

IN THE SUPREME COURT OF THE STATE OF NEVADA

SERGIO CONTRERAS A/K/A SERGIO
CONTERAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48748

FILED

JUL 24 2007

JANEITE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
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; Michael A. Cherry, Judge.

On March 29, 2005, the district court convicted appellant, pursuant to a jury verdict, of robbery with the use of a deadly weapon (Count 1), battery with the use of a deadly weapon (Counts 2 and 3), and malicious destruction of private property (Counts 4 and 5). The district court sentenced appellant to serve two equal and consecutive terms of 35 to 156 months for Count 1, one 24 to 60 month term for Count 2, to be served consecutive to Count 1, one 24 to 60 month term for Count 3, to be served concurrent to Counts 1 and 2, and two 12 month terms for Counts 4 and 5, to be served concurrent to each other and all other counts in the Nevada State Prison. This court affirmed appellant's conviction and

sentence, but remanded for a proper determination of pre-sentence jail credit.¹ The remittitur issued on February 24, 2006.

On September 5, 2006, appellant filed a 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 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On December 21, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant first contended that: (1) the district court improperly allowed the jury to see him in handcuffs; (2) the district court erred in denying his motion for mistrial based on a witness's statements concerning a stolen stereo; (3) his speedy trial rights were violated; (4) the district court erroneously denied him the right to present a diminished capacity defense; (5) the district court failed to conduct a Faretta² canvass and denied his motion for substitute counsel without conducting an evidentiary hearing; (6) his convictions and deadly weapon enhancements violated double jeopardy; and (7) the prosecutor engaged in misconduct by offering a police officer's opinion as evidence and soliciting testimony concerning uncharged bad acts. This court considered and rejected these claims on appeal. The doctrine of the law of the case

¹Contreras v. State, Docket No. 44985 (Order Affirming in Part, Reversing in Part and Remanding, January 30, 2006).

²Faretta v. California, 422 U.S. 806 (1975).

prevents further litigation of these issues and cannot be avoided by a more detailed and precisely focused argument.³

Appellant also claimed that: (1) the prosecutor engaged in misconduct; (2) the evidence was insufficient to sustain his convictions; and (3) the evidence was insufficient to support his deadly weapon enhancements. The district court did not err in dismissing these claims as they could have been raised on appellant's direct appeal and appellant failed to demonstrate good cause for his failure to do so.⁴

Next, appellant claimed that: (1) appellate counsel was ineffective for failing to raise a claim that the prosecution coached witnesses; (2) trial counsel was ineffective for failing to impeach the victim's testimony; (3) trial counsel was ineffective for not objecting to the admission of materially unreliable evidence of deadly weapons; and (4) trial counsel failed to object to judicial misconduct. However, these claims were only terse statements that were not supported by specific facts which, if true, would have entitled appellant to relief.⁵ Accordingly, the district court did not err in denying the claims.

³See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

⁴NRS 34.810(1)(b)(1), (2).

⁵See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that a motion consisting of "'bare' or 'naked' claims for relief, unsupported by an specific factual allegations that would, if true, have entitled" appellant to relief does not entitle appellant to an evidentiary hearing).

Next, appellant contended that he received ineffective assistance of trial counsel.⁶ 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.⁷ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁸

First, appellant claimed that his counsel was ineffective for failing to object to the jury instruction that addressed intent. The instruction provided that "[t]o constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act." The instruction further stated, "[t]he intent with which an act is done is shown by the facts and circumstances surrounding the case." The intent instruction correctly stated Nevada law.⁹ As the instruction was legally correct, counsel was not deficient for failing to raise an

⁶To the extent that any of the underlying claims were raised independent from the ineffective assistance of counsel claims, those claims were waived as they should have been raised on direct appeal and appellant failed to demonstrate good cause for his failure to do so. See NRS 34.810(1)(b).

⁷Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁸Strickland, 466 U.S. at 697.

