

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER PAUL JERNIGAN,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondent.

No. 48534

FILED

FEB 15 2008

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY J. Warada
DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant Christopher Jernigan's post-conviction petition for a writ of habeas corpus. Fifth Judicial District Court, Mineral County; John P. Davis, Judge.

On January 8, 2003, the district court convicted Jernigan, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, victim 65 years of age or older. The district court sentenced him to serve two consecutive terms of life without the possibility of parole in the Nevada State Prison. On direct appeal, this court affirmed his conviction, but reversed his sentence and remanded for a new sentencing hearing.¹ The remittitur issued on January 18, 2005.

On April 14, 2005, the district court entered a second amended judgment of conviction and sentenced Jernigan to serve two consecutive terms of life in prison with the possibility of parole after 20 years. He did not appeal from the entry of the second amended judgment of conviction.

¹Jernigan v. State, Docket No. 41081 (Order Affirming in Part, Reversing in Part and Remanding, December 21, 2004).

On August 22, 2005, Jernigan filed in the district court a proper person post-conviction petition for a writ of habeas corpus. He subsequently filed two amended post-conviction petitions and a memo of points and authorities in support of the second amended petition. The State opposed and moved to dismiss the petition.² Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Jernigan or to conduct an evidentiary hearing. On August 23, 2006, the district court denied the petition. This appeal followed.

In his petition, Jernigan claimed that he received ineffective assistance of trial counsel. 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 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, Jernigan claimed that his trial counsel was ineffective for failing to move for a change of venue. He asserted that there was substantial pre-trial publicity about his case that prejudiced him. He failed to demonstrate that his counsel was ineffective. Jernigan failed to demonstrate that a motion for a change of venue would have been

²On November 28, 2006, Jernigan filed an untimely reply to the State's opposition and motion to dismiss. See NRS 34.750(4).

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

⁴Strickland, 466 U.S. at 697.

successful. Additionally, he failed to demonstrate that the jury that heard his case was biased or prejudiced against him. Therefore, we conclude the district court did not err by denying this claim.

Second, Jernigan claimed that his trial counsel was ineffective for advising him to waive his speedy trial rights. He asserted that his counsel was going to use the time to retain experts and investigators to investigate his defense but counsel never did any of these things. He claimed that under these circumstances his counsel's advice amounted to a denial of a speedy trial. Jernigan failed to demonstrate prejudice. Even if counsel had not advised him to waive his speedy trial rights, he waived his statutory right to be brought to trial within 60 days when he filed his pretrial habeas corpus petition.⁵ Therefore, we conclude the district court did not err by denying this claim.

Third, Jernigan claimed that his trial counsel was ineffective for failing to assist him in preparing a pretrial petition for a writ of habeas corpus. He stated that because his counsel would not file the petition, he had to file it in proper person. He asserted that his petition was rejected on the basis that he did not have leave to file the petition in proper person. The record reveals that his counsel presented argument regarding the petition and the district court denied the petition on its merits. He failed to demonstrate the district court would not have denied the petition if it had been prepared by counsel. Therefore, Jernigan failed to demonstrate prejudice, and we conclude the district court did not err by denying this claim.

⁵See NRS 34.700(1)(b)(1).

Fourth, Jernigan claimed that his trial counsel was ineffective for failing to conduct a pretrial investigation into his theory of defense. He failed to demonstrate that his counsel was ineffective. His defense was that someone else killed the victim after he left the victim's room. Jernigan admitted punching the victim two times and causing the victim to bleed, but alleged that when he left the victim's room the victim was alive. Jernigan's counsel presented evidence that a palm print not matching Jernigan's was found in the bathroom area near where the victim was killed. Counsel also presented evidence that despite the significant amount of blood at the crime scene, only small amounts of the victim's blood were found on Jernigan's boots, which was consistent with Jernigan's testimony of what occurred. Jernigan failed to identify what investigation his counsel should have conducted that would have resulted in a different outcome at trial.⁶ Therefore, we conclude the district court did not err by denying this claim.

Fifth, Jernigan claimed that his trial counsel was ineffective because counsel waited until the first day of trial to subpoena key defense witnesses, did not subpoena all key witnesses, and admitted at the beginning of trial that he was not prepared to proceed. He asserted that his counsel should have compelled Christy Shane O'Neil, Dave Theissen, Jeremy Mullens, Hawk Kimble, Jamie Leonard, an unidentified person in Hawthorne, and Sam Robert Johnson to testify. Jernigan failed to demonstrate that his counsel was ineffective. He did not assert that the

⁶See *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that a petitioner is not entitled to an evidentiary hearing on bare or naked allegations unsupported by specific factual allegations).

subpoenaed witnesses failed to appear to testify at trial. He further failed to demonstrate that the testimony of individuals that were not subpoenaed would have resulted in a different outcome at trial. Finally, although his counsel stated he was not prepared to proceed on the day of trial, counsel thoroughly examined all witnesses, identified inconsistencies in witness testimony and identified weaknesses in the prosecution's case. Therefore, we conclude the district court did not err by denying this claim.

