

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY EUGENE HAWES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49322

FILED

MAR 05 2008

TRACEE K. LINDEMAN
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. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

On October 9, 2002, the district court convicted appellant, pursuant to a jury verdict, of one count of sexual assault and one count of misdemeanor battery.¹ The district court adjudicated appellant a habitual criminal pursuant to NRS 207.010 and sentenced appellant to serve a term of life without the possibility of parole in the Nevada State Prison. On appeal, this court affirmed appellant's judgment of conviction.² The remittitur issued on February 24, 2004.

On July 22, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel to

¹An amended judgment of conviction was filed on February 11, 2004, to correct a clerical error in the judgment of conviction.

²Hawes v. State, Docket No. 40431 (Order of Affirmance and Limited Remand to Correct Judgment of Conviction, January 28, 2004).

represent appellant. On April 4, 2007, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised seventeen claims of 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 fell below an objective standard of reasonableness and resulting prejudice such that there is a reasonable probability of a different outcome but for counsel's errors.³ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁴ A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁵

First, appellant claimed that his trial counsel was ineffective for failing to conduct interviews with potential exculpatory witnesses. Appellant failed to demonstrate that trial counsel's performance was deficient. In his petition, appellant argued that these witnesses would have established that the victim was promiscuous, that the State's witness, Timmy Ahern, had previously made false allegations against appellant's brother and that he and Ahern had fought over these

³See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴Strickland, 466 U.S. at 697.

⁵Means v. State, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

allegations, and that Robert Myers was the third person who was present at Grog's Bar and Grill, the 7-11 store, and the storage shed where the rape occurred. At the evidentiary hearing, however, appellant failed to produce any witnesses who would attest that they would have testified consistently with appellant's claims. Thus, appellant failed to demonstrate that his counsel was ineffective for failing to investigate these witnesses. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to adequately review and investigate his case. Specifically, appellant complained that his counsel failed to take pictures of the wound appellant allegedly received when he was hit with a crow bar during a skirmish with the victim's boyfriend at the storage shed where the sexual assault occurred. Appellant failed to demonstrate that trial counsel's performance was deficient. Appellant failed to present any witnesses to verify that the alleged wound on his arm was the result of an injury sustained in a fight with a third party on the evening of April 24, 2001. Thus, appellant's trial counsel was not ineffective for failing to photograph the wound because there was no proof that the wound was related to the events at issue in this case. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to examine and photograph the crime scene in order to find potential exculpatory evidence. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to allege what information such an investigation would

have yielded or how that information would have affected the outcome of the trial. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to have an independent DNA analysis of the victim's clothing, particularly the hairs found in the victim's panties and bra and the blood found on the victim's bracelet. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. Appellant claimed that such an investigation would have determined the involvement of a third party, which would corroborate appellant's account of the events surrounding this case. However, appellant failed to present any witnesses or evidence supporting his claim that there was a third party present that evening. For that reason, it is unlikely that a DNA analysis of the victim's clothing and bracelet would have affected the outcome of this case. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to investigate the sizes of the clothing found at the scene and to compare them with the size of the victim. Appellant further contended that this was important because the panties and bra found inside the shed were small, but the victim was a large framed woman. Appellant failed to demonstrate that his trial counsel was deficient. At trial, these items of clothing were entered into evidence and the victim testified that the items belonged to her. Therefore, the jury was able to see both the items and the victim and make a determination as to whether it believed the items truly belonged to the victim. Moreover, at the evidentiary hearing appellant offered no proof that the items belonged to another individual. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to investigate why the Sexual Assault Response Team (SART) nurse Annette Titus's initial report indicated that no trauma to the vaginal area occurred, but during trial, photographs were admitted which indicate that tearing of the vaginal area did occur. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. At trial, Titus indicated that there had been tearing in the vaginal area and her report was entered into evidence. Appellant's counsel questioned Titus about her report and specifically asked why the report did not mention vaginal tearing. Titus explained that the report indicated an uptake of the dye, which in turn indicated tearing. Titus further indicated that she had not used the term "tear" in her report because the tear on the victim's vagina was not visible without the use of dye. Notably, it was photographs of the victim's vagina, after the administration of the dye, which were presented to the jury at trial. Because appellant's trial counsel questioned Titus extensively about this issue at trial, trial counsel was not deficient for failing to investigate the issue. Moreover, appellant failed to demonstrate that further inquiry would have a reasonable probability of altering the outcome at trial. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for failing to utilize any expert witnesses to contradict testimony given by the prosecution's expert witness, including an expert on DNA. Appellant failed to demonstrate that trial counsel's performance was deficient. In his petition, and at the evidentiary hearing, appellant failed to indicate what testimony such an expert would have offered if

