

IN THE SUPREME COURT OF THE STATE OF NEVADA

GABRIEL JURADO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50154

**FILED**

APR 10 2008

TRACIE 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 a post-conviction petition for a writ of habeas corpus. Sixth Judicial District Court, Humboldt County; John M. Iroz, Judge.

On December 3, 2004, the district court convicted appellant, pursuant to a guilty plea, of one count of trafficking in a controlled substance (level 3) in district court case number CR03-4742. On that same date, the district court convicted appellant, pursuant to a guilty plea, of five counts of ex-felon in possession of a firearm in district court case number CR04-4858. The district court sentenced appellant to serve in the Nevada State Prison a term of 10 to 25 years in the trafficking case and five concurrent terms of 12 to 36 months in the firearms case. This court affirmed the judgments of conviction on direct appeal.<sup>1</sup> The remittitur issued on August 2, 2005.

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<sup>1</sup>Jurado v. State, Docket Nos. 44454 and 44455 (Order of Affirmance, July 5, 2005).

On July 17, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the trafficking case. Appellant filed a subsequent amendment. On June 4, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the firearms case. The State opposed the petitions. 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 August 17, 2007, the district court denied appellant's petitions in both cases. This appeal followed.

Preliminarily, we note that the petition filed in the firearms case was untimely as it was filed more than one year after the issuance of the remittitur in the direct appeal.<sup>2</sup> No good cause statement was set forth on the face of the petition explaining the failure to file the petition in the firearms case within one year from issuance of the remittitur on direct appeal. Thus, the district court erred in reaching the merits of this petition. Nevertheless, we conclude that the denial of the petition in the firearms case was the correct result because the petition was procedurally barred, and we affirm the denial of the petition on that basis.<sup>3</sup>

In his petition and amended petition filed in the trafficking case, appellant contended that his guilty plea was invalid and that he received ineffective assistance of trial counsel. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing

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<sup>2</sup>See NRS 34.726(1).

<sup>3</sup>See generally Kraemer v. Kraemer, 79 Nev. 287, 291, 382 P.2d 394, 396 (1963) (holding that a correct result will not be reversed simply because it is based on the wrong reason).

that the plea was not entered knowingly and intelligently.<sup>4</sup> In determining the validity of a guilty plea, this court looks to the totality of the circumstances.<sup>5</sup> To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.<sup>6</sup> The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.<sup>7</sup>

First, appellant claimed that his guilty plea was invalid because his trial counsel failed to personally interview or have an investigator interview critical witnesses in preparation of the defense. Specifically, appellant claimed that in the trafficking case trial counsel failed to interview: (1) Lori Jock and ascertain her propensity to lie and her use of drugs; (2) Craig Jock and ascertain Lori Jock's untrustworthiness due to her extensive drug problem; (3) Larry Jacobs and ascertain Lori Jock's drug problem and deceptive behavior; (4) Michelle Smith and ascertain Lori Jock's drug history; and (5) Detective

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<sup>4</sup>Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

<sup>5</sup>State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

<sup>6</sup>Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

<sup>7</sup>Strickland v. Washington, 466 U.S. 668, 697 (1984).

Andy Rorex and ascertain that Lori Jock had previously made a false allegation of sexual assault against appellant.

Based upon our review of the record on appeal, we conclude that appellant failed to carry his burden of demonstrating that his guilty plea was invalid and failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. During the plea canvass, appellant was specifically asked if he was satisfied with trial counsel's investigation of the facts and if trial counsel followed through with any requests that appellant may have had with respect to interviewing any potential witnesses or investigating any other facts important to the case; appellant answered in the affirmative. Notably, during a hearing on a motion to dismiss and motion to suppress evidence, Michelle Smith testified about Lori Jock's drug usage while she was a confidential informant and Detective Rorex testified about Lori Jock's prior unfounded allegation of sexual assault. Appellant failed to indicate what further information would have been gathered in interviews with these witnesses that would have had a reasonable probability of a different outcome. Appellant received a substantial benefit by entry of his guilty plea. In exchange for his guilty plea to one count of level 3 trafficking and five counts of ex-felon in possession of a firearm, the State agreed to dismiss the charges of solicitation to commit murder,<sup>8</sup> one count of possession of a controlled substance for purpose of sale (marijuana), and fifteen counts of ex-felon in possession of a firearm. Additionally, no charges were to be filed concerning Elko County's pending investigation of

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<sup>8</sup>Lori Jock, one of the confidential informants in the trafficking case, was the target of the solicitation to commit murder offense.

appellant, and the State agreed to not pursue habitual criminal adjudication. Finally, the State agreed that the sentences between the trafficking case and the firearm case should run concurrently with one another. Thus, appellant substantially limited his liability in the instant cases. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his guilty plea was invalid because his trial counsel failed to investigate the solicitation to commit murder case.<sup>9</sup> Appellant claimed that he entered his guilty plea in the trafficking case and the firearms case because of the solicitation charge. Appellant claimed that if his trial counsel had personally interviewed JB Wilks, an inmate who witnessed appellant's conversations with James Hamilton (the inmate appellant was alleged to have solicited to commit murder), trial counsel would have discovered that it was Hamilton that approached appellant and that appellant's rights were violated because Hamilton was an agent of the State and wired with audio surveillance equipment during at least one conversation with appellant.