⁹See Finger v. State, 117 Nev. 548, 579, 27 P.3d 66, 86 (2001) (Leavitt, J., concurring).

objection to it.¹⁰ Accordingly, the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to pursue a theory of voluntary intoxication or request a jury instruction on voluntary intoxication. This claim is belied by the record. Appellant's counsel unsuccessfully opposed the State's motion in limine to preclude the voluntary intoxication defense. Nevertheless, appellant's counsel preserved the record by conducting a voir dire examination of a witness during which he elicited facts concerning the defense, as well as introduced a police report detailing appellant's bizarre behavior for introduction as a court record. Appellant's counsel even unsuccessfully appealed the court's ruling to this court. As this court held that voluntary intoxication was not a defense to the crimes with which the appellant was charged,¹¹ appellant failed to demonstrate that his counsel was ineffective for failing to request a jury instruction on voluntary intoxication. Accordingly, the district court did not err in denying this claim.

¹⁰See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (holding that trial counsel does not need to lodge futile objections to avoid a claim of ineffective assistance of counsel).

¹¹See Ewish v. State, 110 Nev. 221, 228, 871 P.2d 306, 311 (1994) (holding that voluntary intoxication is a defense to a specific intent crime); Daniels v. State, 114 Nev. 261, 269, 956 P.2d 111, 116 (1998) (holding that robbery is a general intent crime to which incapacity to form specific intent is not a defense); NRS 200.481(1)(a) (providing no requirement for specific intent); NRS 206.310 (providing no requirement for specific intent).

Third, appellant claimed that his counsel failed to object to the jury pool as it did not contain any members of his race.¹² Our review of the record on appeal reveals that the district court did not err in denying appellant relief on this claim. Appellant had the burden of establishing a prima facie violation of the fair-cross-section requirement.¹³ To demonstrate a prima facie violation, appellant must demonstrate that the group allegedly excluded from the jury venire was a "distinctive" group in the community, that representation of that group in jury venires was not fair and reasonable in relation to the proportion of members of that group in the community, and that the under-representation of that group in jury venires was due to systemic exclusion of that group in the jury selection process.¹⁴ Appellant failed to satisfy this three-part test. Appellant failed to demonstrate that Hispanic individuals were systematically excluded from the venire or the jury-selection process, or that the percentage of Hispanic individuals within the venire was not fair and reasonable in proportion to the number of such persons in the community. Thus, the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel failed to object to the introduction of the gun clip and the testimony about the missing stereo. Appellant's claim concerning the testimony about the missing stereo is belied by the record. Appellant's counsel objected to the victim's

¹²We note that nothing in the record before this court supports appellant's statement regarding the racial composition of the jury.

¹³Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 275 (1996).

¹⁴See Duren v. Mississippi, 439 U.S. 357, 364 (1979).

testimony about the missing stereo and the district court sustained the objection and instructed the jury to disregard the testimony. Regarding the gun clip, appellant did not allege any factual basis for why the gun clip should not have been admitted. He asserted no constitutional violation in the manner in which it was discovered.¹⁵ Further, he did not show that a part of a firearm located in an apartment to which the appellant had access was irrelevant to whether appellant had used a firearm in the crime.¹⁶ Thus, he did not demonstrate a sufficient basis for his counsel's objection to its admission. Accordingly, the district court did not err in denying this claim.

Fifth, appellant claimed that his counsel failed to move for a directed verdict. Although the district court may enter a judgment of acquittal,¹⁷ there is no provision in Nevada law for the entry of a directed verdict in a criminal case. To the extent that appellant argued that his counsel should have requested a judgment of acquittal, a review of the record reveals sufficient evidence to sustain his convictions for robbery with the use of a deadly weapon, battery with the use of a deadly weapon, and malicious destruction of property.¹⁸ The victim, Epigmenio Garcia, testified that appellant demanded his truck and wallet at gunpoint, appellant struck him with the gun, and stabbed him with a knife before taking the truck. Garcia described the gun as a six-inch long semi-

¹⁵NRS 48.025(1)(b).

¹⁶NRS 48.025(1).

¹⁷See NRS 175.381(2).

¹⁸See id.

automatic handgun, and the knife as having a blade of at least eight inches.¹⁹ An officer testified as to the severity of the wounds that had been inflicted. Lastly, four witnesses testified that appellant repeatedly rammed Garcia's truck into parked vehicles. Therefore, appellant failed to demonstrate that his counsel was ineffective for failing to move for a judgment of acquittal. Accordingly, the district court did not err in denying this claim.