called to testify. Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for failing to have a polygraph test performed on appellant to demonstrate his innocence. Appellant failed to demonstrate that his trial counsel's performance was deficient. The results of a polygraph examination are not admissible unless both parties have signed a written stipulation to that effect.⁶ Appellant did not demonstrate that the results of a polygraph examination would have been both favorable and admissible such that his counsel acted objectively unreasonable in failing to arrange for one. Thus, the district court did not err in denying this claim.

Ninth, appellant claimed that his trial counsel was ineffective for failing to investigate potential witnesses and the crime scene. Appellant failed to demonstrate that he was prejudiced. Moreover, at the evidentiary hearing, appellant failed to present any evidence or witnesses to demonstrate how such an investigation would have altered the outcome at trial.⁷ Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that trial counsel was ineffective for failing to file any pre-trial motions to suppress evidence on appellant's behalf. Specifically, appellant complained that the search warrant was invalid and his counsel should have filed a motion to suppress evidence garnered from the crime scene because the judicial officer who signed the warrant initially signed it on the incorrect page. Appellant failed to

⁶Santillanes v. State, 102 Nev. 48, 50, 714 P.2d 184, 186 (1986).

⁷Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

demonstrate that trial counsel's performance was deficient or that he was prejudiced. Contrary to appellant's claims otherwise, appellant's trial counsel filed a motion to suppress the evidence found at the crime scene on the basis that the search warrant was invalid. The district court denied that motion on the ground that appellant lacked standing to bring the motion, because he did not have an ownership interest in either the shed or the vehicle and because he did not have a legitimate expectation of privacy in the shed or the vehicle. Therefore, the district court did not err in denying this claim.

Eleventh, appellant claimed that his trial counsel was ineffective for withdrawing a motion to suppress a statement appellant made to Detective Alan Salter, of the Reno Police Department. Appellant failed to demonstrate that trial counsel's performance was deficient. Although the district court had granted the motion to suppress as to a portion of the statement that was exculpatory and beneficial to appellant, appellant's trial counsel testified that he withdrew the motion so that the exculpatory portion of the statement could be presented to the jury. Appellant's trial counsel testified that it was not strategically sound to produce this exculpatory evidence through appellant's own testimony because appellant's credibility was susceptible to attack through the admission of appellant's prior felony convictions. Appellant's trial counsel testified that the admission of the statement allowed him to present appellant's theory of defense without requiring appellant to testify. "On appeal, this court will not second-guess an attorney's tactical decisions where they relate to trial strategy and are within the attorney's

discretion.”⁸ As the district court correctly noted, here, trial counsel reasonably decided to allow admission of appellant’s statement in order to present appellant’s version of events. Therefore, the district court did not err in denying this claim.

Twelfth, appellant claimed that his trial counsel was ineffective for failing to request a psychological evaluation of the victim based on the fact that she was an alcoholic, who had admitted to having blackouts, who could not remember the actual assault, and had made inconsistent statements regarding the assault. Appellant further claimed that the victim gave inconsistent statements about the sexual assault, which indicates psychological instability and that it was constitutional error not to request an independent psychological evaluation of the victim. Appellant failed to demonstrate that trial counsel’s performance was deficient or that he was prejudiced. Appellant failed to demonstrate that a request for a psychological evaluation would have been successful. Appellant also failed to state what evidence would have been produced by psychological evaluations that would have changed the outcome of the trial.⁹ Therefore, the district court did not err in denying this claim.

