IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES GOODALL A/K/A JAMES GOODALL, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49202

FILED

SEP 06 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 a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On January 19, 2005, the district court convicted appellant, pursuant to a jury verdict, of one count of possession of stolen property. The district court sentenced appellant as a habitual criminal to serve a term of five to twenty years in the Nevada State Prison. On March 2, 2005, the district court amended the judgment of conviction. This court affirmed the judgment of conviction on appeal, but remanded the matter for correction of the amended judgment of conviction.[1]

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

[1]Goodall v. State, Docket No. 44590 (Order of Affirmance and Limited Remand to Correct Amended Judgment of Conviction, May 22, 2006). A second amended judgment of conviction was entered on April 21, 2005.

district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On March 13, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of appellate counsel.[2] 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.[3] Appellate counsel is not required to raise every non-frivolous issue on appeal.[4] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[5]

First, appellant claimed that appellate counsel was ineffective for failing to argue that his Fourth Amendment rights had been violated. Appellant claimed that the police did not have probable cause to obtain a search warrant because the computer was not reported stolen and the warrant was not disclosed prior to trial. Appellant failed to demonstrate that his appellate counsel's performance was deficient in this regard or that this issue had a reasonable probability of success on appeal. The

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[2]To the extent that appellant raised any of the underlying claims independently of his ineffective assistance of appellate counsel claims, those claims were waived as they should have been raised on direct appeal, and appellant did not demonstrate good cause for his failure to do so. See NRS 34.810(1)(b).

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

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

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

record reveals that there was no search warrant in this case, but that a search warrant had been issued pursuant to a burglary/stolen property investigation in another case.[6] In executing the search warrant in the other case, the police found the laptop computer at issue in this case at appellant's sister's residence. The laptop computer had been reported stolen at the time police had conducted the search, but the victim had not reported the serial number of the laptop computer, and thus, the police were not able to confirm at that time that the laptop computer was in fact stolen. Later, the police confirmed that the laptop computer was stolen and appellant was arrested.[7] Appellant did not indicate how the alleged failure to disclose the search warrant in the other case before trial affected the outcome of the proceedings in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that prior bad acts had been admitted without a hearing. Appellant failed to demonstrate that his appellate counsel's performance was deficient in this regard or that this issue had a reasonable probability of success on appeal. Appellant failed to identify the prior bad acts that were allegedly introduced at trial. To the extent

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[6]The district granted the defense's motion in limine to exclude testimony about the search warrant and other investigation.

[7]Appellant was arrested after he brought the laptop computer to a computer service store in order to change the password on the computer. When the computer service personnel became suspicious and contacted the police, appellant left the laptop computer in the store. Using information in a work order filled out by appellant, the police located and arrested appellant. At the time of the arrest, the police had confirmed that the laptop computer was in fact stolen.

that appellant referred to a witness's brief mention of the search warrant in the other case, appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. The failure to conduct a Petrocelli[8] hearing is grounds for reversal unless the record is sufficient for this court to determine that the evidence is admissible as bad act evidence or where the result would have been the same had the court not admitted the evidence.[9] Notably, the witness only mentioned that the witness was at appellant's residence pursuant to a search warrant and did not state that the search warrant was pursuant to another case. The district court instructed the jury to disregard mention of the search warrant. Under these facts, appellant failed to demonstrate that there was a reasonable probability of a different result had the witness not mentioned the search warrant. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that appellate counsel was ineffective for failing to argue that his right to a jury trial was violated when the issue of habitual criminality was not presented to the jury. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. This court has clarified that the just and proper determination relates to the discretion to dismiss a count and does not serve to increase the punishment, and thus, the district court could sentence appellant as a habitual criminal without submission of the issue before a jury upon presentation and proof of the requisite number of prior

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[8]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[9]Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998); Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064 (1997).

convictions.[10] The record contains proof of at least four, and as many as five, prior felony convictions. This satisfied the requirements of NRS 207.010(1)(a). Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed insufficient evidence was presented to support the conviction. This claim was waived as it should have been raised on direct appeal, and appellant failed to demonstrate good cause for his failure to do so.[11] Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that the police did not reduce to writing, and thus the State withheld, appellant's inculpatory statements made to the police that he had purchased the laptop computer from "Woody" without a receipt and that the laptop computer may have been stolen as "Woody" was a burglar. This court considered and rejected an argument on direct appeal that the district court had erred in denying a motion for mistrial based on the State's failure to produce appellant's inculpatory statements to the police. The doctrine of the law of the case prevents further litigation of this issue and cannot be avoided by a more detailed and precisely focused argument.[12] Finally, as a separate and independent ground to deny relief, even assuming that the latter claim was properly considered a Brady[13] claim that had not been previously

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[10]O'Neill v. State, 123 Nev. ___, 153 P.3d 38 (2007).

[11]See NRS 34.810(1)(b).

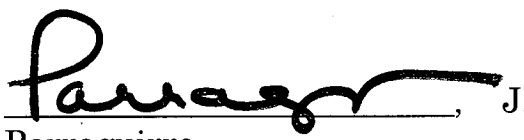
[12]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

[13]Brady v. Maryland, 373 U.S. 83 (1963).

litigated, appellant's claim was patently without merit as inculpatory statements are by definition not favorable to the defense or material and the prosecution as a general rule does not have a duty to disclose inculpatory evidence to the police.[14] Therefore, we conclude that the district court did not err in denying these claims.

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.[15] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
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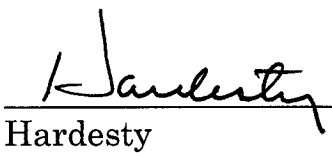

_____, J.
Hardesty

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Saitta

cc: Eighth Judicial District Court Dept. 6, District Judge
James Jr. Goodall
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[14]See Browning v. State, 120 Nev. 347, 369, 91 P.3d 39, 54 (2004); Furbay v. State, 116 Nev. 481, 487, 998 P.2d 553, 557 (2000).

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