IN THE SUPREME COURT OF THE STATE OF NEVADA

AUBREY T. GRANT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49012

FILED

NOV 13 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
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; Jackie Glass, Judge.

On February 5, 2004, the district court convicted appellant, pursuant to a jury verdict, of conspiracy to commit robbery (Counts 1 and 9); robbery with the use of a deadly weapon (Counts 2, 3, 4, 5, 6, 7, 10, and 11); and attempted robbery with the use of a deadly weapon (Count 8). The district court sentenced appellant to serve consecutive terms totaling 131 to 564 months in the Nevada State Prison. The remaining sentences were imposed concurrently. This court affirmed appellant's conviction on appeal.[1] The remittitur issued on October 19, 2005.

On October 11, 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

[1]Grant v. State, Docket No. 42869 (Order of Affirmance, September 23, 2005).

conduct an evidentiary hearing. On January 29, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed (1) the counts alleged in the second amended information were multiplicitous, (2) appellant's sentences violated double jeopardy, and (3) the district court erred in not instructing the jury that conspiracy to commit robbery was a lesser-included offense of robbery with the use of a deadly weapon. These claims should have been raised on appellant's direct appeal, and appellant failed to demonstrate good cause for his failure to do so.[2] Therefore, the district court did not err in denying these claims.

Appellant also claimed that evidence seized during the search of his car was seized in violation of the Fourth Amendment. This court rejected this claim on direct appeal. The doctrine of the law of the case prevents further litigation of this issue and cannot be avoided by a more detailed and focused argument.[3] Therefore, the district court did not err in denying this claim.

Next, appellant contended that he received ineffective assistance of 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

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[2]NRS 34.810(1)(b).

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

errors were so severe that they rendered the jury's verdict unreliable.[4] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[5]

First, appellant claimed that his counsel was ineffective for failing to file a pre-trial motion to suppress evidence seized from the search of his car because his consent to search the car was not broad enough to permit the officers to pry open a broken glove compartment and dismantle the dashboard, and his consent was tainted by the illegal seizure. On appeal, this court determined that appellant's consent to search his car was voluntary and he further expressly consented to the breaking open of the locked glove compartment. Because this court already determined that appellant's consent to search was voluntary, appellant failed to show that a motion to suppress based on the voluntariness of his consent would have been meritorious. Thus, he failed to show that his counsel's failure to file such a motion resulted in prejudice, and the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to raise a claim under Brady v. Maryland[6] regarding the State's suppression of currency seized from appellant and his codefendant. Specifically, he claimed that the police gave some of the money that was confiscated during appellant's arrest to some of the victims and

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

[5]Strickland, 466 U.S. at 697.

[6]373 U.S. 83 (1963).

impounded the rest of the money. Appellant failed to establish that his counsel was deficient or that he was prejudiced. Appellant was accused of stealing several hundred dollars from several victims during separate robberies. Trial testimony established that appellant and his codefendant were in possession of several hundred dollars when they were arrested. As appellant was accused of stealing money, evidence that he was in possession of a significant amount of currency when he was arrested is not favorable evidence for the defense.[7] Appellant did not establish that the introduction of the money would have benefited the defense by explaining away the charges.[8] As appellant did not show that he was prejudiced by his counsel's failure to raise a Brady claim, the district court did not err in denying this claim.

Third, appellant claimed that his counsel was ineffective for failing to challenge the amended information, as well as appellant's convictions and sentences, as multiplicitous. He claimed that the State improperly charged multiple counts of robbery with the use of a deadly weapon despite the fact that only one firearm was used during the two criminal transactions. Appellant did not show that he was prejudiced by his counsel's failure to raise a claim that his convictions were multiplicitous. Appellant was convicted of attempting to rob one victim

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[7]Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000) (providing that Brady v. Maryland requires disclosure of material evidence that is favorable to the accused).

