

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN TOLE MOXLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48542

FILED

AUG 0 2 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY A. Alvarado
DEPUTY CLERK

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; Jackie Glass, Judge.

On August 27, 2004, the district court convicted appellant, pursuant to a jury verdict, of possession of a stolen vehicle. The district court adjudicated appellant as a habitual criminal and sentenced him to serve a prison term of life with parole eligibility after ten years. We affirmed appellant's judgment of conviction on direct appeal.¹ The remittitur issued on August 19, 2005.

On August 14, 2006, appellant filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On December 18, 2006, the district court denied appellant's petition. This appeal followed.

¹Moxley v. State, Docket No. 44002 (Order of Affirmance, June 29, 2005).

In his petition, appellant contended that 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, appellant claimed that trial counsel was ineffective for failing to object to jury instructions. Specifically, appellant claimed that counsel should have objected to (1) jury instruction No. 6: "A person who knowingly has direct physical control over a thing, at a given time, is in actual possession of it"; (2) jury instruction No. 8: "You are further instructed that knowledge by the defendant of the stolen nature of the vehicle may be inferred from all of the evidence and the reasonable inferences which may be drawn therefrom"; (3) jury instruction No. 16:

²Appellant represented himself before and during trial, until the close of the State's case. In the petition, appellant raised a claim of ineffective assistance of counsel involving the admission of preliminary hearing testimony, which occurred when appellant represented himself. We need not consider the allegation because appellant cannot claim ineffective assistance of counsel for the time that he represented himself. See Faretta v. California, 422 U.S. 806, 835 (1975).

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.

"In your deliberation you may not discuss or consider the subject of punishment, as that is a matter which lies solely with the court"; and (4) jury instruction No. 10:

You are here to determine the guilt or innocence of the Defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty.

Appellant failed to demonstrate that trial counsel was deficient for failing to challenge the jury instructions. In the petition, appellant failed to explain why the jury instructions were inadequate, and we conclude that the jury instructions correctly stated the law.⁵ Thus, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to request that the jury be instructed on the State's failure to gather or preserve evidence. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant did not show that material evidence was lost or destroyed.⁶ Although appellant claimed that fingerprint evidence would have proven that he was innocent, this was mere speculation because the fingerprint evidence was not shown to exist. Moreover, given the overwhelming evidence

⁵See Harrison v. State, 96 Nev. 347, 350, 608 P.2d 1107, 1109 (1980).

⁶See Mortensen v. State, 115 Nev. 273, 986 P.2d 1105, 1111 (1999).

presented at trial, appellant failed to demonstrate that the outcome of the trial would have been different had the jury received additional jury instructions on the State's failure to gather or preserve evidence. Thus, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to request a jury instruction on a lesser-included offense. Appellant's claim lacked adequate specificity.⁷ He failed to identify the lesser-included offense or set forth the jury instruction that should have been given to the jury. Thus, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to inform the district court that appellant's petition for a writ of mandamus was pending before this court at the time of trial. In the petition, appellant sought to have the criminal charges dismissed. However, this court denied appellant's petition.⁸ Thus, appellant failed to demonstrate that he was prejudiced, and the district court did not err in denying this claim.

Fifth, appellant claimed that he received ineffective assistance of standby counsel. Appellant waived his right to counsel and chose to represent himself. Appellant did not have a constitutional right to

⁷See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

⁸Moxley v. State, Docket No. 43830 (Order Denying Petition, September 15, 2004).

standby counsel.⁹ Because appellant had no constitutional right to standby counsel, he had no right to the effective assistance of standby counsel.¹⁰ Moreover, appellant failed to demonstrate that his right to self-representation was compromised by standby counsel's assistance during the trial.¹¹ Accordingly, the district court did not err in denying this claim.

Next, appellant claimed that 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 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

⁹See Harris v. State, 113 Nev. 799, 804, 942 P.2d 151, 155 (1997) (holding that a defendant does not have a right to advisory counsel).

¹⁰Cf. McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996) (holding that a post-conviction petitioner who has no constitutional or statutory right to the appointment of counsel has no right to the effective assistance of post-conviction counsel); see also Faretta, 422 U.S. at 835 ("When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel.").

¹¹See McKaskle v. Wiggins, 465 U.S. 168 (1984).

¹²Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996) (citing Strickland, 466 U.S. 668).

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, appellant claimed that appellate counsel was ineffective because of a conflict of interest which prevented counsel from raising meritorious arguments on direct appeal. "The Sixth Amendment guarantees a criminal defendant the right to conflict-free representation."¹⁵ In order to establish a violation of this right, a defendant must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance."¹⁶ The existence of an actual conflict of interest must be established on the specific facts of each case, but "[i]n general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties."¹⁷ Appellant failed to specify facts demonstrating the existence of an actual conflict of interest. Thus, the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel was ineffective for failing to challenge the district court's rulings denying his pretrial and post-trial motions. However, appellant failed to present a

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

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

¹⁵Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993); see also Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992).

¹⁶Cuyler v. Sullivan, 446 U.S. 335, 348 (1980); see also Clark, 108 Nev. 324, 831 P.2d 1374.

¹⁷Clark, 108 Nev. at 326, 831 P.2d at 1376 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

cogent argument in support of this claim. Further, appellant failed to show that the omitted claims would have had a reasonable likelihood of success on appeal. The district court did not err in denying appellant's pretrial motion to suppress because the search was lawful. Specifically, the police officer initially entered the premises on a welfare check, and the owner of the residence consented to a further search.¹⁸

Likewise, the district court did not err in denying appellant's post-trial motion to dismiss, which challenged the sufficiency of the evidence. Evidence presented was sufficient to support a finding that appellant committed the charged crime beyond a reasonable doubt.¹⁹ At trial, an eyewitness testified that she saw appellant drive the vehicle into a neighbor's yard and take items from the vehicle, including the license plate. When the police searched the residence, appellant was found hiding in the garage rafters. Thus, appellant has failed to demonstrate that appellate counsel was deficient for failing to challenge the district court's rulings denying his pretrial and post-trial motions. Accordingly, the district court did not err in denying this claim.

