

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGELO PANTANO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50259

**FILED**

DEC 17 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 a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

On May 11, 2004, the district court convicted appellant Angelo Pantano, pursuant to a jury verdict, of sexual assault of a child under 14. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after 20 years. This court affirmed appellant's judgment of conviction and sentence on appeal.<sup>1</sup> The remittitur issued on August 21, 2006.

On June 29, 2007, appellant filed a timely proper person post-conviction petition for a writ of habeas corpus. 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 conduct an evidentiary hearing. On September 18, 2007, the district court denied the petition. This appeal followed.

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<sup>1</sup>Pantano v. State, 122 Nev. 782, 138 P.3d 477 (2006).

Appellant claimed 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 fell below an objective standard of reasonableness, and there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.<sup>2</sup> The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.<sup>3</sup>

First, appellant claimed that his trial counsel was ineffective for failing to file a motion to suppress his confession. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. "The question of the admissibility of a confession is primarily a factual question addressed to the district court: where that determination is supported by substantial evidence, it should not be disturbed on appeal."<sup>4</sup> Moreover, in determining whether a confession is voluntary, the court looks at the totality of the circumstances.<sup>5</sup> During his interview by Detective Given, appellant was informed that his interview was voluntary and that he could leave at any time. Thus, the circumstances indicate that appellant's confession was voluntary. As such, appellant failed to

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<sup>2</sup>See Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432, 33, 683 P.2d 504, 505 (1984) (adopting test set forth in Strickland).

<sup>3</sup>Strickland, 466 U.S. at 697.

<sup>4</sup>Chambers v. State, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997).

<sup>5</sup>Id.

demonstrate that a motion to suppress had a reasonable likelihood of success.<sup>6</sup> Therefore, the district court did not err in denying this claim.<sup>7</sup>

Second, appellant claimed that his trial counsel was ineffective for failing to object to the admission of the audiotape of his confession and for failing to object to the use of transcripts of the audiotape by the jurors. Appellant claimed that the audiotape was not an accurate representation of his interview with Detective Given. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. At trial, Detective Given testified concerning the recording of the interview and to the accuracy of the audiotape. As such, appellant failed to demonstrate that any objection to the admission of the audiotape or to the use of the audiotape transcript by the jury would have had a reasonable likelihood of success.<sup>8</sup> Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to sufficiently meet with him to discuss trial strategy, including discussing witnesses to call in his defense, inconsistencies in the State's

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<sup>6</sup>Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996).

<sup>7</sup>To the extent that appellant argued that his confession was coerced and that the district court should have conducted a hearing to determine if his confession was coerced, appellant failed to demonstrate good cause for failing to raise these claims in his direct appeal and prejudice, and therefore, we conclude that the district court did not err in denying this claim. See NRS 34.810(b)(2).

<sup>8</sup>We note that the transcript was not certified and was not admitted into evidence, but was used for demonstrative purposes to aid the jurors as they listened to the audiotape.

witnesses' stories, which defense strategy to use, and how to question the State's witnesses. Appellant failed to demonstrate that he was prejudiced. As there was overwhelming evidence of appellant's guilt due to his confession, the victim's testimony and corroborating physical evidence, appellant failed to demonstrate a reasonable probability of a different outcome had his trial counsel met further with appellant to discuss these issues. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to ensure his speedy trial rights. Appellant failed to demonstrate that he was prejudiced. Appellant failed to identify how the outcome of his trial would have been different had the trial been conducted earlier.<sup>9</sup> Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for stipulating to the competency of the minor child victim. Appellant argued that the short answers that the victim gave at trial indicate that she was not competent to testify. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. Prior to trial, the district court held a hearing to determine if the minor child victim was competent to testify. Following the questioning of the victim, appellant's trial counsel stipulated that the victim was competent to testify. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances" and appellant failed to demonstrate any such

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<sup>9</sup>Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

circumstances.<sup>10</sup> Further, when the testimony of the victim is viewed as a whole, there is nothing to indicate that she was incompetent. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for stipulating that the DNA and blood of the victim were on the victim's undergarments, for failing to conduct an independent DNA test on the victim's underwear to determine if the blood was actually that of the victim, and for failing to force the State to reveal evidence concerning the underwear that appellant claimed was exculpatory. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. The victim's mother found undergarments belonging to the victim which had a dark stain. A test performed by a nurse following an examination of the victim determined that the stain was blood. Appellant failed to identify any reason why the blood on the victim's undergarments would not have come from the victim. Further, tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances and appellant failed to demonstrate any such circumstances.<sup>11</sup> In addition, as there was overwhelming evidence of appellant's guilty due to his confession the victim's testimony and corroborating physical evidence, appellant failed to demonstrate that there was a reasonable probability of a different outcome of the trial had his counsel not stipulated that the blood was that of the victim. Therefore, the district court did not err in denying this claim.