Based upon our review of the record on appeal, we conclude that appellant failed to carry his burden of demonstrating that his guilty plea was invalid in this regard and that his trial counsel's performance was deficient or that he was prejudiced. During the plea canvass, appellant was asked if he was satisfied with his trial counsel's

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<sup>9</sup>Because the solicitation to commit murder case was dismissed, appellant cannot litigate any claims that his counsel was ineffective in the solicitation to commit murder case. These claims are reviewed only to the extent that appellant claimed they effected the representation in the trafficking case.

investigation, and appellant answered in the affirmative. Because the solicitation to commit murder case was dismissed pursuant to appellant's guilty plea, trial counsel was not deficient for failing to further investigate the solicitation to commit murder case. The transcript in the solicitation to commit murder case that appellant attached to this petition indicated that trial counsel was in the process of investigating JB Wilks. Appellant failed to demonstrate that the solicitation to commit murder case would have been dismissed had trial counsel pursued a motion to dismiss because appellant failed to demonstrate that such a motion would have been meritorious. Finally, as stated above, appellant received a substantial benefit by entry of his guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his guilty plea was invalid because his trial counsel failed to consult with appellant and gather information to assist in preparing a defense in the both the trafficking and solicitation cases. Appellant failed to carry his burden demonstrating that his guilty plea was invalid and that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that he would not have entered a guilty plea had trial counsel consulted with appellant further. In his guilty plea agreement, appellant affirmatively indicated that he had discussed any possible defenses and circumstances that might be in his favor with his trial counsel. During the guilty plea canvass, appellant indicated that there was nothing further that trial counsel could have done that would have changed his guilty plea decision. Finally, the record on appeal indicates that trial counsel vigorously represented appellant during the trial proceedings in the instant case and filed a motion to dismiss and a motion to suppress evidence. Again,

appellant received a substantial benefit by entry of his guilty pleas, and appellant failed to demonstrate that further consultation would have had a reasonable probability of altering appellant's decision to enter a guilty plea. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his guilty plea was coerced by his trial counsel's lack of communication, failure to investigate and failure to file a motion to dismiss the solicitation to commit murder case. Appellant further claimed that his guilty plea was coerced because he was housed in isolation for four months prior to his guilty plea and trial counsel visited him only one time and conversed with him only a few times on the telephone during this period. Finally, appellant claimed that trial counsel coerced his guilty plea by informing him that he faced habitual criminal adjudication if he went to trial and lost.

Based upon our review of the record on appeal, we conclude that appellant failed to demonstrate that his guilty pleas were invalid. Appellant failed to demonstrate that his guilty pleas were coerced. As discussed earlier, appellant failed to demonstrate that trial counsel's failure to consult, investigate and file a motion to dismiss the solicitation case had a reasonable probability of altering his decision to enter guilty pleas in the trafficking and firearms cases. During the plea canvass, appellant affirmatively indicated that he was not threatened into entering a guilty plea. The district court specifically canvassed appellant about the effect of his confinement on his decision to plead guilty, and appellant indicated that his confinement was not causing him to plead guilty. Finally, appellant faced the possibility of habitual criminal adjudication; thus, any advice regarding the possibility of habitual criminal adjudication

was reasonable under the circumstances. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for being unprepared in the solicitation to commit murder case and requesting a continuance in that case, which violated his speedy trial rights in that case. Appellant further claimed that he wanted to go to trial first on the solicitation to commit murder case, then the firearms case, and then the trafficking case. However, because trial counsel was not prepared in the solicitation to commit murder case and because trial counsel requested a remand for a new preliminary hearing in the firearms case, appellant had to face the charges in the trafficking case first. Appellant alleged that the solicitation to commit murder case and the firearms case were weaker cases used as leverage against him in the trafficking case.

Based upon our review of the record on appeal, we conclude that appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant agreed to the continuance in the solicitation to commit murder case. Appellant failed to demonstrate that trial counsel's level of preparation was unreasonable in the solicitation to commit murder case and influenced appellant's guilty plea in the trafficking case. Further, trial counsel's decision to proceed on the trafficking case first was a tactical decision. Tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances, and appellant demonstrated no such extraordinary circumstances here.<sup>10</sup>

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<sup>10</sup>See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).