Thirteenth, appellant claimed his trial counsel was ineffective for failing to enter into evidence a report completed at Washoe Medical Center wherein appellant alleges that the victim stated she was unsure if she had been penetrated. Appellant claimed that this report would have

⁸Davis v. State, 107 Nev. 600, 603, 817 P.2d 1169, 1171 (1991); see Wilson v. State, 99 Nev. 362, 372, 664 P.2d 328, 334 (1983).

⁹See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

impeached the victim because at the preliminary hearing the victim claimed that she was pretty sure penetration had occurred. Appellant failed to demonstrate that he was prejudiced. At the preliminary hearing the victim testified that she was “pretty sure” that intercourse had occurred because she had felt pressure in her vagina. Similarly, at trial the victim testified that she thought she had been penetrated, and that she had felt appellant’s penis inside of her. At trial, the victim further testified that her memory of the sexual assault was spotty, that she had blacked out during portions of the evening, and that she could not remember everything that happened to her on the night of the sexual assault. Thus, the jury was well aware that the victim’s memory of the events was not entirely clear and was able to make its own determination regarding the victim’s credibility.¹⁰ Based on all of this testimony, the jury convicted appellant of sexual assault. Appellant failed to demonstrate that admission of the report the victim completed at Washoe Medical Center would have changed the outcome of the trial.¹¹ Therefore, the district court did not err in denying this claim.

Fourteenth, appellant claimed his trial counsel was ineffective for beginning his opening statement with the following statement, “Evidence will show that it goes all of a sudden from a nice, fun, time kissing, hugging, to choking, to rape, due to [the victim’s] alcoholic condition.” Appellant argued that this statement implied that he actually committed the rape. Appellant failed to demonstrate that he was

¹⁰See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

¹¹Hargrove, 100 Nev. at 502, 686 P.2d at 225.

prejudiced. When the statement is read in context with the entirety of trial counsel's opening statement, it is clear that trial counsel was attempting to imply that the victim had engaged in a consensual sexual encounter and then the victim alleged a sexual assault. Importantly, the jury was admonished that none of the statements made by counsel in opening statements should be considered as evidence in the case. Moreover, the defense appellant presented at trial made it plain that appellant did not concede his guilt; rather, appellant contended throughout the trial that he had engaged in consensual sexual relations with the victim. Therefore, the district court did not err in denying this claim.

Fifteenth, appellant claimed that his trial counsel was ineffective for entering into a stipulation, which involved the admission of a statement made by appellant's ex-girlfriend, without appellant's permission. Appellant claimed that when the stipulation was read in court, he told his trial counsel that his ex-girlfriend had never made the statements that were being admitted into evidence. Appellant claimed that he argued with his trial counsel about the admission of this "hearsay testimony." Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. At the evidentiary hearing, appellant offered no proof that he objected to the stipulation. Moreover, appellant failed to present any witnesses to verify that the statements in the stipulation were incorrect. Thus, appellant failed to demonstrate that the reading of the stipulation altered the outcome of his trial. Therefore, the district court did not err in denying this claim.

Sixteenth, appellant claimed that trial counsel was ineffective for failing to object to Timmy Ahern's testimony that he had met appellant

when appellant was released from prison in 1992 or 1993, even though this statement revealed that appellant had prior convictions. Appellant failed to demonstrate that he was prejudiced. After Timmy Ahern testified at trial, the jury asked if they could be told what crime appellant had previously committed. The district court indicated that it thought that either a mistrial or an admonishment was appropriate and thoroughly canvassed appellant to determine if he wished to move for a mistrial. Appellant's trial counsel indicated that he would prefer an admonishment and a limiting instruction. The district court then asked appellant whether he agreed with this approach, and appellant asked the district court to put the matter into layman's terms. The court explained that a mistrial would result in a new trial. The district court further explained that it could not express any opinion on the weight of the evidence or the credibility of the witnesses. The district court then gave appellant time to discuss the matter with his trial counsel and after this discussion appellant stated that he did not want a mistrial. As a result, the district court continued with the trial, but admonished the jury that it should disregard any reference to appellant's prior prison sentence. Thus, the district court took appropriate steps to cure any prejudice to appellant on this matter. Appellant was fully informed regarding the nature of the motion for a mistrial and offered a knowing, intelligent, and voluntary waiver. Therefore, the district court did not err in denying this claim.

