

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD ELRY MORRISON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48341

**FILED**

**MAY 31 2007**

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

This is a proper person appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Edward Elry Morrison was convicted, pursuant to a jury verdict, of burglary and petit larceny. The district court adjudicated Morrison a habitual criminal and sentenced him to a life term in prison with the possibility of parole for burglary and a concurrent term of five to twenty years in prison for petit larceny. This court affirmed Morrison's conviction and sentence on appeal.<sup>1</sup> Morrison filed a timely postconviction petition for a writ of habeas corpus, which the district court summarily denied. This appeal followed.

Morrison argues that the district court erred in denying numerous claims of ineffective assistance of trial counsel. To establish

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<sup>1</sup>Morrison v. State, Docket No. 44719 (Order of Affirmance, May 19, 2006).

such a claim, Morrison must demonstrate that his counsel's performance was deficient and resulted in prejudice.<sup>2</sup> Prejudice is demonstrated by showing that, but for trial counsel's errors, the result of the proceedings would have been different.<sup>3</sup> Morrison "cannot rely on conclusory claims for relief but must support any claims with specific factual allegations that if true would entitle him . . . to relief."<sup>4</sup> He is not entitled to an evidentiary hearing if the factual allegations are belied or repelled by the record.<sup>5</sup>

Morrison first contended that trial counsel Craig Jorgenson was ineffective for failing to challenge an allegedly erroneous information, which he argued demonstrated that the State engaged in prosecutorial misconduct and provided inadequate notice that he would have to defend himself against a felony charge rather than a misdemeanor petit larceny charge.<sup>6</sup> An information filed on October 7, 2004, charged Morrison with burglary and "petit larceny (Felony - NRS 205.240)." However, the information advised Morrison that the State intended to seek habitual criminal status should he be found guilty of the primary offenses of burglary and petit larceny. NRS 207.010(1)(a) provides that a person

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<sup>2</sup>See Strickland v. Washington, 466 U.S. 668, 687 (1984).

<sup>3</sup>Id.

<sup>4</sup>Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001).

<sup>5</sup>See Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004).

<sup>6</sup>See NRS 205.240(2).

convicted of petit larceny "who has previously been two times convicted . . . of any crime which under the laws of the situs of the crime or of this State would amount to a felony. . . is a habitual criminal and shall be punished for a category B felony." A habitual criminal adjudication pursuant to NRS 207.010(1)(a) elevated the petit larceny charge to a class B felony, as reflected in the information. Counsel had no reason to object to the information on the grounds Morrison asserted in his petition. Therefore, we conclude that the district court did not err in summarily denying this claim.

Morrison next argued that trial counsel was ineffective for not seeking dismissal of the information based on an alleged speedy trial violation. NRS 178.556(1) provides that a defendant should be brought to trial within 60 days after the arraignment on the indictment or information. Morrison's trial commenced 63 days after his arraignment. However, "the failure to set a trial within 60 days is not per se equatable to a denial of a speedy trial."<sup>7</sup> Here, although Morrison asserted his right to a speedy trial and the reason for the delay appears to be related to the district court's schedule,<sup>8</sup> the length of the delay was minimal and

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<sup>7</sup>Rodriguez v. State, 91 Nev. 782, 784, 542 P.2d 1065, 1065 (1975).

<sup>8</sup>The district court minutes reveal that the State and the defense were ready to proceed within 60 days of arraignment, but the district court referred Morrison's case to the overflow calendar and set the trial for December 20, 2004, 63 days after arraignment.

Morrison did not adequately explain any resulting prejudice.<sup>9</sup> Consequently, we conclude that there was no reasonable probability that the result of his trial would have been different had counsel sought a dismissal on speedy trial grounds. Therefore, the district court did not err in summarily denying this claim.

