


IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES BURNELL LEWIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49667

FILED

JAN 08 2008

FRANIE K. LINDEMAN
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; Michael Villani, Judge.

On February 16, 2006, the district court convicted appellant, pursuant to a jury verdict, of grand larceny auto. The district court sentenced appellant to serve a term of 24 to 60 months in the Nevada State Prison. The district court also ordered appellant to pay \$1200 in restitution. This court affirmed appellant's conviction, but reversed the district court's restitution order.¹ The remittitur issued on January 2, 2007.

On March 1, 2007, 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

¹Lewis v. State, Docket No. 46924 (Order Affirming in Part, Reversing in Part and Remanding, December 6, 2006).

conduct an evidentiary hearing. On May 15, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that there was insufficient evidence to sustain his conviction, and the district court erred in admitting into evidence letters he wrote to the victim from jail. This court rejected these claims on direct appeal. The doctrine of the law of the case prevents further litigation of these claims and cannot be avoided by a more detailed and focused argument.² Therefore, the district court did not err in denying these claims.

Next, appellant claimed that the district court erred in permitting the prosecution to imply that the victim was a prostitute and appellant was living off her earnings. This claim should have been raised on appellant's direct appeal, and appellant failed to demonstrate good cause for his failure to do so.³ Therefore, the district court did not err in denying this claim.

Next, appellant contended that his trial counsel was ineffective. 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.⁴ The court need

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

³NRS 34.810(1)(b)(2).

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

not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁵

First, appellant claimed that his trial counsel was ineffective for failing to suppress statements he made as they were the product of police coercion. Appellant did not establish that his counsel was deficient or that he was prejudiced. Appellant did not allege any specific facts regarding how the police coerced him into making statements.⁶ Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to call witnesses that heard the victim grant appellant permission to drive her car on occasion prior to when he was arrested driving the victim's car after she reported it stolen. Appellant did not establish that his counsel was deficient or that he was prejudiced. Appellant did not specifically identify the possible or potential witnesses who would have offered the testimony.⁷ Moreover, appellant did not demonstrate that such evidence of past consent would have affected the outcome of the trial in light of his admission that he did not have the victim's permission to use her car when he took possession of it in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

⁵Strickland, 466 U.S. at 697.

⁶See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that "bare" or "naked" claims, which are unsupported by specific facts, are insufficient to grant relief).

⁷Id.

Third, appellant claimed that his trial counsel was ineffective for failing to object to the prosecution implying that the victim was a prostitute and appellant was living on her earnings. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. During cross-examination, appellant admitted that he had been convicted of pandering several years prior to when he met the victim.⁸ There was no testimony that the victim was a prostitute and the State did not argue that appellant was living on her earnings from prostitution. The single reference to appellant's conviction did not improperly imply that the victim was a prostitute and that appellant was living on her earnings. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to impeach the victim's testimony with evidence that appellant had paid the victim rent and had been employed while he resided at her home.⁹ Appellant asserted that the victim lied when she testified that he did not pay her rent and did not have a job when he moved into her home. Appellant failed to demonstrate that he was prejudiced. At trial, appellant admitted that he took possession of the victim's car without asking for her permission or otherwise informing her that he was in possession of the car. Although he initially stated that he took the car out of necessity, he conceded that he continued to use the car for his own convenience. Further, a police officer testified that appellant told him that

⁸See NRS 50.095(1) (providing that evidence of a prior felony conviction may be used to impeach a testifying witness).

⁹In support of his claim, appellant attached a handwritten lease agreement to the petition.

appellant took the car to "get even" with the victim. As there was sufficient evidence that appellant took possession of the victim's car without her permission and with the intent to permanently deprive her of the car, independent of the victim's testimony, appellant did not demonstrate that had his counsel attempted to impeach the victim's testimony on these collateral issues that the jury would not have convicted him. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to investigate when the victim traveled to California. Appellant testified that he was planning to return the victim's car when she returned from California. Appellant claimed that because the victim did not travel to California until several days after her stated departure date, appellant did not expect her to return as soon as she did in fact return. Thus, the fact that he retained her car after she returned was due to a mistake and not appellant's intent to permanently deprive her of the car.

Appellant failed to demonstrate that he was prejudiced. While a misunderstanding about when the victim would return from her trip might have tended to show that appellant did not intend to retain possession of her car, appellant's other actions, which were not dependent upon the victim's return, demonstrated that he planned to retain her car. Appellant stated that he took the car out of necessity one evening because he had no way of returning home. However, he did not leave a note or otherwise attempt to contact the victim. Further, he did not return the car to her home the next day when he could have arranged alternate transportation. Instead, he drove the car for several days until his arrest. Moreover, an officer testified that appellant stated he took the car to "get even" with the victim. In addition, while appellant was in jail awaiting

trial, he wrote letters apologizing for taking the victim's car and instructing her not to testify against him in court. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for failing to investigate the victim's motive for reporting that appellant had stolen her car. Specifically, he claimed that the fact that he and the victim had a fight prior to her reporting the car stolen could lead to reasonable doubt concerning whether or not she granted him permission to use the car. Appellant did not demonstrate that he was prejudiced. Both the victim and appellant testified that they had an argument that led to appellant's eviction from the victim's home. Thus, the jury heard evidence of the argument despite appellant's counsel's alleged failure to investigate it. Moreover, appellant admitted that he did not have the victim's permission to drive her car and did not attempt to contact her to obtain her permission. Therefore, the district court did not err in denying this claim.

Appellant also 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.¹⁰ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹¹ This court has held that

¹⁰Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

¹¹Jones v. Barnes, 463 U.S. 745, 751 (1983).

appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹²

First, appellant claimed that his appellate counsel was ineffective for not raising federal constitutional claims. Appellant did not demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant did not identify the federal claims his appellate counsel should have argued on appeal.¹³ Therefore, we conclude the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for not raising claims of ineffective assistance of trial counsel. Claims of 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.¹⁴ Therefore, the district court did not err in denying these claims.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that there was insufficient evidence to convict him and that the district court erred in admitting letters he wrote to the victim while awaiting trial. Appellant's claim is belied by the record.¹⁵ On appeal, appellant's counsel argued that there was insufficient

¹²Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

¹³See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

¹⁴See Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001); Fezell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

¹⁵See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

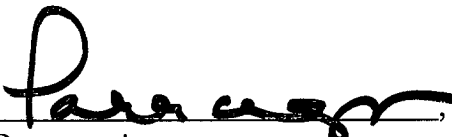
evidence to convict appellant and that the district court erred in admitting the letters. Appellant failed to demonstrate that further argument on these points would have had a reasonable probability of success on appeal. Therefore, the district court did not err in denying these claims.

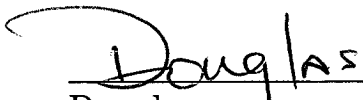
Fourth, appellant claimed that his appellate counsel was ineffective for not arguing that the district court erred in permitting the prosecution to imply that the victim was a prostitute and appellant had been living off her earnings. For the reasons discussed above, we conclude that appellant did not establish that his appellate counsel was ineffective for failing to raise these issues. Therefore, the district court did not err in denying these claims.

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.¹⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

¹⁶See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Michael Villani, District Judge
James Burnell Lewis
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk