

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOE KELLY ARMSTEAD A/K/A JOE
ARMSTEAD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49485

FILED

SEP 07 2007

ORDER OF AFFIRMANCE

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

This is a proper person appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Appellant Joe Kelly Armstead was originally convicted, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. The district court sentenced Armstead to serve two consecutive prison terms of 120 to 300 months. On direct appeal, this court affirmed the judgment of conviction.¹

Armstead filed a timely post-conviction petition in the district court, asserting various claims of ineffective assistance of counsel. The district court granted Armstead leave to file a supplement to the petition. The State filed an opposition, and the district court denied the petition without conducting an evidentiary hearing.

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,

¹Armstead v. State, Docket No. 45255 (Order of Affirmance, January 25, 2006).

and that there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.² The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.³

In the petition, Armstead first claimed that his trial counsel was ineffective for failing to challenge the imposition of the deadly weapon enhancement. Armstead argues that counsel should have required the jury to determine the validity of the enhancement. Armstead relies on Apprendi v. New Jersey.⁴

The jury did, in fact, find Armstead guilty of murder with the use of a deadly weapon. Under Apprendi and its progeny, the statutory maximum that may be imposed is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."⁵ Here, although the jury did not specifically approve the enhancement, the jury found the facts supporting the deadly weapon enhancement beyond a reasonable doubt. Thus, the district court was permitted to impose the deadly weapon enhancement, and Armstead has failed to show that counsel's performance was deficient. Accordingly, the district court did not err by denying this claim.

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

³Strickland, 466 U.S. at 697.

⁴530 U.S. 466 (2000).

⁵Blakely v. Washington, 542 U.S. 296, 303 (2004).

Armstead also claimed that counsel was ineffective for failing to prevent a Brady⁶ violation. Apart from arguing generally that counsel should have sought evidence from the State regarding the character of the victim, Armstead failed to allege any specific evidence that was withheld by the State. The district court did not err, therefore by denying this claim.⁷

Armstead further claimed that counsel was ineffective for failing to investigate adequately. Apart from arguing generally that counsel should have thoroughly investigated the character of the witnesses, Armstead failed to make specific factual allegations or show a reasonable probability that the outcome of the trial would have been different. Accordingly, the district court did not err by denying this claim.

Finally, in the supplemental petition, Armstead claimed that trial and appellate counsel were ineffective for failing to challenge the constitutionality of the deadly weapon enhancement. Specifically, Armstead argues that the enhancement violates the proscription against double jeopardy. NRS 193.165 specifically authorizes the district courts to impose an equal and consecutive term for the use of a deadly weapon. It is well settled that NRS 193.165 does not violate the Double Jeopardy Clause.⁸ Therefore, the district court did not err by denying this claim.

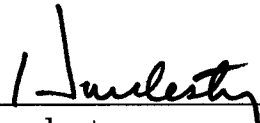
⁶Brady v. Maryland, 373 U.S. 83 (1963).

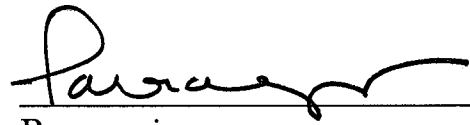
⁷See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that claims asserted in a post-conviction petition must be supported by specific factual allegations which, if true, would entitle petitioner to relief).

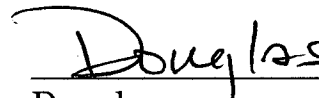
⁸Nevada Dep't. Prisons v. Bowen, 103 Nev. 477, 479, 745 P.2d 697, 698 (1987) (citing Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975)).

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.¹⁰


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Valorie Vega, District Judge
Joe Kelly Armstead
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).

¹⁰We 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.