of an employer's property, by use of force or fear directed at two employees, both of whom were in joint possession and control of the property taken, supports a conviction for two separate counts of robbery.⁷ As such, multiple robberies may be properly charged where, as here, there are multiple victims involved in a single event. Therefore, Austin failed to demonstrate that there was the likelihood of a different result had counsel challenged the charging document. Accordingly, we conclude that the district court did not err by rejecting this claim.⁸

Third, Austin contended that trial counsel was ineffective for failing to oppose the admission of prior bad act evidence and file a pretrial motion to suppress. Austin's counsel did object to the admission of evidence regarding a stolen credit card that linked him to the robbery. Additionally, on direct appeal, this court found that the stolen credit card

⁷See Klein v. State, 105 Nev. 880, 885, 784 P.2d 970, 973-74 (1989); see also NRS 200.380(1) (defining "robbery").

⁸See, e.g., Commonwealth v. Levia, 431 N.E.2d 928, 929-31 (Mass. 1982) (upholding multiple robbery convictions where defendant entered convenience store and forcibly obtained money from cash register operated by one employee and gas pump receipts collected by another employee); People v. Wakeford, 341 N.W.2d 68, 75 (Mich. 1983) (upholding multiple robbery convictions where defendant entered grocery store armed with sawed-off shotgun and took money belonging to store from two employees), called into doubt on other grounds by People v. Baskin, 378 N.W.2d 535 (Mich. Ct. App. 1985); Commonwealth v. Rozplochi, 561 A.2d 25, 28-30 (Pa. Super. Ct. 1989) (upholding multiple robbery convictions where defendant threatened two employees at financial institution and obtained money from safe).

evidence was relevant to prove the identity of Austin,⁹ and that in light of the overwhelming evidence of Austin's guilt, the district court's failure to conduct a Petrocelli hearing¹⁰ and give a limiting instruction did not have an injurious effect on the jury's verdict and was harmless error.¹¹ Therefore, Austin failed to demonstrate that counsel was ineffective for failing to prevent the admission of the stolen credit card evidence by filing a motion to suppress. Accordingly, we conclude that the district court did not err by rejecting this claim.

Fourth, Austin contended that trial counsel was ineffective for failing to propose an alibi instruction. Austin also claims that trial counsel was "unprepared" to question his sister, Latrica Mathis, who testified that Austin was babysitting her children at the time of the robbery. We disagree. Austin's counsel presented his theory of defense – that he was not present at the scene of the crime – through the direct examination of his sister. Three of the Mountain Hams employees, however, positively identified Austin as one of the perpetrators of the robbery. Austin failed to set forth what jury instruction should have been offered to present his alibi defense and how the instruction would have affected the outcome of the trial. Moreover, this court also concluded in

⁹See NRS 48.045(2).

¹⁰See King v. State, 116 Nev. 349, 354, 998 P.2d 1172, 1175 (2000) (citing Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766-67 (1998)).

¹¹See Rhymes v. State, 121 Nev. 17, 24, 107 P.3d 1278, 1282 (2005) (citing Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001)); see also NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

his direct appeal that there was sufficient evidence presented by the State to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.¹² Accordingly, we conclude that the district court did not err by rejecting this claim.

Fifth, Austin contended that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness. We disagree. This court has repeatedly stated that claims of ineffective assistance of counsel will not be considered on direct appeal; such claims must be presented to the district court in the first instance in a post-conviction proceeding.¹³ Therefore, Austin failed to demonstrate that appellate counsel was ineffective for failing to raise the issue. Accordingly, we conclude that the district court did not err by rejecting this claim.

Sixth, Austin contended that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence. Specifically, Austin argued that he was "actually innocent" and that counsel failed to raise this claim. Austin's contention is belied by the record. As noted above, appellate counsel did, in fact, challenge the sufficiency of the evidence presented by the State and this court rejected the argument. Therefore, Austin failed to demonstrate that appellate counsel was ineffective in this regard. Accordingly, we conclude that the district court did not err by rejecting this claim.

