IN THE SUPREME COURT OF THE STATE OF NEVADA

DARYL S. WRIGHT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50067

FILED

JUL 10 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

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; Jennifer Togliatti, Judge.

On October 18, 2004, the district court convicted appellant, pursuant to a jury verdict, of one count of first degree kidnapping with the use of a deadly weapon and one count of robbery with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life with the possibility of parole and two consecutive terms of 36 to 150 months in the Nevada State Prison, the latter to be served consecutively to the former. This court affirmed the judgment of conviction on direct appeal.[1] The remittitur issued on July 25, 2006.

On April 20, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

[1]Wright v. State, Docket No. 44276 (Order of Affirmance, June 29, 2006).

08-17633

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 hearing. On September 6, 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]

First, appellant claimed that his trial counsel was ineffective for failing to impeach the victim with discrepancies between the victim's testimony at trial and the victim's voluntary statements to police. Specifically, appellant claimed that in the prior statements to the police the victim did not mention that appellant had a knife or threatened him with a knife whereas at trial the victim testified that appellant told him that he had a knife and threatened to stab, hurt or kill the victim with the knife. Appellant also claimed that in a voluntary statement to the police the victim stated that after he gave appellant the money from the ATM the victim seemingly got into the vehicle of his own accord whereas at trial

---

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

[3]Strickland, 466 U.S. at 697.

the victim testified that after giving appellant the money appellant would not let him leave and ordered him back into the vehicle. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that had trial counsel attempted to impeach the victim with these discrepancies that there was a reasonable probability of a different result at trial given the testimony of the victim and the testimony regarding appellant's various statements to the police. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to call Officer Eric Solano, the police officer who took appellant's handwritten voluntary statement, as a witness. Appellant claimed that Officer Solano would have disclosed that the victim did not initially claim that appellant had told the victim he had a knife or threatened him with a knife. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that Officer Solano would have testified to these facts. More importantly, appellant failed to demonstrate that any testimony from Officer Solano on this point would have had a reasonable probability of altering the outcome of the trial. The decision of which witnesses to call is a strategic decision; tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances, and appellant demonstrated no such extraordinary circumstances here.[4] Therefore, we conclude that the district court did not err in denying this claim.

---

[4]See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

Next, appellant 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.[5] Appellate counsel is not required to raise every non-frivolous issue on appeal.[6] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[7]

First, appellant claimed that his appellate counsel was ineffective for failing to raise the aforementioned claims of ineffective assistance of trial counsel on direct appeal. 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.[8] Appellant failed to demonstrate that any issues of ineffective assistance of counsel would have been appropriate for direct appeal in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

---

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

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

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

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

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that there was insufficient evidence presented at trial that he had used a deadly weapon during the commission of his offenses. Appellant asserted that the victim testified that appellant claimed he had a knife but that the victim had never seen the knife. Appellant noted that he was shirtless and wearing shorts during the commission of the crimes and that at one point his shorts had been pulled down.

Based upon our review of the record on appeal, we conclude that the district court erred in denying this claim because appellate counsel was ineffective for failing to argue on appeal that there was insufficient evidence to support the deadly weapon enhancements.[9] The standard of review for sufficiency of the evidence in a criminal case is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution.[10] A reviewing court will not disturb a verdict on appeal if it is supported by substantial evidence.[11] In

---

[9]Although appellant did not challenge jury instruction 11 regarding the deadly weapon enhancement, it appears jury instruction 11 is flawed. Specifically, the language in jury instruction 11 which states "it is not always necessary for the State to prove that the deadly weapon was seen by the victim such as when the defendant's statements or conduct produce a fear of harm from that weapon" appears to be without legal support for the reasons discussed in this section.

[10]See Koza v. District Court, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

[11]See Nix v. State, 91 Nev. 613, 614, 541 P.2d 1, 2 (1975).

the instant case there is not substantial evidence that a deadly weapon was used in the commission of these offenses. NRS 193.165 provides that "any person who uses a . . . deadly weapon . . . in the commission of a crime" shall be subject to the deadly weapon sentencing enhancement.[12] "In order to 'use' a deadly weapon for purposes of NRS 193.165, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of the deadly weapon in aiding the commission of the crime."[13] In the instant case, there was no evidence that appellant used or displayed a weapon. Rather, appellant told the victim that he had a knife and threatened to use a knife on the victim during the crime, but the victim testified that he never saw a knife and appellant did not pat his pocket when threatening the victim. Stating one has a weapon is insufficient to establish "use" for purposes of the deadly weapon enhancement.[14] Because appellant's insufficiency of the evidence argument had a reasonable likelihood of success on appeal, we conclude that appellate counsel was ineffective, and the district court erred in denying this claim. Therefore, we reverse the district court's denial of this claim, and remand this matter for the district court to strike the deadly weapon enhancements from the judgment of conviction.[15]

---

[12]See 1995 Nev. Stat., ch. 455, § 1, at 1431.

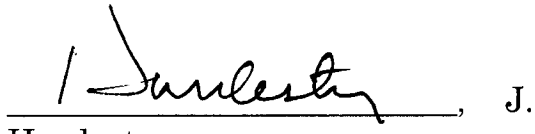
[13]Allen v. State, 96 Nev. 334, 336, 609 P.2d 321, 322 (1980).

[14]See id.

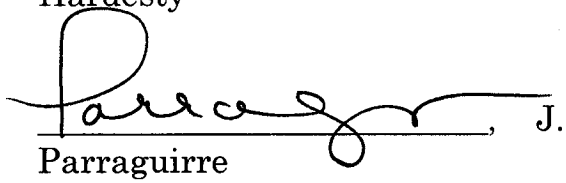
[15]Appellant also raised this claim independent of his ineffective assistance of appellate counsel claim. We have addressed this claim only as an ineffective assistance of appellate counsel claim as appellant failed to argue that he had good cause pursuant to NRS 34.810(1)(b).

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.[16] Accordingly, we

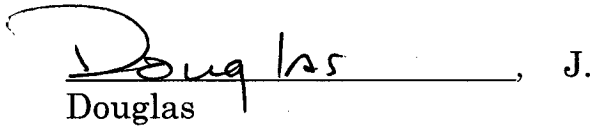
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[17]



_____, J.
Hardesty



_____, J.
Parraguirre



_____, J.
Douglas

cc: Hon. Jennifer Togliatti, District Judge
Daryl S. Wright
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

---

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

[17]This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.