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<sup>10</sup>See Ford v State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

<sup>11</sup>See id.

Seventh, appellant claimed that his trial counsel was ineffective for failing to properly cross-examine witnesses. Specifically, appellant claimed that his trial counsel did not question the State's witnesses concerning prior inconsistent statements. Appellant failed to demonstrate that he suffered prejudice. The inconsistencies appellant cited were minor and given the overwhelming evidence of appellant's guilt, appellant failed to demonstrate a reasonable probability of a different outcome of the trial had the witnesses been questioned concerning these minor inconsistencies. Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for failing to investigate alibi witnesses and failing to call additional witnesses to testify in his defense. Appellant claimed that an investigation would have revealed witnesses that would have testified that he was with them at the time the incident was alleged to have occurred. Appellant further claimed that multiple other witnesses should have been called to testify concerning the victim and her family members' motives for fabricating their stories. In addition, appellant claimed that an expert witness should have been retained to refute the testimony of the State's expert witnesses and to perform an independent psychological examination of the victim. Appellant failed to demonstrate that he was prejudiced. Appellant confessed that he sexually assaulted the victim. Appellant failed to demonstrate that testimony from any additional witnesses had a reasonable possibility of altering the outcome of the trial under the circumstances. Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that his trial counsel was ineffective for failing to present evidence concerning witnesses' motives for fabricating their testimony. Appellant claimed that the mother of the victim owed him money and that she coached the victim's testimony so that she would not have to repay appellant. Appellant failed to demonstrate that he was prejudiced. In light of appellant's confession that he sexually assaulted the victim, appellant failed to demonstrate that this testimony would have had a reasonable possibility of altering the outcome of the trial. Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that his trial counsel was ineffective for failing to present his mother's testimony to refute claims that his mother was afraid of him. At trial, the victim's mother testified that appellant's mother was afraid of him. Appellant included an affidavit from his mother in which she stated that she was not afraid of appellant. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. Following an objection to the victim's mother's statement regarding appellant's mother, the district court admonished the jury to disregard the statement concerning appellant's mother's fear. As stated earlier, there was overwhelming evidence of appellant's guilt. Thus, he failed to demonstrate that testimony concerning his mother's feelings towards him would have changed the outcome of the trial. Therefore, the district court did not err in denying this claim.

Eleventh, appellant claimed that his trial counsel was ineffective for failing to investigate whether appellant possessed a cell phone at the time of the incident. Appellant claimed that he lied to the police about having a cell phone with him during the incident; therefore, his trial counsel should have investigated to show that appellant did not

have a cell phone at the time of the assault and that would have shown his confession was false. Appellant failed to demonstrate that he was prejudiced. Appellant confessed to the police that during the sexual assault, he distracted the victim's brother by allowing the brother to play a game on his cell phone. In light of his confession, the victim's testimony and the physical evidence, appellant failed to demonstrate that such an investigation would have resulted in a reasonable probability of a different outcome at trial.<sup>12</sup> Therefore, the district court did not err in denying this claim.

Twelfth, appellant claimed that the Clark County Public Defender's office denied him the right to counsel because he had different counsel at different stages of the proceedings. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had he had the same counsel throughout the entire trial proceedings. Therefore, the district court did not err in denying this claim.

Thirteenth, appellant claimed that his trial counsel was ineffective for failing to correct a defective, vague, and unconstitutional criminal complaint. Appellant claimed that the complaint did not specify the exact date and time of the offense. Appellant failed to demonstrate that his trial counsel was deficient or he was prejudiced. Time and date are not essential elements of a sexual offense against a minor.<sup>13</sup> Therefore, the district court did not err in denying this claim.

