

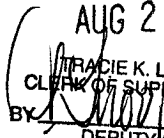
IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN TOLE MOXLEY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50302

**FILED**

AUG 29 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 appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On May 26, 2006, the district court convicted appellant, pursuant to a guilty plea, of battery by a prisoner.<sup>1</sup> The district court sentenced appellant as a small habitual criminal to serve a term of five to twenty years in the Nevada State Prison. This court affirmed the judgment of conviction on direct appeal.<sup>2</sup> The remittitur issued on February 28, 2007.

On March 6, 2007, appellant filed a motion to withdraw a guilty plea. On March 22, 2007, the district court denied appellant's motion. On March 13, 2007, appellant filed a proper person motion to

<sup>1</sup>Appellant initially proceeded to trial. However, after the jury indicated it was deadlocked the district court declared a mistrial. Appellant then entered a guilty plea.

<sup>2</sup>Moxley v. State, Docket No. 47446 (Order of Affirmance, February 1, 2007).

correct an illegal sentence. On April 5, 2007, the district court denied appellant's motion. This court affirmed the district court's orders on appeal.<sup>3</sup>

On June 5, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. 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 October 3, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that the district court erred in denying his motion for self-representation. This court considered and rejected this claim on appeal. The doctrine of the law of the case prevents further litigation of this issue and cannot be avoided by a more detailed and precisely focused argument.<sup>4</sup> Therefore, the district court did not err in denying this claim.

Next, appellant claimed that the district court erred when it: (1) failed to appoint counsel or conduct a Faretta<sup>5</sup> canvass at the May 26, 2005, hearing; (2) failed to conduct a hearing to investigate why appellant was without counsel between May 7, 2005, and May 20, 2005; (3) misstated evidence received at trial; (4) induced a witness to commit perjury; (5) ordered appellant to wear a stun belt; (6) granted the State's

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<sup>3</sup>Moxley v. State, Docket Nos. 49250 and 49363 (Order of Affirmance, December 10, 2007).

<sup>4</sup>See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

<sup>5</sup>Faretta v. California, 422 U.S. 806 (1975).

motion in limine regarding the introduction of the victim's past incidents of misconduct; (7) attempted to make appellant wear an ugly shirt in court; (8) overruled objections to the victim's testimony; (9) failed to instruct the jury on false testimony; (10) failed to strike perjured testimony or declare a mistrial because of said testimony; (11) permitted the State to suborn perjury; (12) committed judicial misconduct; (13) incorrectly instructed the jury; (14) imposed appellant's sentence concurrent to a sentence that was not yet imposed; (15) permitted appellant to plead guilty to an indictment based on perjury; (16) failed to instruct the State to charge the victim with attempted murder and assault; (17) failed to enter a directed verdict; (18) failed to ensure fair proceedings; (19) denied appellant's right to counsel at critical stages; (20) hindered appellant's ability to collect evidence; (21) failed to conduct a probable cause hearing; (22) denied appellant the opportunity to file papers through counsel; (23) permitted multiple identical prosecutions; (24) failed to direct the State to file charges against the victim; (25) failed to make findings to support habitual criminal adjudication; (26) permitted appellant's stipulation to habitual criminal status; and (27) incorrectly calculated credits for time served at sentencing. Appellant also claimed that the State erred when it: (1) failed to charge the victim with perjury; (2) failed to file notice of its intent to seek habitual criminal adjudication; (3) committed prosecutorial misconduct; (4) conducted multiple identical prosecutions; (5) prevented evidence gathering by appellant; (6) failed to inform the court of the victim's perjury; (7) failed to provide the victim's medical records in discovery; (8) provided inadequate notice of the grand jury proceedings; (9) denied appellant the opportunity to testify before the grand jury; (10) failed to ensure that appellant had counsel; (11)

committed misconduct in other cases concerning appellant; (12) failed to provide witness criminal records; (13) failed to provide adequate notice of intent to seek habitual criminal adjudication; (14) improperly permitted district attorneys who were not assigned to appellant's case to file documents related to appellants case; (15) incorrectly informed the court that the notice of intent to seek habitual criminal adjudication was filed; and (16) suborned perjury. As appellant's claims did not address the voluntariness of his plea or whether his plea was entered without the effective assistance of counsel, the claims fell outside the scope of claims permissible in a habeas corpus petition challenging a judgment of conviction based upon a guilty plea.<sup>6</sup> Therefore, the district court did not err in denying these claims.