Seventeenth, appellant claimed that trial counsel was ineffective for failing to present Rebecca Morgan, Sharon Brown, Hugh Ahern, Sandra Hranko, Robert Myers, and Kenneth Theall as witnesses. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. At the evidentiary hearing, appellant

failed to present any evidence or witnesses to demonstrate that these witnesses would have testified at trial consistently with his claims. Thus, appellant failed to show that the presentation of these witnesses would have changed the outcome of the trial.¹² Therefore, the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)."¹³ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁴ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹⁵ "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."¹⁶

First, appellant claimed that his trial counsel was ineffective for failing to raise the issue of sufficiency of the evidence on appeal. Appellant failed to demonstrate that that this issue had a reasonable probability of success on appeal. Our review of the record reveals sufficient evidence from which a rational jury could find appellant guilty of

¹²Id.

¹³Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

¹⁴Jones v. Barnes, 463 U.S. 745, 751 (1983).

¹⁵Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

¹⁶Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

sexual assault beyond a reasonable doubt.¹⁷ The victim testified that appellant sexually assaulted her in a storage shed. The victim reported the sexual assault immediately after the incident occurred. Moreover, the victim was found by the police a very short distance from the storage shed where the sexual assault occurred. Timmy Ahern testified that he heard a female voice crying for help inside the shed and that appellant had reassured him that everything was okay. The SART nurse, Titus, testified that the victim's injuries were consistent with sexual assault and that there was seminal fluid found in the victim's vagina. Thus, the evidence adduced at trial indicates that a challenge to the sufficiency of the evidence would not have had a reasonable probability of success on appeal. Therefore, the district court did not err in denying appellant's claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to raise a claim of prosecutorial misconduct because the prosecutor purposefully elicited testimony regarding appellant's prior conviction. Appellant failed to demonstrate that his appellate counsel was deficient or that he was prejudiced. Notably, after Ahern referenced appellant's prior prison sentence at trial, the district court canvassed the prosecuting attorney to determine if she had purposefully elicited evidence of appellant's prior incarceration. The prosecutor indicated that she had previously warned Ahern not to testify about appellant's prior prison sentence. At the evidentiary hearing, appellant failed to present any evidence supporting his claim that the prosecutor purposefully elicited this testimony. Thus, appellant failed to demonstrate that this issue

¹⁷See Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

would have had a reasonable probability of success on appeal. Therefore, the district court did not err in denying appellant's claim.

Finally, appellant claimed that the district court violated his constitutional right, pursuant to Apprendi v. New Jersey,¹⁸ to have a jury determine his habitual criminal status when the district court determined he was a habitual criminal. Appellant's claim is outside the scope of claims permissible in a petition for a writ of habeas corpus.¹⁹ Moreover, as a separate and independent ground to deny appellant's claim, this claim lacked merit. As this court recently noted in O'Neill v. State, NRS 207.010 comports with because NRS 207.010 does not require the district court to find any facts beyond prior convictions before sentencing a defendant as a habitual criminal.²⁰ In O'Neill, this court held that the only discretionary aspect of NRS 207.010 relates to the discretion to dismiss a count, which does not serve to increase punishment; 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 convictions.²¹ Here, appellant had five prior felony convictions. Therefore, the district court did not err in denying appellant's claim.

¹⁸530 U.S. 466 (2000).

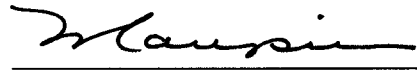
¹⁹NRS 34.810(b)(2).

²⁰123 Nev. ___, ___, 153 P.38, 43 (2007).

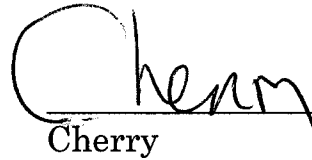
²¹Id.

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.

Maupin

 _____, J.

Cherry

 _____, J.

Saitta

cc: Hon. Brent T. Adams, District Judge
Gary Eugene Hawes
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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