Sixth, Jernigan claimed that his trial counsel was ineffective for failing to adequately prepare to examine the witnesses. However, the record reveals that his counsel thoroughly examined the witnesses, and Jernigan failed to identify what additional preparation his counsel should have undertaken that would have resulted in a different outcome at trial.⁷ Therefore, Jernigan failed to demonstrate that his counsel was ineffective, and we conclude the district court did not err by denying this claim.

Seventh, Jernigan claimed that his trial counsel was ineffective for failing to hire an investigator to show that Kimberly Jackson and Silvia Brown gave perjured testimony. He asserted that they gave false testimony because the State dismissed 12 pending felony counts against Jackson in exchange for her testimony and Brown's husband was released from jail in exchange for Brown's testimony. Jernigan failed to demonstrate that his counsel was ineffective. The jury was informed that there were charges pending against Brown at the time of the murder and Jackson had drug charges against her. He failed to identify what additional investigation would have revealed that would have altered the

⁷See id.

outcome of the trial.⁸ Moreover, he failed to demonstrate that either Brown or Jackson gave perjured testimony. Their testimony was consistent with the testimony of other witnesses, including Jernigan's testimony. Therefore, we conclude the district court did not err by denying this claim.

Eighth, Jernigan claimed his trial counsel was ineffective for failing to file motions to suppress a statement he made to investigators, autopsy photographs, and his pants. He failed to demonstrate that his counsel was deficient or that he was prejudiced by his counsel's actions. The record reveals that his counsel verbally moved to suppress his statement to the investigators, but the district court denied the motion. He failed to demonstrate that had counsel filed a written motion to suppress the statement the motion would have been granted. Additionally, he failed to demonstrate that a motion to suppress his pants and the autopsy photographs would have been successful or that the exclusion of these items of evidence would have resulted in a different outcome at trial. Therefore, we conclude the district court did not err by denying this claim.

Ninth, Jernigan claimed that his trial counsel was ineffective for failing to challenge the blood evidence found on his boots and for failing to have his boots independently tested for blood evidence. He asserted that because initial tests demonstrated no blood was present on the boots but later tests revealed the victim's blood on the boots, the State "salted" the evidence. Jernigan failed to demonstrate that his counsel was

⁸See id.

ineffective. Evidence was presented at trial that an initial visual inspection of the boots revealed no indication of blood. The boots were later sprayed with Luminol. One boot luminesced, showing traces of presumptive blood on or near the sole of the boot. A sample was taken from the luminescent areas. Shoe polish was then removed from both boots, the boots were re-sprayed with Luminol, and both boots luminesced. Additional samples were taken from the luminescent areas. Of the samples taken for which DNA results were obtained, some matched the victim's blood and two could not be attributed to either Jernigan or the victim. Jernigan failed to demonstrate that additional testing of the boots would have produced different results. Further, because he testified that the victim wiped blood on his boots after the victim fell to the ground, he failed to demonstrate that the State planted the blood evidence on the boots. Therefore, we conclude the district court did not err by denying this claim.

Tenth, Jernigan claimed that his trial counsel was ineffective for failing to secure and provide video surveillance tapes that would have proved he never used hand signals as testified to by Dawn Ahart and would have shown that she lied about who was present when he spoke with her at the Gas Store. Jernigan failed to demonstrate that his counsel was ineffective. Ahart's testimony about who was standing near Jernigan when the conversation took place was consistent with the testimony of the other witnesses, including Jernigan's testimony. Therefore, he failed to demonstrate that Ahart lied. Moreover, he failed to demonstrate that video surveillance tapes were available, or, if available, his actions would have been shown. Additionally, he failed to demonstrate that, even if a video was available and demonstrated that he did not make any hand

signals, the result of his trial would have been different. Ahart testified that in addition to giving her a “thumb up” sign, Jernigan verbally replied “Yes” when she asked him whether he killed the victim. Therefore, we conclude the district court did not err by denying this claim.