Appellant also claimed that the district court failed to conduct hearings prior to denying appellant's motions to withdraw a guilty plea and to correct an illegal sentence. These claims fell outside the scope of claims permissible in a habeas corpus petition challenging a judgment of conviction based on a guilty plea.<sup>7</sup> Therefore, the district court did not err in denying these claims.

Appellant also contended that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice

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<sup>6</sup>NRS 34.810(1)(a).

<sup>7</sup>Id.

such that there is a reasonable probability of a different outcome in the proceedings.<sup>8</sup> To demonstrate prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner must demonstrate that “he would not have pleaded guilty and would have insisted on going to trial.”<sup>9</sup> The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.<sup>10</sup>

First, appellant claimed that his counsel did not ensure that he was able to testify before the grand jury. Appellant failed to demonstrate that his counsel was deficient. Appellant acknowledged in his petition, and the record indicates, that appellant was not represented by counsel at the time the State sought an indictment from the grand jury. Further, appellant did not have a Sixth Amendment right to counsel until the grand jury returned an indictment.<sup>11</sup> Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his counsel was ineffective for failing to move to dismiss the indictment because he was unable to testify before the grand jury. Appellant asserted that he properly informed the State of his desire to testify before the grand jury but was not permitted to do so. Appellant failed to demonstrate that he was prejudiced. Appellant

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<sup>8</sup>Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>9</sup>Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996) (quoting Hill, 474 U.S. at 59).

<sup>10</sup>Strickland, 466 U.S. at 697.

<sup>11</sup>Sheriff, Clark County, v. Warner, 112 Nev. 1234, 1243, 926 P.2d 775, 780 (1996).

merely alleged that he was denied the right to testify before the grand jury.<sup>12</sup> Appellant did not allege that “the evidence against [appellant] [was] irrevocably tainted or [appellant’s] case on the merits [was] prejudiced to the extent ‘that notions of due process and fundamental fairness would preclude reindictment.’”<sup>13</sup> Thus, even if the district court dismissed the indictment because he was unable to testify, the State would be permitted to refile. Further the evidence presented to the grand jury was sufficient to create a reasonable inference that appellant committed the battery.<sup>14</sup> The victim, attorney Paul Wommer, testified that appellant attacked him while Wommer was meeting with appellant at the Clark County Detention Center. Appellant did not demonstrate that he would not have been indicted a second time if he presented his exculpatory explanation that he was defending himself against his attorney’s aggression to the grand jury.<sup>15</sup> Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to object to the trial court proceedings because appellant was

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<sup>12</sup>State v. Babayan, 106 Nev. 155, 174, 787 P.2d 805, 818 (1990) (stating “denial of due process before the grand jury, in and of itself, does not mandate dismissal with prejudice”).

<sup>13</sup>Id. at 173, 787 P.2d at 818 (quoting United States v. Lawson, 502 F. Supp. 158, 172 (D. Md. 1980) (citations omitted)).

<sup>14</sup>State v. Boueri, 99 Nev. 790, 795, 672 P.2d 33, 36 (1983) (citing LaPena v. Sheriff, 91 Nev. 692, 541 P.2d 907 (1975)).

<sup>15</sup>See State v. Eddington, 83 Nev. 359, 363, 432 P.2d 87, 89 (1967) (providing that a grand jury may indict someone even if presented with an exculpatory explanation).

not provided with counsel from the date of his arrest until his arraignment roughly twenty days later. Further, appellant was not represented by counsel at the grand jury proceedings. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not have the right to appointed counsel in proceedings before a grand jury.<sup>16</sup> Further, appellant's Sixth Amendment right to counsel did not attach until appellant had been indicted.<sup>17</sup> In addition, appellant did not allege that he had been subject to interrogation during the time that he was without counsel.<sup>18</sup> Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for failing to move to dismiss the complaint and indictment because the district court had failed to conduct a probable cause hearing between the time when appellant was arrested on May 7, 2005, and rebooked on the indictment on May 20, 2005. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. A delay of more than 48 hours between an individual's arrest and first appearance before a

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<sup>16</sup>Sheriff, Clark County v. Warner, 112 Nev. 1234, 1243, 926 P.2d 775, 780 (1996).

<sup>17</sup>See Kaczmarek v. State, 120 Nev. 314, 326, 91 P.3d 16, 25 (2004) (providing that the Sixth Amendment right to counsel does not attach until adversarial proceedings have commenced).

