

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN K. O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48867

FILED

OCT 31 2007

JANE TIE M. BLOOM
CLERK OF SUPREME COURT
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; Valorie Vega, Judge.

On March 9, 2006, the district court convicted appellant, pursuant to a jury verdict, of battery constituting domestic violence (Category C felony). The district court sentenced appellant to serve a term of 24 to 60 months in the Nevada State Prison. This court affirmed appellant's conviction and sentence on direct appeal.¹ The remittitur issued on September 8, 2006.

On November 15, 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 February 16, 2007, the district court denied appellant's petition. This appeal followed.

¹O'Keefe v. State, Docket No. 46938 (Order of Affirmance, August 14, 2006).

In his petition, appellant 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 that they rendered the jury's verdict unreliable.² The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.³

First, appellant claimed that his trial counsel was ineffective for failing to call witnesses to rebut tainted evidence and testimony presented by the State. Specifically, appellant argued that his counsel should have called Officer Rumery to testify that when Rumery arrested appellant on the morning after the instant offense, Rumery saw no visible injuries to the victim.

Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced by his counsel's actions. "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."⁴ The record reveals that appellant's counsel made a tactical decision not to call Rumery to testify at the trial because she believed Rumery's testimony would have been harmful to appellant's case because it may have revealed that appellant had a prior conviction for battery constituting domestic

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

³Strickland, 466 U.S. at 697.

⁴Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691).

violence against the same victim. Appellant did not demonstrate any extraordinary circumstance for challenging counsel's decision not to call Rumery to testify. Therefore, we conclude the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective because she had a conflict of interest. Specifically, appellant claimed that his trial counsel worked for the husband of a judge who presided over his trial in an unrelated matter.

In the context of an ineffective assistance of counsel claim based on an alleged conflict of interest, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'"⁵ 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."⁶ Appellant failed to demonstrate that the judge in this matter was related or married to trial counsel or anyone in trial counsel's office. Thus, appellant failed to demonstrate that his counsel had an

⁵Strickland, 466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 350, 348 (1980)); see Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992); but see Cuyler, 446 U.S. at 348 (holding that prejudice is presumed if the district court fails to provide a defendant the opportunity to show that a potential conflict of interest, that the defendant has timely objected to, impermissibly imperils his right to a fair trial).

⁶Clark, 108 Nev. at 326, 831 P.2d at 1376 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

actual conflict of interest in this matter. Therefore, we conclude the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to file a motion to dismiss the charge against him based on the district court's failure to arraign him within 72 hours of when appellant turned himself in after being released from Ohio's extradition.

NRS 171.178(3) provides that an individual must be brought before a magistrate within 72 hours of being arrested, excluding nonjudicial days. "Failure to bring a defendant before a magistrate without unnecessary delay does not warrant reversal absent a showing of prejudice to the defendant's constitutional rights."⁷

The record reveals that a criminal complaint charging appellant with the instant offense was filed in justice court on December 20, 2004. Appellant's initial arraignment in justice court occurred on December 22, 2004. Appellant's preliminary hearing was conducted on January 5, 2005, and an information charging appellant with the instant offense was filed in the district court on January 7, 2005. Appellant's initial arraignment in the district court was scheduled for January 13, 2005. It appears, however, that appellant failed to appear for his initial arraignment in the district court because appellant had been extradited to Ohio on that same date. Appellant turned himself in to Nevada authorities on May 3, 2005, upon his return to Nevada after the Ohio extradition. Appellant was arraigned in the district court on May 12, 2005, at which time he invoked his right to a speedy trial.

⁷Elvik v. State, 114 Nev. 883, 895, 965 P.2d 281, 289 (1998) (citing Huebner v. State, 103 Nev. 29, 32, 731, P.2d 1330, 1333 (1987)).

Appellant failed to demonstrate that his counsel was ineffective. To the extent that appellant argued his counsel should have moved to dismiss the charge based on a violation of NRS 171.178, the claim lacked merit. Because appellant was brought before a magistrate within 72 hours of when the complaint was filed, appellant was not denied his right to a timely arraignment. NRS 171.178(3) is inapplicable to the time period after appellant turned himself in after the Ohio extradition because appellant had already been timely arraigned, advised of his rights, and bound over to the district court. Further appellant failed to demonstrate that a motion to dismiss would have had a likelihood of success.⁸ Therefore, we conclude the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to file a motion to dismiss the charges based on a speedy trial violation. Appellant alleged that the district court erred when it vacated his trial date upon remanding his case to the justice court. Appellant asserted that when his case was transferred back to the district court his original trial date should have been reinstated.