[8]See King v. State, 116 Nev. 349, 359, 998 P.2d 1172, 1178 (2000) ("Exculpatory evidence is defined as evidence that will explain away the charge.") (citing Lay v. State, 110 Nev. 1189, 1197, 886 P.2d 448, 453 (1994)).

and robbing six others during one hold up, then robbing two other men in a separate incident a short time later. While the attempted robbery with the use of a deadly weapon and some of the robbery with the use of a deadly weapon convictions occurred on the same date and in the same general location, each conviction involved a separate victim. The convictions were not multiplicitous merely because some of the victims happened to go to the same gentlemen's clubs at the same time.[9] Moreover, as the convictions for robbery and attempted robbery were based on the robbery of each individual victim, it made no difference that only one firearm was used during each of the robberies. Consequently, appellant failed to demonstrate that the result of his trial would have been different if his trial counsel had sought the dismissal of the purportedly multiplicitous counts. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for failing to object to the jury instructions because the court did not instruct the jury that conspiracy to commit robbery was a lesser-included offense of robbery with the use of a deadly weapon. Appellant failed to show that his counsel was deficient or that he was prejudiced. Appellant was charged with robbery with the use of a deadly weapon, which is the taking of personal property from another "against his will, by means of force or

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[9]See Bedard v. State, 118 Nev. 410, 413-14, 48 P.3d 46, 48 (2002) (reasoning that the burglarizing of separate suites in a single office building were separate offenses that occurred at different times and places).

violence or fear of injury," with the use of a deadly weapon.[10] Conspiracy to commit robbery requires proof of an agreement between two or more persons to commit the crime of robbery.[11] As conspiracy to commit robbery requires proof of an agreement and the crime of robbery with the use of a deadly weapon does not, a defendant committing robbery with the use of a deadly weapon does not also necessarily commit conspiracy to commit robbery.[12] Thus, conspiracy to commit robbery is not a lesser included offense of robbery with the use of a deadly weapon, and appellant was not prejudiced by his counsel's failure to assert otherwise.[13] Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his counsel was ineffective for failing to challenge the deadly weapon enhancements to his sentences as violating double jeopardy. This court stated that the deadly weapon enhancement set forth in NRS 193.165 "does not create any separate offense but provides an additional penalty for the primary offense," and thus, did not violate the double jeopardy clause.[14] As the statute was

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[10]NRS 200.380(1); 1995 Nev. Stat., ch. 455, § 1 at 1431 (NRS 193.165(1)).

[11]NRS 199.480(1).

[12]See Smith v. State, 120 Nev. 944, 946, 102 P.3d 569, 571 (2004) (providing that "an offense is lesser included only where the defendant in committing the greater offense has also committed the lesser offense.").

[13]See 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).

[14]Woofter v. O'Donnell, 91 Nev. 756, 762, 542 P.2d 1396, 1399-1400 (1975).

constitutional, appellant was not prejudiced by counsel's failure to raise an objection to it.[15] Therefore, the district court did not err in denying this claim.

Next, 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, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.[16] Appellate counsel is not required to raise every non-frivolous issue on appeal.[17] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[18]

First, appellant claimed that appellate counsel was ineffective for failing to perfect appellant's appeal. This claim is belied by the record.[19] Appellant's counsel filed an appeal from appellant's judgment of conviction. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel was ineffective for failing to argue that trial counsel was ineffective. Claims of

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[15]See Ennis, 122 Nev. at 706, 137 P.3d at 1103 (holding that trial counsel does not need to lodge futile objections to avoid a claim of ineffective assistance of counsel).

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

[17]Jones v. Barnes, 463 U.S. 745, 751 (1983).

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

[19]Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

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 appeal.[20] Therefore, the district court did not err in denying these claims.

Third, appellant claimed that appellate counsel was ineffective for failing to argue (1) the counts alleged in the second amended information were multiplicitous, (2) appellant's sentence violated double jeopardy, and (3) the district erred in not instructing the jury that conspiracy to commit robbery was a lesser-included offense of robbery with the use of a deadly weapon. For the reasons discussed above, we conclude that appellant did not establish that his appellate counsel was ineffective for failing to raise these issues. Therefore, the district court did not err in denying these claims.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that evidence seized during the search of appellant's car was seized in violation of the Fourth Amendment. Appellant's claim is belied by the record.[21] This court rejected appellant's claim that his consent was not voluntary on direct appeal. Therefore, the district court did not err in denying this claim.

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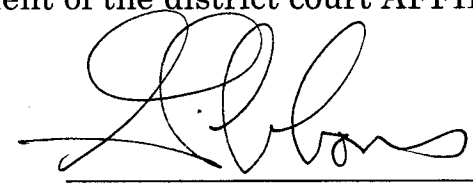
[20]See Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001); Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

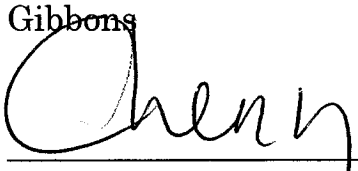
[21]Hargrove, 100 Nev. at 503, 686 P.2d at 225.

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.[22] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons



_____, J.
Cherry

_____, J.
Saitta

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

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