Third, appellant claimed that appellate counsel was ineffective in failing to argue that the district court erred in appointing standby

¹⁸Koza v. State, 100 Nev. 245, 252, 681 P.2d 44, 48 (1984) (recognizing that the police may enter private premises without an arrest or search warrant to preserve life or property pursuant to the emergency doctrine); State v. Taylor, 114 Nev. 1071, 1079, 968 P.2d 315, 321 (1998).

¹⁹NRS 205.275; Koza, 100 Nev. at 250, 681 P.2d at 47 (emphasis in original) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

counsel. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. As discussed above, appellant did not have a right to effective standby counsel, and appellant failed to specify how the district court erred in the appointment of standby counsel.²⁰ Thus, the district court did not err in denying this claim.

Fourth, appellant claimed that appellate counsel was ineffective for failing to argue that the district court erred in sentencing appellant as a habitual criminal. Appellant failed to demonstrate that this issue had a reasonable likelihood of success on appeal. Pursuant to NRS 207.010(1)(b), any person who has previously been convicted of three felonies may be sentenced as a habitual criminal. Appellant had four qualifying prior convictions and the district court properly exercised its discretion under NRS 207.010. Thus, the district court did not err in denying this claim.

Fifth, appellant claimed that appellate counsel was ineffective for failing to argue that the district court erred in allowing the State to subject an indigent proper person defendant to "coercive tactics" and imposing a high bail. Appellant failed to demonstrate that the State used coercive tactics, and thus he failed to demonstrate that this issue had a reasonable probability of success on appeal. Further, the district court was justified in ordering a high bail amount because it was alleged that appellant committed the present offense while out on bail for another offense. Thus, the district court did not err in denying this claim.

²⁰See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

Sixth, appellant claimed that appellate counsel was ineffective for failing to raise the issue of prosecutorial misconduct. Specifically, appellant claimed that appellate counsel should have argued that the prosecutor (1) mischarged him in order to gain advantage in another case pending against appellant, (2) negotiated in bad faith, and (3) tampered with and manufactured evidence. However, appellant failed to demonstrate that his claim of prosecutorial misconduct had a reasonable probability of success on appeal, and he failed to allege facts with sufficient specificity demonstrating that the State mischarged him, negotiated in bad faith, or tampered or manufactured evidence.²¹ Thus, the district court did not err in denying this claim.

Seventh, appellant claimed that appellate counsel was ineffective for failing to argue that the Public Defender's Office failed to investigate and serve subpoenas adequately. However, appellant failed to demonstrate that this issue had a reasonable probability of success on direct appeal. In particular, he failed to identify or describe the witness testimony that the investigator would have discovered with further investigation.²² Thus, the district court did not err in denying this claim.

Appellant further argued that the district court erred in (1) imposing unconstitutional bail despite the fact that he was indigent; (2) denying his motions to suppress and for a continuance; (3) refusing to authorize additional funding for investigative services; (4) failing to

²¹See id.

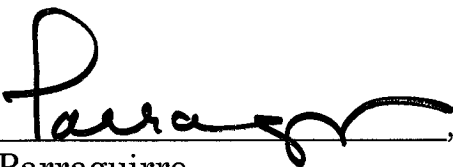
²²See id.

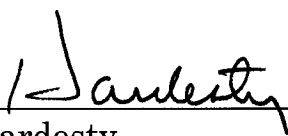
conduct evidentiary hearings on critical issues; (5) denying funds for appointment of expert witnesses and testing of evidence; (6) being judicially biased; (7) admitting preliminary hearing testimony of an unavailable witness; (8) admitting inflammatory and irrelevant evidence; (9) denying him the right to subpoena in open court; (10) failing to instruct the jury on the State's loss of, or failure to gather and preserve, evidence; (11) failing to instruct the jury on a lesser-included offense; (12) failing to instruct the jury regarding prejudicial and inflammatory statements made by the prosecution; (13) failing to instruct the jury regarding the State's tampering and manufacturing of evidence and the defense theory of the case; (14) failing to appoint conflict-free counsel; (15) being vindictive by allowing the State to file the habitual criminal notice; and (16) failing to allow adequate time for argument on motions and petitions. Additionally, appellant claimed that (17) he was deprived of the right to a speedy trial; (18) his conviction and sentence were invalid because he was unlawfully detained and the evidence was illegally seized; (19) law enforcement officers failed to gather and preserve evidence; (20) he was illegally subjected to a lineup without allowing him time to procure an attorney; (21) investigative services were not productive; (22) funding for investigative services was inadequate; (23) the State withheld material evidence which caused him to waive his speedy trial rights; (24) the evidence presented at trial was insufficient to support the conviction; (25) his sentence was excessive and disproportionate to the crime; (26) his conviction is illegal because the district court did not make particular findings on his sentence as a habitual criminal and his crime was non-violent; and (27) his conviction and sentence are invalid based on the


United States Constitution and this court's prior case law. We conclude that these claims are waived. They should have been raised on direct appeal and appellant did not demonstrate good cause for his failure to do so.²³

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.²⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²⁵


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

²³See NRS 34.810(1)(b).

²⁴See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²⁵We 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.

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