Dismissal based upon the failure of the State to provide a speedy trial is mandatory only when there is a lack of good cause for the

⁸See generally, Deutscher v. State, 95 Nev. 669, 680, 601 P.2d 407, 414 (1979).

delay.⁹ A constitutional deprivation of the right to a speedy trial requires proof of prejudice attributable to the delay.¹⁰

Appellant failed to demonstrate that his counsel was ineffective. The record reveals that appellant invoked his right to a speedy trial on May 12, 2005. The trial was scheduled to commence on July 11, 2005. On July 8, 2005, however, the parties informed the district court that they had negotiated a plea and requested a remand to the justice court. The district court remanded this matter to the justice court and vacated the trial date. After remand to the justice court, appellant refused to enter into the negotiated plea and waived his right to a preliminary hearing. This case was then transferred back to the district court upon the filing of an information. Appellant was arraigned for a second time in district court on July 19, 2005, at which time appellant again invoked his right to a speedy trial. Appellant's trial commenced on September 19, 2005. By requesting a remand to the justice court, appellant postponed his trial and waived his right to have a trial within 60 days.¹¹ Appellant's trial commenced within 60 days of when appellant's case was transferred back to the district court. Thus appellant failed to demonstrate that any delay occurred. Because no delay occurred, counsel was not ineffective for failing to move to dismiss the charge based upon a

⁹See NRS 178.556; Huebner v. State, 103 Nev. at 31, 731, P.2d at 1332.

¹⁰Anderson v. State, 86 Nev. 829, 833-34, 477 P.2d 595, 598 (1970).

¹¹See NRS 178.556(2); Huebner, 103 Nev. at 31, 731, P.2d at 1332.

denial of the right to a speedy trial. Therefore, we conclude the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to adequately oppose certification of Officer Holley as an expert witness. Appellant asserted that his counsel should have filed a written motion, rather than making an oral motion, and should have claimed that Holley was biased against him. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced by his counsel's actions. Appellant failed to demonstrate that Holley would not have been allowed to testify as an expert witness if his counsel had filed a written motion. This court held on direct appeal that, given Holley's qualifications, the district court did not abuse its discretion in allowing Holley to testify as an expert witness.¹² Further, because Holley only testified about domestic violence victims in general, and did not testify about any specific facts pertaining to appellant or the instant case, appellant failed to demonstrate that a motion challenging Holley as biased would have been successful. Therefore, we conclude the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to present an argument that it was improper for the State to charge appellant for the same offense twice by way of an information. Appellant argued that when his case was brought back to district court after a remand to the justice court, the State should have charged him by way of an amended information rather than a second information.

¹²O'Keefe v. State, Docket No. 46938 (Order of Affirmance, August 14, 2006).

Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced by his counsel's actions. Upon remand to the justice court, the justice court scheduled a new preliminary hearing. Appellant declined to enter a guilty plea as negotiated and waived the preliminary hearing. This matter was then transferred back to the district court upon the filing of a second information. Appellant failed to demonstrate that the filing of a second information, after appellant's waiver of a preliminary hearing, was improper.¹³ Thus, appellant failed to demonstrate that his counsel was ineffective. Therefore, we conclude the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for failing to act in accordance with the code of ethics and rules of professional conduct, and by causing disloyalty and a conflict. Specifically, appellant alleged that his counsel only visited him two times, may have violated the attorney-client privilege when she brought a co-worker with her on her second visit, and failed to subpoena Rumery after informing him she would. Appellant failed to demonstrate that he was prejudiced by his counsel's actions. Appellant failed to demonstrate that his counsel's failure to visit him more often affected the reliability of the jury's verdict. Further, appellant failed to demonstrate that his counsel violated the attorney-client privilege. The record indicates that the co-worker who accompanied his counsel on the second visit was also an attorney, and appellant failed to demonstrate that this attorney's presence at the visit was improper. Although appellant alleged that his counsel's