<sup>18</sup>See Harte v. State, 116 Nev. 1054, 1065, 13 P.3d 420, 428 (2000) (recognizing that the Fifth Amendment right to counsel protects accused from further interrogation).

magistrate presumptively violates the Fourth Amendment.<sup>19</sup> However, the delay does not offend the Fourth Amendment where the defendant's incarceration is a continuation of other lawful custody and not solely based on the warrantless arrest.<sup>20</sup> Appellant was being held in custody awaiting trial for another offense when he battered his attorney and was arrested for that battery. As he was in lawful custody on another charge, the State was not required to present him to a magistrate without unnecessary delay. Moreover, as appellant did not assert that the State interrogated him during that time, he did not show prejudice resulting from the delay.<sup>21</sup> Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to move to dismiss the indictment. Specifically, appellant claimed that (1) the victim's testimony before the grand jury constituted hearsay because he later admitted that he did not see appellant first strike him as he was looking down but was told what occurred by another

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<sup>19</sup>County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991); see also NRS 171.178 (requiring an arrested person to be brought before a magistrate "without unnecessary delay").

<sup>20</sup>See State v. Gattuso, 108 Nev. 49, 51, 825 P.2d 569, 570 (1992) (providing that the apprehension of a prisoner is not an arrest as described by NRS 171.178, but a continuation of the correctional institution's custody).

<sup>21</sup>See Huebner v. State, 103 Nev. 29, 32, 731 P.2d 1330, 1333 (1987) (providing that the purpose of the rule requiring prompt presentation to a magistrate is to inform appellant of his privilege against self-incrimination and "avoid all the evil implications of secret interrogation of persons accused of crime") (quoting McNabb v. United States, 318 U.S. 332, 344 (1943)).



witness, (2) the victim's testimony was perjured because it was inconsistent with his later trial testimony concerning whether he was wearing his glasses when appellant struck him, and (3) the State failed to put forth evidence that appellant was in lawful custody. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. "At a grand jury proceeding, the state is required to produce evidence establishing 'probable cause' to hold an accused for trial."<sup>22</sup> Evidence supporting the indictment must be legal evidence and not hearsay.<sup>23</sup> First, while the victim admitted that he did not see appellant's first punch, he testified that he felt the first punch and then witnessed appellant attack him thereafter. As the victim experienced and witnessed the attack on his person, appellant did not establish that his grand jury testimony concerning the entire attack was hearsay. Second, the mere fact that the victim may have testified inconsistently before the grand jury and trial regarding whether he was wearing glasses when appellant struck him did not significantly undermine his testimony regarding the attack such that the evidence was not sufficient upon which to find probable cause to believe that appellant committed the crime. Third, the victim's testimony that he was visiting appellant at the detention center where appellant resided was sufficient evidence upon which to find probable cause to believe that appellant was in custody at the time of the attack. Therefore, the district court did not err in denying this claim.

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<sup>22</sup>State v. Boueri, 99 Nev. 790, 795, 672 P.2d 33, 36 (citing NRS 172.155(1)).

<sup>23</sup>Collins v. State, 113 Nev. 1177, 1182, 946 P.2d 1055, 1059 (1997) (quoting NRS 172.135(2)).

Sixth, appellant claimed that his trial counsel was ineffective for not objecting to the State maintaining two prosecutions against appellant. Specifically, he claimed that his counsel should have argued that the State erred in not immediately dismissing the complaint once the grand jury indicted appellant. He claimed that the two prosecutions and two bails hindered his ability to have a fair trial. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. The State did not maintain two prosecutions for the same crime against appellant. The indictment or information is the first pleading on the part of the State.<sup>24</sup> The State could not proceed to trial for a felony on the complaint alone. Thus, the State did not proceed in two identical prosecutions against appellant. Moreover, appellant even acknowledged, and the record reflects, that the complaint was dismissed well before trial. In addition, appellant did not explain how the possible imposition of two bails impacted his decision to enter a guilty plea. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for advising him to plead guilty to an indictment based on hearsay, perjury, the denial of counsel, the denial of the right to testify at grand jury proceedings, the denial of a probable cause hearing, and prosecutorial misconduct despite his actual innocence. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. As noted above, appellant's indictment was not based on inadmissible hearsay or perjury, he was not entitled to counsel until he was indicted,

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<sup>24</sup>NRS 173.015.

