IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE WILLIAM GIBBS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50083

FILED

JUN 09 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant George William Gibbs, Jr.'s post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

First, Gibbs argues that the district court erred in denying his claim that his appellate counsel was ineffective for failing to challenge Gibbs' convictions for lewdness and sexual assault as redundant. We conclude that Gibbs' failed to demonstrate that the district court erred in denying this claim without conducting an evidentiary hearing. The record on appeal does not contain sufficient information to conclude that any of the acts of lewdness with a minor were incidental to any of the acts of sexual assault. See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980).[1]

[1]Gibbs also argues that his convictions for lewdness and sexual assault violate double jeopardy. However, as lewdness with a minor is not a lesser included offense of sexual assault of a child, see Moore v. State, 109 Nev. 445, 447, 851 P.2d 1062, 1063 (1993), the prohibition against

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Second, Gibbs argues that the district court erred in denying his claim that his appellate counsel was ineffective for failing to challenge his convictions for use of a minor in the production of pornography and possession of child pornography as redundant. We disagree. The charges for use of a minor in the production of pornography were not redundant with each other as each charge related to a separate incident where a minor was used. See Wilson v. State, 121 Nev. 345, 357, 114 P.3d 285, 294 (2005). Similarly, the charges of possession of child pornography were not redundant as each related to a separate videotape. Lastly, the charges for use of a minor in a sexual performance did not punish the same illegal acts as the charges for possession of child pornography. Salazar v. State, 119 Nev. 224, 228, 70 P.3d 749, 751; see NRS 200.710 (prohibiting the enticement of a minor into a sexual performance); NRS 200.730 (prohibiting the possession of a visual depiction of a minor engaged in sexual conduct). Therefore, the district court did not err in denying this claim.[2]

Third, Gibbs argues that the district court erred in denying his claim that his appellate counsel was ineffective for failing to challenge his

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double jeopardy is not implicated, see Estes v. State, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006).

[2]To the extent Gibbs challenges his convictions for use of a minor in the production of pornography and possession of child pornography as violative of double jeopardy, we conclude that his claim lacks merit because of those offenses "requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932).

convictions for manufacturing a controlled substance, conspiracy to manufacture a controlled substance, and trafficking in a controlled substance as redundant. We disagree. Each of the charged drug offenses did not punish the same illegal act. Salazar, 119 Nev. at 228, 70 P.3d at 751; NRS 453.322 (prohibiting the manufacture of a controlled substance); NRS 453.3385(3) (prohibiting the possession of 28 grams or more of a controlled substance); NRS 453.401 (prohibiting an agreement to manufacture a controlled substance). Therefore, the district court did not err in denying this claim.[3]

Fourth, Gibbs argues that the district court erred in denying his claim that his trial counsel was ineffective for failing to investigate and present evidence that Gibbs had been in Utah until shortly before his arrest. We disagree. A search of the home in which Gibbs was arrested revealed the makings of a drug lab, other drugs and paraphernalia, and a strong odor of fresh methamphetamine. Gibbs also admitted to assisting in methamphetamine production. In light of this evidence, Gibbs failed to demonstrate that the result of the trial would have been different had his counsel investigated a potential alibi. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, the district court did not err in denying this claim.

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[3]To the extent Gibbs challenges his convictions for manufacturing a controlled substance, conspiracy to manufacture a controlled substance, and trafficking in a controlled substance as violative of double jeopardy, we conclude that his claim lacks merit because each of those offenses "requires proof of a fact which the other does not." Blockburger, 284 U.S. at 304.

Fifth, Gibbs argues that the district court erred in denying his claim that his trial counsel was ineffective for failing to investigate whether telephone calls by Gibbs were unlawfully intercepted. We disagree. The State did not attempt to introduce any evidence at trial related to intercepted phone calls; therefore, the absence of a challenge to that evidence did not affect the outcome of the trial. See Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996). Further, Gibbs did not allege what evidence was discovered as a result of intercepted phone calls. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Sixth, Gibbs argues that the district court erred in denying his claim that his trial counsel was ineffective for failing to obtain pretrial discovery materials from other law enforcement agencies under Brady v. Maryland, 373 U.S. 83 (1963). We disagree. Gibbs failed to demonstrate that a Brady motion would have been successful as the evidence Gibbs identifies was not exculpatory or material, see Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000), and the evidence he asserted that the State possessed concerning his potential alibi was not unknown to him, see Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). Further, as discussed above, Gibbs failed to demonstrate that any information concerning an alibi would have affected the outcome of the trial. Therefore, the district court did not err in denying this claim.