Eleventh, Jernigan claimed that his trial counsel was ineffective for failing to hire an investigator to pursue evidence that he did not commit the crime. Specifically, he asserted his counsel should have investigated the fact that the victim was a well known drug dealer, a bloody palm print not matching Jernigan’s was found at the crime scene, and two individuals stated they heard voices coming from the victim’s room after Jernigan allegedly left the scene. He failed to demonstrate that his counsel was ineffective. Testimony was presented that the victim was a drug dealer and at least one individual heard noises and movement coming from the victim’s room during the early morning hours, after Jernigan had allegedly left the scene. Additionally, although an unidentified palm print was found in the bathroom, the print was not bloody. Jernigan failed to demonstrate that any additional investigation into these items of evidence would have resulted in a different outcome at trial. Therefore, we conclude the district court did not err by denying this claim.

Twelfth, Jernigan claimed that his trial counsel was ineffective for failing to request that the jury review the crime scene. He failed to demonstrate prejudice because he did not show that had the jury visited the crime scene the result of his trial would have been different. Therefore, we conclude the district court did not err by denying this claim.

Thirteenth, Jernigan claimed that his trial counsel was ineffective for failing to move for a mistrial because he was escorted into

the courtroom by three officers in the presence of the jury. He failed to demonstrate that his counsel was ineffective. This court has held that the positioning of a guard in close proximity to the defendant during trial did not violate the defendant's constitutional rights.⁹ Jernigan failed to demonstrate that an officer escort into the courtroom violated his constitutional rights. Therefore, we conclude the district court did not err by denying this claim.

Fourteenth, Jernigan claimed that his trial counsel was ineffective for failing to object to instances of prosecutorial misconduct. Specifically, he claimed his counsel should have objected to the introduction of bad character evidence and evidence of prior bad acts. He failed to demonstrate that his counsel was ineffective. The record reveals that his counsel objected to several instances of prosecutorial misconduct of which he complained. Although his counsel did not object to several other instances of prosecutorial misconduct, on direct appeal this court determined that these instances of prosecutorial misconduct were harmless and did not result in prejudice to him given the overwhelming evidence of his guilt. Because Jernigan cannot show that he was prejudiced by his counsel's failure to object, he failed to demonstrate that his counsel was ineffective. Therefore, we conclude the district court did not err by denying this claim.

Fifteenth, Jernigan claimed that his trial counsel was ineffective for failing to seek a Petrocelli¹⁰ hearing on numerous items of

⁹See Elvik v. State, 114 Nev. 883, 889, 965 P.2d 281, 285 (1998).

¹⁰Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

bad character evidence and prior bad act evidence presented by the State. He failed to demonstrate that his counsel was ineffective. The record reveals that counsel requested a hearing to determine whether some of the bad character evidence should be admitted, but the court denied the request. Jernigan failed to demonstrate that additional requests for a hearing would have been successful. Additionally, on direct appeal, this court held that the failure to conduct a Petrocelli hearing was harmless error, thus he cannot demonstrate that he was prejudiced. Therefore, we conclude the district court did not err by denying this claim.

Sixteenth, Jernigan claimed that his trial counsel was ineffective because counsel made improper stomping and stabbing motions during closing arguments. However, even assuming his counsel made stomping and stabbing motions, testimony was presented that the victim was stomped and stabbed and his counsel argued that someone else was responsible for stomping and stabbing the victim. Therefore, Jernigan failed to demonstrate that he was prejudiced, and we conclude the district court did not err by denying this claim.

Seventeenth, Jernigan claimed that his trial counsel was ineffective for failing to object to improper vouching and commentary in closing arguments by the prosecutor. He failed to identify what statements his counsel should have objected to, and thus failed to demonstrate that his counsel was ineffective.¹¹ Therefore, we conclude the district court did not err by denying this claim.

¹¹See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Eighteenth, Jernigan claimed that his trial counsel was ineffective for failing to request jury instructions on the lesser-included offense of second-degree murder. However, the jury was instructed on second-degree murder. Therefore, Jernigan failed to demonstrate that his counsel was ineffective, and we conclude the district court did not err by denying this claim.

Nineteenth, Jernigan claimed that his trial counsel was ineffective for failing to object to his being sentenced by a judge rather than the jury. Although he was initially improperly sentenced by the judge rather than the jury, this court acknowledged the error, reversed his sentence and remanded for a new sentencing hearing on direct appeal. Therefore, Jernigan failed to demonstrate prejudice, and we conclude the district court did not err by denying this claim.

Twentieth, Jernigan claimed that his counsel was ineffective for failing to consult with him about his appeal rights and for failing to file a notice of appeal. However, Jernigan pursued a direct appeal from his judgment of conviction and, as a result, his sentence was reversed. Therefore, Jernigan failed to demonstrate prejudice, and we conclude the district court did not err by denying this claim.