was not prejudiced by his failure to testify before the grand jury, was not entitled to a probable cause hearing, and was not subjected to two identical prosecutions. Further, a factual basis for the plea was established during the plea canvass when appellant admitted that he attacked the victim while appellant was in lawful custody on other charges. Moreover, appellant received a substantial benefit by entry of his guilty plea in the instant case. Appellant had five prior felony convictions, as noted in the State's notice of intent to seek habitual criminal adjudication. Thus, he was eligible for large habitual criminal treatment. Under large habitual criminal treatment, appellant could have been sentenced to life without the possibility of parole, life with the possibility of parole after ten years, and twenty-five years with the possibility of parole after ten years. Pursuant to the plea negotiations, appellant agreed to enter a conditional plea to the indictment and stipulated to small habitual criminal treatment. The State also agreed not to oppose a concurrent sentence with another case. Appellant's potential liability was significantly reduced by his guilty plea. Thus, in light of appellant's admission and the substantial benefit he received, appellant failed to demonstrate that he would have proceeded to trial if only his counsel had pursued his actual innocence claim. Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for failing to secure evidence that supported his theory of self-defense. Specifically, he claimed that his counsel failed to obtain appellant's medical records and photograph appellant's injuries, including a stab wound, that appellant asserted he received when his counsel attacked him. He further claimed that counsel was ineffective for failing to raise an

issue that appellant was prevented from obtaining this evidence. Appellant failed to demonstrate that he was prejudiced. “An attorney must make reasonable investigations or a reasonable decision that particular investigations are unnecessary.”<sup>25</sup> A petitioner asserting a claim that his counsel did not conduct a sufficient investigation bears the burden of showing that he would have benefited from a more thorough investigation.<sup>26</sup> While evidence of appellant’s injuries is consistent with a theory of self-defense, the evidence does not indicate the order in which the injuries were inflicted. Thus, the evidence could equally support the conclusion that appellant merely received the injuries during his attack on the victim when the victim tried to defend himself. Appellant did not demonstrate that, in light of the substantial benefit he received as a result of the plea bargain, the evidence was so significant that he would not have pleaded guilty and would have insisted upon going to trial had it been discovered or had his counsel argued that appellant was prevented from collecting this evidence. Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that his trial counsel was ineffective for failing to investigate whether the victim had filed a civil lawsuit against the Clark County Detention Center and the Las Vegas Metropolitan Police. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant put forth no evidence that

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<sup>25</sup>State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006) (citing Strickland, 466 U.S. at 691).

<sup>26</sup>Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

the victim had filed any lawsuit against the detention center or police department.<sup>27</sup> In addition, appellant did not explain how the failure to discover this evidence impacted his decision to enter a guilty plea. Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that his trial counsel was ineffective for failing to obtain the victim's criminal and state bar records concerning prior assaults or allegations of assaults. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant put forth no evidence that there were any criminal or bar records that indicated that anyone had ever accused the victim of assaulting them.<sup>28</sup> In addition, appellant did not explain how the failure to discover this evidence impacted his decision to enter a guilty plea. Therefore, the district court did not err in denying this claim.

Eleventh, appellant claimed that his trial counsel was ineffective for failing to obtain photographs of the visiting room in which the battery allegedly occurred and the table that he allegedly jumped over during the battery, failing to obtain visitation logs, and failing to interview medical staff who treated the victim. Appellant failed to demonstrate that he was prejudiced. Appellant did not explain how the introduction of the photographs would have aided his defense or otherwise impacted his decision to plead guilty. Appellant did not state what information his

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<sup>27</sup>Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

<sup>28</sup>Id.

counsel would have obtained from the visitation logs or medical staff.<sup>29</sup> Therefore, the district court did not err in denying this claim.

Twelfth, appellant claimed that his trial counsel was ineffective for failing to interview Melissa Pokie, Mike Pfreinder, Ruth Pfreinder, Arnold Weinstock, Robert Guinta, Gregory L. Denué, Lauren of Frasco Investigations, Paul Wommer, Betty Moxley, Robert Walsh, Gene Russo, William T. Smith, Kelvin Patton, Becky Goettsch, Vicki Monroe, Elissa Zuzach, Pete Baldanado, William, Freiberg, Correctional Officer Crandel, Correctional Officer Hickman, Correctional Officer Reese, Anthony Prentice, Dr. Paglini, Renee Edwards, William Merner, Roger Timothy, Jeffery Bruce, Raymond R. Green, Correctional Officer M. Becker, M. Murphy, and the technician who photographed the crime scene. He asserted that these witnesses would have provided information that would have supported appellant's theory of the case. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not identify what specific events each witness observed or what each witness's potential testimony would be.<sup>30</sup> In addition, appellant did not explain how the failure to interview these witnesses impacted his decision to enter a guilty plea. Therefore, the district court did not err in denying this claim.<sup>31</sup>

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<sup>29</sup>Id.