Seventh, Gibbs argues that the district court erred in denying his claim that his trial counsel was ineffective for failing to file a motion to suppress Gibbs' statements to police. We conclude that even if such a motion were successful, Gibbs did not demonstrate that he would not have been convicted of the drug charges, see Kirksey, 112 Nev. at 990, 923 P.2d

at 1109, considering the evidence of methamphetamine manufacturing and drug paraphernalia discovered in the home which Gibbs inhabited. Therefore, the district court did not err in denying this claim.

Eighth, Gibbs argues that the district court erred in denying his claim that his trial counsel was ineffective for failing to challenge the validity of the warrant used to search his safe. We disagree. Gibbs failed to demonstrate that a motion to suppress would have been granted. See id. Officers entered and searched the home pursuant to voluntary consent from the homeowners. See Gibbs v. State, Docket No. 39643 (Order of Affirmance, June 3, 2003). The officers' observations of the makings of a drug lab in the home was sufficient to support a warrant to further search the home and all the containers therein for more evidence of drug production. See Keesee v. State, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994). Therefore, the district court did not err in denying this claim.

Ninth, Gibbs argues that the district court erred in denying his claim that his trial counsel was ineffective for failing to move to sever the drug charges from the molestation charges. As the molestation charges were not based on the same transaction or common scheme as the drug charges, Gibbs' counsel was deficient for failing to move to sever the counts. See NRS 173.115. However, considering the overwhelming evidence of guilt related to each charge, Gibbs failed to demonstrate prejudice from counsel's failure to move to sever the charges. See Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 564 (1990) (providing that misjoinder will result in reversal "only if the error has a 'substantial and injurious effect or influence in determining the jury's verdict.'" (quoting Mitchell v. State, 105 Nev. 735, 739, 782 P.2d 1340, 1343 (1989))). Therefore, the district court did not err in denying this claim.

Tenth, Gibbs argues that the district court erred in denying his claim that his trial counsel was ineffective for failing to proffer jury instructions on alibi, mere presence, and mere association. Considering the aforementioned evidence of Gibbs' guilt, we conclude that he failed to demonstrate that had the proffered instructions been given, he would not have been convicted. Therefore, the district court did not err in denying this claim.

Eleventh, Gibbs argues that the district court erred in failing to make specific findings of fact and conclusions of law. Based on our review of the appendices, we conclude that the district court order denying Gibbs' post-conviction habeas corpus petition was sufficient. See NRS 34.830(1). Therefore, we conclude that no relief is warranted on this claim.

Twelfth, Gibbs argues that the district court violated the Nevada Code of Judicial Conduct by failing to inform Gibbs that he had an opportunity to respond to the proposed findings of fact and conclusions of law. While the district court may not have strictly followed the mandates of NCJC Canons 2.6 and 2.9, we conclude that any error was harmless and appellant failed to demonstrate prejudice. See NRS 178.598 (stating that any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded). Gibbs failed to identify any challenge to the factual findings of the district court or explain any adverse effect from the district court's failure to strictly follow the NCJC Canons. Therefore, Gibbs is not entitled to relief on this claim.

Thirteenth, Gibbs challenges the district court's failure to vacate the amended judgment of conviction. Although Gibbs claimed below that his counsel was ineffective for failing to address the district

court's entry of the amended judgment of conviction while his direct appeal from the judgment of conviction was pending, see Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994), he did not raise the independent underlying claim that he now argues on appeal, and we therefore decline to address it on appeal. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (noting that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).[4]

Having considered Gibbs' contentions and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Jackie Glass, District Judge
Bailus Cook & Kelesis
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[4]It appears that the district court lacked jurisdiction to enter an amended judgment of conviction. After the remittitur issues, the district court should enter a new amended judgment of conviction.