Morrison asserted that his trial counsel was ineffective for not challenging the search of Morrison's backpack. Morrison acknowledged that he consented to a reasonable search of the backpack but that the search conducted was unreasonable because the items confiscated were unrelated to the charge for which he was being investigated. To succeed on a claim of ineffective assistance of counsel based on counsel's failure to seek suppression of allegedly illegally seized evidence, Morrison was required to establish prejudice by "showing that the claim was meritorious and that there was a reasonable likelihood that the exclusion of the evidence would have changed the result of a trial."<sup>10</sup>

Here, Morrison was taken into custody on suspicion of an unrelated offense of automobile burglary. During questioning, Morrison signed a consent form and orally granted detectives permission to search his backpack. Although detectives initially conducted the search to recover items related to the automobile burglary, they discovered a plastic bag containing women's clothing with Macy's department store price tags

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<sup>9</sup>See Graves v. State, 112 Nev. 118, 128, 912 P.2d 234, 240 (1996).

<sup>10</sup>Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996).

attached and no accompanying receipt. Subsequent investigation led to Morrison's arrest and conviction for the instant offenses. Morrison testified on his own behalf at trial and made no allegation that the search conducted extended beyond that to which he consented.<sup>11</sup> Even assuming trial counsel had challenged the constitutionality of the search of his backpack, we conclude that there was no reasonable probability that the result of his trial would have been different. Therefore, we conclude that the district court did not err in summarily denying this claim.

Morrison next argued that trial counsel was ineffective for failing to secure an affidavit from Josie T. Bayudan, who represented Morrison in another criminal matter (case no. C-205109). Morrison contended that Bayudan's affidavit would have supported a claim of malicious prosecution because Bayudan was aware that the prosecutor in case no. C-205109, who also prosecuted Morrison in the instant action, was "pissed off" at Morrison as a result of his acquittal in that case. Morrison claimed that the prosecutor's animosity toward him formed the impetus for the instant prosecution and that trial counsel was aware of the prosecutor's feelings well before trial. However, even assuming the prosecutor expressed unhappiness about Morrison's prior acquittal, we conclude that there was no reasonable probability, considering the evidence against him, that the result of his trial would have been different had trial counsel challenged the prosecution as Morrison desired.

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<sup>11</sup>See Canada v. State, 104 Nev. 288, 291, 756 P.2d 552, 553 (1988).

Therefore, we conclude that the district court did not err in summarily denying this claim.

Morrison argued that counsel was ineffective for failing to object to an improper reasonable doubt instruction at the beginning of the trial.<sup>12</sup> On direct appeal, we concluded that the instruction was erroneous, but that Morrison suffered no prejudice considering the district court's subsequent proper instructions respecting reasonable doubt and the burden of proof. Here, we conclude that there was no reasonable probability that the result of his trial would have been different even if counsel had objected to the district court's initial instruction. Therefore, the district did not err in summarily denying this claim.

Morrison also contended that his trial counsel was ineffective for the following reasons: counsel did not discuss a defense strategy with Morrison; counsel did not subpoena or interview potential witnesses; counsel refused to file various pretrial motions; counsel did not request a hearing to explore the validity of Morrison's prior convictions; counsel failed to appear at sentencing without explanation;<sup>13</sup> counsel did not

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<sup>12</sup>While explaining the trial process, the district court initially advised the jury that after applying the law to the facts, it would decide "whether the State has met its burden in proving the defendant guilty or not guilty beyond a reasonable doubt."

<sup>13</sup>Gary Guymon represented Morrison at sentencing.

inform Morrison of his right to appeal or file an appeal;<sup>14</sup> counsel allowed Morrison to testify knowing that Morrison was taking psychotropic drugs; counsel made no attempt to validate Morrison's claim that he was mentally impaired; counsel refused to provide Morrison with copies of police reports; counsel failed to object to repeated badgering during the prosecutor's cross-examination of Morrison; counsel failed to object to Morrison not being allowed to view video surveillance evidence introduced at trial; counsel did not use a list of questions Morrison provided him; the prosecution attempted to introduce evidence not disclosed during discovery; counsel failed to object to the prosecutor's running narrative during the jury's viewing of a surveillance videotape; counsel failed to identify clear inconsistencies in the testimony of the State's witnesses; counsel appeared at trial tired, unkempt, distastefully dressed, disinterested and detached; and counsel improperly introduced a question regarding prior bad acts. However, these claims are either belied by the record or not adequately supported by specific factual allegations demonstrating prejudice. Therefore, we conclude that the district court did not err in summarily denying these claims.

