

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID LAMOR GIBBS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49160

FILED

AUG 24 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Alvarado*
DEPUTY CLERK

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

On August 22, 2005, the district court convicted appellant, pursuant to a jury verdict, of one count of burglary. The district court sentenced appellant to serve a term of 48 to 120 months in the Nevada State Prison. This court affirmed the judgment of conviction on appeal.¹

On December 4, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court, and on January 22, 2007, appellant filed a supplement. 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

¹Gibbs v. State, Docket No. 45971 (Order of Affirmance, July 14, 2006).

hearing. On March 14, 2007, the district court denied appellant's petition. This appeal followed.

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

Specifically, appellant claimed that his trial counsel was ineffective for spending all of her efforts on challenging an "illusionary" confession that did not exist and failing to challenge NRS 205.060. Appellant offered no specific facts in support of these claims, and thus, he failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Therefore, we conclude that 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

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.

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.⁴ Appellate counsel is not required to raise every non-frivolous issue on appeal.⁵

First, appellant claimed that his appellate counsel should have raised claims of ineffective assistance of trial counsel on direct appeal as errors were obvious from the record. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Claims of ineffective assistance of counsel should be raised in post-conviction proceedings in the district court in the first instance and are generally not appropriate for review on direct appeal.⁶ Appellant failed to specifically identify the claims of ineffective assistance of counsel that should have been raised on direct appeal or demonstrate that any issues of ineffective assistance of counsel would have been appropriate for direct appeal. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel had a conflict of interest with appellant because appellate counsel represented

⁴Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

⁵Jones v. Barnes, 463 U.S. 745, 751 (1983).

⁶Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

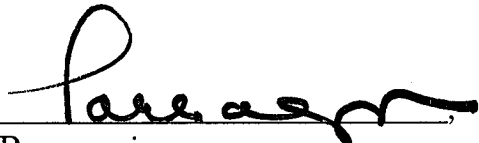
appellant in the trial proceedings. Appellant argued that appellate counsel failed to raise any claims of ineffective assistance of trial counsel because of this conflict. Appellant failed to demonstrate that an actual conflict of interest adversely affected appellate counsel's performance.⁷ As discussed above, appellant failed to identify any claims of ineffective assistance of trial counsel that would have been appropriate for direct appeal. The mere fact that appellate counsel also represented appellant in the trial proceedings does not amount to a conflict of interest.⁸ Therefore, we conclude that the district court did not err in denying this claim.

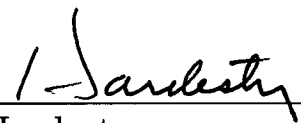
Third, appellant claimed that his appellate counsel was ineffective for failing to challenge NRS 205.260. Appellant provided no specific facts in support of this claim, and thus, he failed to demonstrate a reasonable probability that a challenge to NRS 205.260 would have been successful on appeal. Therefore, we conclude that the district court did not err in denying this claim.

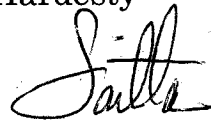
⁷Strickland, 466 U.S. at 692; Cuyler v. Sullivan, 446 U.S. 335 (1980); Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 404 (2001).

⁸See, e.g., NRAP 3C (setting forth the fast track rules that mandate trial counsel represent a defendant on appeal when the conviction involves a penalty of less than death or life imprisonment and the defendant was represented by counsel in the trial proceedings).

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.⁹ Accordingly, we ORDER the judgment of the district court AFFIRMED.


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

cc: Hon. Douglas W. Herndon, District Judge
David Lamor Gibbs
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).