¹³See NRS 173.035(3).

co-worker may have recorded their conversation, appellant failed to demonstrate any actual violation of the attorney-client privilege. Finally, appellant failed to demonstrate that he was prejudiced by his counsel's failure to subpoena Rumery. The record indicates that Rumery's testimony would have likely been more prejudicial than beneficial to appellant's case. Therefore, we conclude the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for failing to raise a double jeopardy challenge.¹⁴ This claim is belied by the record.¹⁵ The record reveals that appellant's counsel raised a double jeopardy claim at the commencement of trial. The district court specifically determined that there was no indication that appellant's plea agreement in another case included a dismissal of the instant charge. Therefore, we conclude the district court did not err in denying this claim.

Ninth, appellant claimed that his trial counsel was ineffective for failing to adequately argue that the district court did not have proper jurisdiction. Appellant asserted that jurisdiction over the instant offense was only proper in the City of Las Vegas. Appellant failed to demonstrate that his counsel was ineffective. The record indicates that the district

¹⁴To the extent that appellant raised this claim in the context of an ineffective assistance of appellate counsel claim, appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). The record on appeal supports the district court's determination that there was no double jeopardy violation.

¹⁵See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

court had jurisdiction over this matter.¹⁶ Therefore, we conclude the district court did not err in denying this claim.

Tenth, appellant claimed that his trial counsel was ineffective for failing to conduct a proper voir dire of the prospective jury. Appellant asserted that a question asked by his counsel during voir dire implied that this matter was not appellant's first domestic violence case. Appellant asserted that his counsel asked the potential jurors: "If someone has done something before, does that necessarily mean that they are guilty now?" Appellant failed to demonstrate that his counsel acted unreasonably by asking this question. Further, appellant failed to demonstrate that he was prejudiced by his counsel's actions. No evidence was presented at trial regarding any of appellant's prior domestic violence convictions. Therefore, we conclude the district court did not err in denying this claim.

Eleventh, appellant claimed that his trial counsel was ineffective for failing to argue that his plea agreement in another case was violated when he was charged in this matter. Appellant failed to demonstrate that his counsel was ineffective. Any challenge to the breach of a plea agreement in another case must be raised in that case. Therefore, we conclude the district court did not err in denying this claim.

Twelfth, appellant claimed that his trial counsel was ineffective for failing to inform the judge that the Clark County Detention Center denied his counsel multiple visits with him during critical times of the proceedings. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that the meetings he had with his counsel

¹⁶See Nev. Const. art. 6, § 6; NRS 171.010.

were insufficient, or that additional meetings with his counsel prior to or during trial would have resulted in a different outcome. Therefore, we conclude the district court did not err in denying this claim.

Appellant also 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.¹⁷ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁸ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹⁹

Appellant claimed that his appellate counsel was ineffective for failing to present or argue all issues on appeal. Appellant failed to identify any specific claims his counsel should have raised that would have had a reasonable probability of success on appeal. To the extent that appellant claimed his appellate counsel should have raised his twelve claims of ineffective assistance of counsel on direct appeal, such claims may not be raised on direct appeal.²⁰ Thus, appellant failed to demonstrate that his appellate counsel was ineffective. Therefore, we conclude the district court did not err in denying this claim.

¹⁷Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

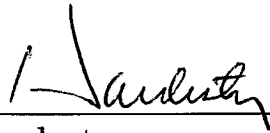
¹⁸Jones v. Barnes, 463 U.S. 745, 751 (1983).

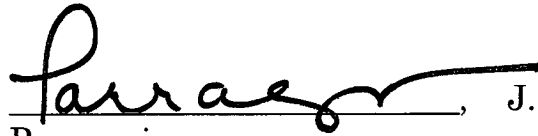
¹⁹Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

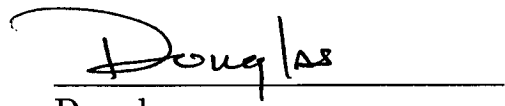
²⁰See Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 535 (2001).

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.²¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²²


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Valorie Vega, District Judge
Brian Kerry O'Keefe
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

²¹See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²²We 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.