IN THE SUPREME COURT OF THE STATE OF NEVADA

SCOTT MICHAEL TYZBIR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50279

FILED

MAR 06 2008

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 Scott Michael Tyzbir's post-conviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; William A. Maddox, Judge.

On March 9, 2004, Tyzbir was convicted, pursuant to a jury verdict, of one count of possession of a stolen vehicle. The district court sentenced Tyzbir to serve a prison term of 24 to 60 months. We affirmed the judgment of conviction on direct appeal.[1]

Tyzbir filed a timely proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent Tyzbir, and counsel supplemented Tyzbir's petition. The State filed a response. The district court conducted a hearing, requested additional briefing, and subsequently entered an order denying the petition. This appeal follows.

Tyzbir claims that the district court erred by concluding that he did not receive ineffective assistance of counsel. To state a claim of

[1]Tyzbir v. State, Docket No. 43121 (Order of Affirmance, March 22, 2005).

ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient, and that the petitioner was prejudiced by counsel's performance.[2] The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong.[3] A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence.[4] The district court's factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal.[5]

First, Tyzbir contends that counsel was ineffective for failing to seek the exclusion of a pretrial identification that was unnecessarily suggestive and unreliable.

Testimony describing a pretrial identification is inadmissible if the totality of the circumstances indicate that it was made under circumstances that were "'so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law.'"[6] "The inquiry is two-fold: (1) whether the procedure is unnecessarily suggestive and (2) if so, whether, under all the circumstances, the identification is reliable despite an unnecessarily

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[2]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1987)).

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

[4]Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

[5]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[6]Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1029 (1980) (quoting Stovall v. Denno, 388 U.S. 293, 301-02 (1967)).

suggestive identification procedure."[7] Relevant factors for determining whether an identification is reliable include: "the witness' opportunity to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."[8]

Here, the district court specifically found that the identification was made by a trained peace officer, the officer had adequate time and lighting to see Tyzbir at the crime scene, and the officer was certain that he saw Tyzbir at the crime scene when he later identified Tyzbir. The district court determined that the officer's identification was reliable and that Tyzbir was not prejudiced by counsel's failure to raise this issue in a pretrial motion or on appeal. We note that the district court's findings are supported by the record on appeal, and we conclude that the district court did not err in denying this claim.

Second, Tyzbir contends that counsel was ineffective for failing to object to hearsay testimony. During the trial, Deputy Douglas Speegle testified that Christopher Weddell, an unavailable witness, told him that Tyzbir was the driver of the stolen vehicle. Tyzbir specifically claims that this hearsay testimony was prejudicial because it was used to bolster the deputy's pretrial identification of him as the driver.

However, the district court found that "trial counsel very effectively examined Deputy Speegle. Another witness offered by Tyzbir's counsel testified that it was another person driving the stolen car and not

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[7]Bias v. State, 105 Nev. 869, 871, 784 P.2d 963, 964 (1989).

[8]Gehrke, 96 Nev. at 584, 613 P.2d at 1030.

Scott Tyzbir. The jury resolved this factual dispute against Tyzbir." Based on its evaluation of the evidence presented at trial, the district court was unconvinced that the trial's outcome would have been different if Weddell's statements had been excluded. We note that the district court's findings are supported by the record on appeal, and we conclude that the district court did not err in denying this claim.

Third, Tyzbir contends that appellate counsel was ineffective for failing to adequately challenge the district court's denial of his proposed jury instruction. Tyzbir notes that we affirmed the district court's decision to deny the proposed lesser-included offense instruction because it was inconsistent with his theory of the case. Tyzbir observes that we have since clarified our prior precedent by holding that a defendant is not required "to present a defense or evidence consistent with or to admit culpability for a lesser-included offense in order to obtain an instruction on a lesser-included offense."[9] Tyzbir argues that this clarification must be applied to his case.

The district court determined that the unlawful taking of a vehicle is not a lesser-included offense of possession of a stolen vehicle and therefore Tyzbir was not entitled to his proposed jury instruction. The test "to determine whether a crime is necessarily included in the offense charged is 'whether the offense charged cannot be committed without committing the lesser offense.'"[10] Possession of a stolen vehicle may be committed without committing the offense of unlawful taking of a vehicle

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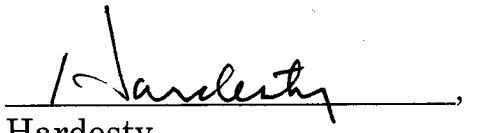
[9]Rosas v. State, 122 Nev. ___, ___, 147 P.3d 1101, 1109 (2006).

[10]Jackson v. State, 93 Nev. 677, 682, 572 P.2d 927, 930 (1977) (quoting Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966)).

because it does not require proof that the defendant unlawfully took the vehicle, just that he was in possession of a vehicle that he knew or had reason to know was stolen.[11] Accordingly, we conclude that the district court correctly determined that the crimes are separate and distinct and that Tyzbir was not entitled to relief on this claim.

Having considered Tyzbir's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.[12]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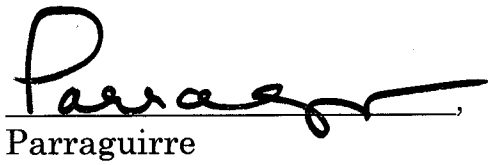
, J.
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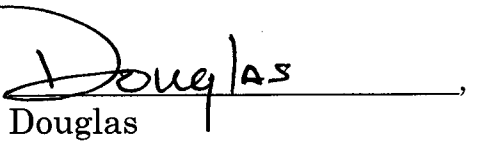
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Douglas

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[11]See NRS 205.2715; NRS 205.273(1)(b).

[12]On November 13, 2007, Tyzbir's court-appointed counsel filed a motion to withdraw as counsel of record in this appeal. We deny the motion. And because Tyzbir is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, this court shall take no action on and shall not consider the proper person documents Tyzbir has submitted to this court in this matter.

cc: Hon. William A. Maddox, District Judge
Carolyn E. Tanner
Attorney General Catherine Cortez Masto/Carson City
Carson City District Attorney
Carson City Clerk
Scott Michael Tyzbir