Morrison next argued that Gary Guymon, who represented Morrison at sentencing, was ineffective for speaking harshly to him and for infuriating the district court by "stammering about for approximately

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<sup>14</sup>Howard Brooks and Robert Miller represented Morrison in his direct appeal, which this court considered. See Morrison, Docket No. 44719.

two to three minutes, resulting in Morrison receiving a lengthy prison sentence." The trial transcript shows that at the outset the district court was disturbed by Morrison's lengthy criminal history. Counsel attempted to persuade the district court not to adjudicate Morrison a habitual criminal considering his positive work history, that his prior convictions were all theft-related and non-violent, and that the thefts were motivated by Morrison's drug use. We conclude that Morrison failed to demonstrate that he was entitled to an evidentiary hearing on these matters. Further, even assuming counsel communicated harshly with Morrison, no discernable prejudice resulted from it. Consequently, we conclude that the district court did not err in summarily denying this claim.

Morrison contended that his appellate counsel Howard S. Brooks was ineffective for failing to communicate with him during his appeal. However, Brooks eventually withdrew as Morrison's counsel and Morrison did not adequately explain how he was prejudiced by Brooks' representation. Consequently, we conclude that the district court did not err in summarily denying this claim. After Brooks' withdrawal as counsel, Robert Miller was appointed to represent Morrison in his direct appeal. Morrison complained that Miller was ineffective for failing to adequately communicate with him during the appellate process and in declining to raise matters Morrison wanted included in his appeal. He did not identify in his petition below what issues he desired Miller to raise or adequately explain how his dissatisfaction with Miller prejudiced his



appeal.<sup>15</sup> Consequently, we conclude that the district court did not err in summarily denying this claim.

Morrison raised several matters appropriate for direct appeal, including: that law enforcement officers conducted an illegal search of his backpack; that two police detectives testified untruthfully at trial about statements Morrison allegedly made during questioning, which continued after he invoked his right to remain silent; that his right to a speedy trial was violated; and that the information erroneously reflected that the charge of petit larceny was a class B felony rather than a misdemeanor. These claims are procedurally barred absent a showing of good cause for the failure to raise them on direct appeal and actual prejudice.<sup>16</sup> Morrison failed to do so. Therefore, we conclude that these matters were waived,<sup>17</sup> and that the district court did not err in summarily denying them.

Morrison further argued that the district court erred in adjudicating him a habitual criminal pursuant to NRS 207.010 because it

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<sup>15</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (stating that "[t]o establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal").

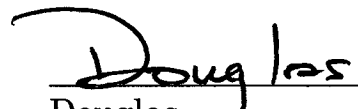
<sup>16</sup>See NRS 34.810(1)(b)(2); NRS 34.810(3).

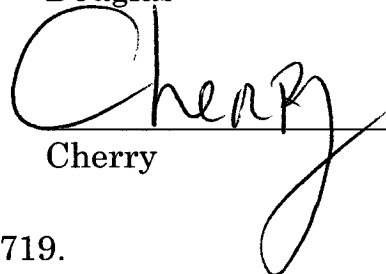
<sup>17</sup>See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (stating that "claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

failed to make the requisite "just and proper" determination. We rejected this claim in Morrison's direct appeal.<sup>18</sup> Therefore, the doctrine of the law of the case precludes further consideration of this matter.<sup>19</sup> Consequently, we conclude that the district court did not err in summarily denying this claim.

Having considered Morrison's arguments and concluded that the district court did not err in summarily denying his habeas petition, we ORDER the judgment of the district court AFFIRMED.<sup>20</sup>

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

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

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

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<sup>18</sup>Morrison, Docket No. 44719.

<sup>19</sup>Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

<sup>20</sup>We have reviewed all documents that Morrison 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 Morrison 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.

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