Appellant further failed to demonstrate that had trial counsel adopted appellant's strategy that there was a reasonable probability of a different outcome. Finally, appellant cannot complain that his speedy trial rights were violated in the solicitation to commit murder case as it was dismissed. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to move for a change of venue. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Because appellant entered a guilty plea prior to the trial, a motion for a change of venue would have been premature. Appellant further failed to demonstrate that such a motion would have had a reasonable probability of success. Therefore, we conclude that the district court did not err in denying this claim.

Finally, 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.<sup>11</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>12</sup> This court has

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<sup>11</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>12</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>13</sup>

Appellant claimed that his appellate counsel failed to adequately argue that the district court erred in denying his motion to suppress. Specifically, appellant claimed that appellate counsel should have argued that Lori Jock's testimony at the suppression hearing was in conflict with the detective's testimony at the hearing, that the detective made a mistake on the dates in the motion to suppress, that Lori Jock was not reliable because of her extensive drug use and her prior false allegation of sexual assault, that the search warrant was based on Lori Jock's statements, and that there was no recording of the detective's conversations with Lori Jock.

Based upon our review of the record on appeal, we conclude that appellant failed to demonstrate that he was prejudiced by appellate counsel's performance. Although appellant provided page citations, appellant failed to provide any specific argument regarding his claim that Lori Jock's testimony was in conflict with the detective's testimony; thus, he failed to demonstrate that his appellate counsel was ineffective in this regard.<sup>14</sup> Appellant failed to demonstrate that any argument regarding the mistake of dates would have had a reasonable probability of success on appeal because the mistake regarding the dates, whether Lori Jock was inside appellant's residence on June 30th or July 2nd, would not have

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<sup>13</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

<sup>14</sup>The district court is not required to review the specific pages and guess what testimony appellant believed was conflicting.

invalidated the search warrant in the instant case as the discrepancy with the dates was not critical and there was no indication the detective knowingly presented false information in his affidavit of probable cause.<sup>15</sup> As the district court concluded at the suppression hearing, the important factor was not the exact date, June 30th or July 2nd, but what Lori Jock viewed in appellant's residence. There was no challenge to the fact that she was in appellant's residence on one of those dates and what she viewed in appellant's residence.<sup>16</sup> This court considered and rejected appellate counsel's argument that the affidavit in support of probable cause was based on information from confidential and named informants that was stale or unreliable. Appellant failed to demonstrate that further information about Lori Jock's drug use or the false sexual assault allegation would have had a reasonable probability of a different result. On direct appeal, this court noted that the affidavit of probable cause was

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<sup>15</sup>See Wright v. State, 112 Nev. 391, 396, 916 P.2d 146, 149-50 (1996) (holding that probable cause requires trustworthy facts and circumstances that would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are seizable and will be found in the place to be searched and holding that a reviewing court should not adopt "a grudging, hypertechnical view of warrant applications"), overruled on other grounds by Levingston v. Washoe County, 114 Nev. 306, 956 P.2d 84 (1998); see also United States v. Leon, 468 U.S. 897, 914 (1984) (recognizing that the preference for warrants is more effectively achieved in granting great deference to a magistrate's determination regarding probable cause, but also recognizing that this deference does not preclude inquiry into the knowing or reckless falsity of the probable cause affidavit).

<sup>16</sup>We note that during the suppression hearing, Lori Jock testified that she could not be certain about the dates.

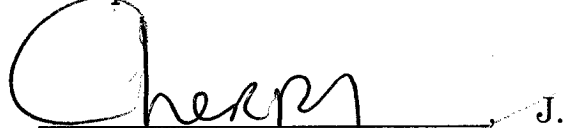
based on three confidential informants and numerous named informants. Finally, the fact that conversations between the detective and Lori Jock were not recorded does not invalidate the search warrant. Therefore, we conclude that the district court did not err in denying this claim.

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.<sup>17</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>18</sup>

  
\_\_\_\_\_ J.

Maupin

  
\_\_\_\_\_ J.

Cherry

  
\_\_\_\_\_ J.

Saitta

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<sup>17</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>18</sup>We 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. To the extent that appellant claimed that Judge Iroz should have been disqualified, appellant failed to follow the procedures set forth in NRS 1.235.

cc: Hon. John M. Iroz, District Judge  
Gabriel Jurado  
Attorney General Catherine Cortez Masto/Carson City  
Humboldt County District Attorney  
Humboldt County Clerk