Next, Jernigan claimed that he received ineffective assistance of appellate counsel. 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.¹² Appellate counsel is not required to raise every non-frivolous issue on appeal.¹³ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹⁴

First, Jernigan claimed that his appellate counsel was ineffective for failing to argue that the prosecutors engaged in prosecutorial misconduct by introducing bad character evidence at trial. His counsel raised this claim on direct appeal. To the extent that he asserts his counsel should have raised additional claims of prosecutorial misconduct relating to the introduction of bad character evidence, he failed to demonstrate that any of those claims would have had a reasonable probability of success on appeal. Therefore, Jernigan failed to demonstrate that his counsel was ineffective, and we conclude the district court did not err by denying this claim.

Second, Jernigan claimed that his appellate counsel was ineffective for failing to argue that the district court erred by denying his pre-trial petition for a writ of habeas corpus. In his pre-trial petition, Jernigan asserted that there was no probable cause to bind him over on the charge of murder. He asserted that the only testimony presented at the preliminary hearing that placed him at the scene of the crime was the testimony of Silvia Brown, who was potentially a co-conspirator or an accomplice. The district court denied the petition finding that Brown was

¹²Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

¹³Jones v. Barnes, 463 U.S. 745, 751 (1983).

¹⁴Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

not an accomplice or a co-conspirator and her testimony was amply corroborated. We conclude the district court did not err by denying the petition¹⁵ and a claim challenging the denial of the petition would not have had a reasonable probability of success on appeal. Therefore, we conclude that appellate counsel was not ineffective and the district court did not err by denying this claim.

Third, Jernigan claimed that his appellate counsel was ineffective for failing to argue that he should have been able to raise his claims of ineffective assistance of trial counsel on direct appeal. Counsel attempted to raise claims of ineffective assistance of trial counsel on direct appeal. This court elected not to consider the claims in the context of the direct appeal because such claims are not generally appropriate for review on direct appeal.¹⁶ Therefore, Jernigan failed to demonstrate that his counsel was ineffective, and we conclude the district court did not err by denying this claim.

Fourth, Jernigan claimed that his appellate counsel was ineffective for failing to claim that cumulative error warranted the reversal of his conviction and sentence. He failed to demonstrate that his counsel was ineffective because he did not establish that this claim had a reasonable probability of success. On direct appeal, this court determined

¹⁵Sheriff v. Milton, 109 Nev. 412, 414, 851 P.2d 417, 418 (1993) (stating that “[a]bsent a showing of substantial error, this court will not overturn . . . a lower court’s [ruling regarding] a writ of habeas corpus based on insufficient evidence”); see Sheriff v. LaMotte, 100 Nev. 270, 272, 680 P.2d 333, 334 (1984).

¹⁶See Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001).

that the errors committed by the district court and by the prosecution were harmless and were not errors of constitutional dimension. Therefore, we conclude the district court did not err by denying this claim.

Jernigan also claimed that (1) the State engaged in prosecutorial misconduct by introducing bad character evidence and prior bad act evidence and the district court erred by admitting this evidence; (2) this court erred by failing to consider his ineffective assistance of counsel claims on direct appeal; and (3) the district court erred by denying his pre-trial petition for a writ of habeas corpus. His claims regarding the introduction and admission of bad character evidence and prior bad act evidence were raised on direct appeal. Jernigan is prevented by the doctrine of the law of the case from reraising these claims.¹⁷ To the extent he raised claims relating to bad character evidence and prior bad act evidence that were not previously raised on direct appeal, these claims were waived because he failed to demonstrate good cause for not raising the claims earlier and prejudice.¹⁸ The same is true for his claim relating to the denial of his pre-trial petition. Finally, he may not challenge in a post-conviction petition filed in the district court this court's decision to decline to consider his ineffective assistance of counsel claims on direct appeal. Therefore, we conclude the district court did not err by denying these claims.

Finally, Jernigan claimed that cumulative error warranted the reversal of his conviction and sentence. "The cumulative effect of errors

¹⁷See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

¹⁸See NRS 34.810(1)(b).

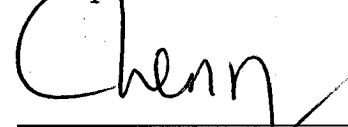
may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."¹⁹ Because Jernigan failed to demonstrate that his counsel were ineffective, he necessarily failed to establish a claim of cumulative error. Therefore, we conclude the district court did not err by denying this claim.

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.²⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.

Maupin

 _____, J.

Cherry

 _____, J.

Saitta

cc: Hon. John P. Davis, District Judge
Christopher Paul Jernigan
Attorney General Catherine Cortez Masto/Carson City
Mineral County District Attorney
Mineral County Clerk

¹⁹Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).

²⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).