Sixth, appellant claimed that his counsel was ineffective for failing to investigate. In particular, he claimed that his counsel did not test the truck for blood or drugs, did not request fingerprinting of the gun clip, and failed to have appellant's watch submitted for forensic testing. Appellant's counsel could not have preserved the evidence left in the truck on the night of the incident as it had been returned to the owner the next day. Moreover, it is not clear how testing for blood could have aided appellant's defense as both the prosecution and defense agreed that Garcia had been injured in the truck, but appellant had not. While the presence of drugs could lend credence to appellant's claim that the two men had intended to take drugs, the test could not show if those drugs were left in the truck before or after the truck was taken from Garcia. Regarding the gun clip, whether the clip was devoid of fingerprints or bore another individual's fingerprints would not necessarily have warranted its exclusion or rendered it exculpatory evidence. The prints would not have

¹⁹See Barnhart v. State, 122 Nev. 301, 304-05, 130 P.3d 650, 652 (2006) (stating that even an inoperable firearm is considered a deadly weapon); Thomas v. State, 114 Nev. 1127, 1146, 967 P.2d 1111, 1124 (1998) (holding that a meat-carving knife with a five-to-seven inch blade was a deadly weapon).

significantly undermined Garcia's testimony that appellant brandished a firearm then struck him in the face with it. Lastly, counsel was not deficient for failing to have appellant's watch tested as the presence of blood on the watch would not conclusively show that appellant struck Garcia with the watch instead of merely wore the watch while he pistol-whipped and stabbed Garcia. Accordingly, the district court did not err in denying this claim.

Lastly, appellant 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, which resulted in prejudice because the omitted issue would have a reasonable probability of success on appeal.²⁰ Appellate counsel is not required to raise every non-frivolous issue on appeal.²¹ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.²²

Appellant claimed that his appellate counsel was ineffective for failing to raise claims of ineffective assistance of trial counsel. Claims of ineffective assistance of counsel are generally raised in the district court in the first instance by filing a post-conviction petition for a writ of habeas corpus as the record is generally insufficient to raise such claims on direct

²⁰Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. at 668); Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992).

²¹Jones v. Barnes, 463 U.S. 745, 751 (1983).

²²Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

appeal.²³ Accordingly, the district court did not err in finding that appellant's appellate counsel was not ineffective for failing to raise those claims.

Next, appellant raised numerous claims of ineffective assistance of appellate counsel asserting that his appellate counsel failed to raise issues on appeal that his appellate counsel did in fact raise on appeal. The district court did not err in finding that appellant's appellate counsel was not ineffective in this regard.

Next, appellant claimed that his appellate counsel was ineffective for failing to argue that the evidence was insufficient to convict him on appeal. In particular, he asserted that there was not adequate proof that he possessed a gun and knife. He also asserted that his appellate counsel was ineffective for failing to raise an issue that the district court erred in failing to conduct an evidentiary hearing to determine if the gun and knife were deadly weapons. As discussed above, there was sufficient evidence upon which to conclude that appellant brandished and struck Garcia with a firearm and stabbed him with a knife. This court has already recognized that such weapons are deadly weapons so no evidentiary hearing was warranted.²⁴ Accordingly, the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective for failing to raise issues of prosecutorial misconduct. He

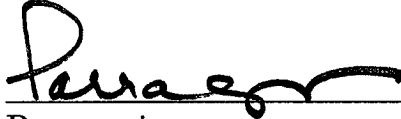
²³See Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995); Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001).


²⁴See Barnhart, 122 Nev. at 304-05, 130 P.3d at 652; Thomas, 114 Nev. at 1146, 967 P.2d at 1124.


asserted that the prosecution unduly hampered his defense theory of voluntary intoxication, improperly introduced the gun clip, and charged the deadly weapon enhancements without conducting an evidentiary hearing to determine if the gun and knife were deadly weapons. As discussed above, voluntary intoxication was not a defense to the crimes to which appellant had been convicted. Appellant did not assert that the prosecution used any improper methods in moving to preclude his use of the defense. In addition, the prosecution did not act improperly in introducing the gun clip or seeking the deadly weapon enhancements without first conducting an evidentiary hearing. Accordingly, appellate counsel was not ineffective for failing to raise claims of prosecutorial misconduct.

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.²⁵ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

²⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Eighth Judicial District Court Dept. 17, District Judge
Sergio Contreras
Attorney General Catherine Cortez Masto/Carson City
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Eighth District Court Clerk