¹²See Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

¹³See Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001).

Seventh, Austin contended that appellate counsel was ineffective for failing to “correctly” raise an additional issue of prosecutorial misconduct, specifically, that the prosecutor improperly pointed him out to the identifying witnesses at a physical lineup after the preliminary hearing. In its order denying Austin’s petition, the district court noted that defense counsel “made such a suggestion” to the witnesses at trial and that each witness contradicted the claim. The district court rejected Austin’s claim and found that “[c]learly, the jurors were not convinced of Defendant’s position as suggested to them by his counsel.” We agree and conclude that Austin failed to demonstrate that this omitted issue would have had a reasonable probability of success had it been raised in his direct appeal. Accordingly, we conclude that the district court did not err by rejecting this claim.

Eighth, Austin contended that trial counsel was ineffective for failing to (1) conduct an adequate pretrial investigation; (2) properly cross-examine witnesses; and (3) challenge jury instructions 4-7, 9-11, and 14. Austin has not supported these claims with the requisite factual specificity,¹⁴ and therefore, failed to demonstrate that counsel’s errors were so severe that there was a reasonable probability that the outcome of his trial would have been different.¹⁵ Accordingly, we conclude that the district court did not abuse its discretion in denying the petition.

¹⁴See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

¹⁵See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

Finally, Austin also raised the following contentions: (1) the district court abused its discretion at sentencing by not considering “relevant facts” and by applying the wrong legal standard; (2) the district court erred by replacing a juror with an alternate after deliberations already began; (3) the district court engaged in judicial misconduct by “watch[ing] the prosecutor lie to her”; (4) the replaced juror made inappropriate comments to the remaining jury members in violation of his right to a fair trial; (5) the district court abused its discretion by allowing the State to present the testimony of a crime scene analyst “whose opinion was speculative,” misleading, and confusing; and (6) the accumulation of errors violated his right to a fair trial.

Austin should have raised these issues in his direct appeal. A court must dismiss a habeas petition if it presents claims that could have been presented in an earlier proceeding unless the court finds both good cause for failing to present the claims earlier and actual prejudice to the petitioner.¹⁶ This court may excuse the failure to show cause where the prejudice from a failure to consider the claim amounts to a “fundamental miscarriage of justice.”¹⁷ Austin failed to argue that any good cause existed for not raising this claim in his direct appeal, and he failed to demonstrate prejudice amounting to a fundamental miscarriage of justice.¹⁸ We therefore conclude that Austin has waived these claims.

¹⁶See NRS 34.810(1)(b)(2), (3).

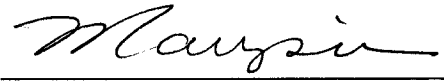
¹⁷Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

¹⁸Cf. Murray v. Carrier, 477 U.S. 478, 496 (1986) (holding that a federal habeas court may grant the writ in the absence of a showing of

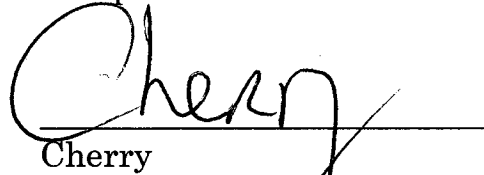
continued on next page . . .

Having reviewed the record on appeal and for the reasons set forth above, we conclude that Austin is not entitled to relief and that briefing and oral argument are unwarranted.¹⁹ Accordingly, we

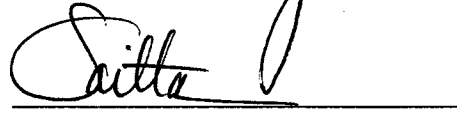
ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Cherry

 J.

Saitta

cc: Hon. Jackie Glass, District Judge
Lawrence Lindsey Austin
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

... continued

cause for the procedural default “where a constitutional violation has probably resulted in the conviction of one who is actually innocent”).

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