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<sup>12</sup>Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

<sup>13</sup>Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984).



Fourteenth, appellant claimed that his trial counsel was ineffective for allowing a jury instruction to shift the reasonable doubt burden to the defense. Appellant failed to demonstrate that his trial counsel was deficient. A proper reasonable doubt instruction was used at trial.<sup>14</sup> Therefore, the district court did not err in denying this claim.

Fifteenth, appellant claimed that his trial counsel was ineffective for failing to object when Dr. Vergara vouched for the credibility of the victim. Appellant claimed that Dr. Vergara's testimony concerning the examination of the victim improperly vouched for the credibility of the victim. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. Statements amounting "to an opinion as to the veracity of a witness in circumstances where veracity might well have determined the ultimate issue of guilt or innocence" are improper.<sup>15</sup> Dr. Vergara simply testified that the examination of the victim revealed injuries that were consistent with sexual assault. As such, Dr. Vergara's testimony was proper and appellant failed to demonstrate that any objection would have had a reasonable probability of changing the outcome at trial. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in

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<sup>14</sup>NRS 175.211; see, e.g., Chambers v. State, 113 Nev. 974, 982-83, 944 P.2d 805, 810 (1997); Milton v. State, 111 Nev. 1487, 1492, 908 P.2d 684, 687 (1995).

<sup>15</sup>Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988).

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>16</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>17</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>18</sup>

First, appellant claimed that his appellate counsel was ineffective for failing to include the audiotape or a certified transcript of his police interview with the appendix for his direct appeal. Appellant failed to demonstrate that he was prejudiced. At trial, a noncertified transcript was used so that the jury could follow along with an audiotape of the interview. The noncertified transcript was not admitted into evidence. Appellant failed to demonstrate that the transcript of the interview that was used at trial was substantially different from the audiotape. Thus, appellant failed to demonstrate that the result of the direct appeal would have been different if this transcript had been included. Therefore, the district court did not err in denying this claim.<sup>19</sup>

Second, appellant claimed that his appellate counsel was ineffective for failing to include assertions that appellant's statements to

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<sup>16</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

<sup>17</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>18</sup>Ford, 105 Nev. at 853, 784 P.2d at 953.

<sup>19</sup>To the extent that appellant argues that this court erred by not sua sponte ordering a certified copy of the transcript of the police interview, this is not a cognizable claim before the district court, therefore we conclude that the district court did not err in denying this claim.

police, including his confession, were false. Appellant failed to demonstrate that his appellate counsel was deficient or that he was prejudiced. As discussed above, appellant's confession was voluntary and appellant did not identify any additional grounds upon which his confession should have been suppressed. Appellant failed to demonstrate that any claim regarding the veracity of his confession would have had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.


Third, appellant claimed that his appellate counsel was ineffective for failing to communicate with him while preparing his direct appeal. Appellant failed to demonstrate that he was prejudiced. Appellant failed to identify any issues, other than the claim relating to his confession, which he wished to raise, but were not raised due to his lack of communication with his appellate counsel. Therefore, the district court did not err in denying this claim.

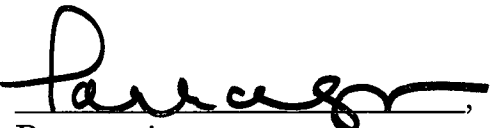
Next, appellant claimed that the cumulative errors of his trial and appellate counsel caused them to be ineffective. Appellant failed to demonstrate that he was prejudiced. As appellant failed to demonstrate any error for the reasons discussed previously, appellant failed to demonstrate cumulative error. Therefore, the district court did not err in denying this claim.

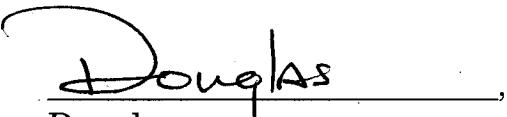
Finally, appellant claimed that he was unable to fully address all of the possible claims because he did not receive a copy of his trial transcript from the district court, his trial counsel, or his appellate counsel. This claim is not a cognizable claim for relief in a post-conviction petition for a writ of habeas corpus. Therefore, 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>20</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>21</sup>

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Valorie Vega, District Judge  
Angelo Pantano  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>20</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>21</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.