<sup>30</sup>Id.

<sup>31</sup>To the extent that appellant claimed that his counsel failed to inform the district court that it was not conducting the aforementioned investigation, we conclude that appellant failed to demonstrate that he was prejudiced for the reasons discussed above.

Thirteenth, appellant claimed that his trial counsel was ineffective for waiving his right to a speedy trial. Specifically, appellant claimed that his counsel told him they were waiving his right so that they could file motions objecting to the illegal prosecution, objecting to the illegal grand jury proceedings, objecting to the denial of his right to be present and present evidence at the grand jury, objecting to the denial of a probable cause hearing, and seeking the recusal of Judge Glass. He claimed that his counsel falsely informed the court that the continuance was necessary to conduct further investigations. Counsel then failed to conduct any investigation. Appellant failed to demonstrate that he was prejudiced. As noted above, appellant did not demonstrate that any avenue of investigation he identified would have impacted his decision to plead guilty. Further, appellant did not demonstrate that any of the motions would have been successful. Moreover, appellant did not establish that the State would not have been able to proceed to trial within the speedy trial period. In addition, appellant failed to indicate how the waiver of his speedy trial rights impacted his decision to enter a guilty plea. Therefore, the district court did not err in denying this claim.

Fourteenth, appellant claimed that his trial counsel was ineffective for failing to argue that the prosecutors were vindictive and should have been removed from the case. Specifically, he claimed that the prosecution withheld evidence and failed to disclose deals with witnesses and witness criminal records in other cases. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. Appellant did not assert that the State filed additional charges or

amended the indictment to increase the severity of the charges filed in the instant case.<sup>32</sup> Further, the charges alleged in the instant case arose out of a completely different set of facts than those alleged in appellant's other cases.<sup>33</sup> The instant charge of battery by a prisoner was factually unrelated to the charges appellant faced in other cases. Further, the instant charge arose well after appellant had been arrested for the other offenses and on the eve of trial for one of the offenses. Therefore the district court did not err in denying this claim.<sup>34</sup>

Seventeenth, appellant claimed that his trial counsel was ineffective for failing to request a Petrocelli hearing<sup>35</sup> to admit testimony at trial of inmates Ricky Slaughter and Ronald Williams to testify about the victim's prior bad acts in which he threatened clients to enter guilty

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<sup>32</sup>See United States v. Burt, 619 F.2d 831, 836 (9th Cir. 1980) ("The right to due process of law is violated where the government increases the severity of alleged charges in response to the exercise of constitutional or statutory rights.").

<sup>33</sup>See id. (providing that a prosecutorial decision does not appear to be the product of vindictiveness where it is justified by independent reasons or intervening circumstances) (quoting United States v. Griffin, 617 F.2d 1342, 1347 (9th Cir. 1980)); see also United States v. Martinez, 785 F.2d 663, 669 (9th Cir. 1986) (providing that there is generally no appearance or likelihood of prosecutorial vindictiveness when the second criminal cases arises out of a different set of facts).

<sup>34</sup>To the extent that appellant claimed he was prejudiced in other cases for the exercise of his constitutional rights in this case, a claim of prosecutorial vindictiveness should be raised in petitions in the other cases. We express no opinion as to whether appellant could satisfy the procedural requirements of NRS chapter 34 in any such petitions.

<sup>35</sup>Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).



pleas. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. First, appellant's counsel filed notice that appellant intended to call Williams and Slaughter as witnesses. Further, the district court did not err in granting the State's motion in limine because appellant did not demonstrate that the evidence was even relevant as he did not allege that the victim was physically violent with either inmate. Moreover, appellant was not entitled to introduce prior bad acts of the victim to prove that he acted in conformance with them.<sup>36</sup> Further, appellant failed to identify another purpose for which the evidence might be admissible.<sup>37</sup> Therefore, the district court did not err in denying this claim.

Eighteenth, appellant claimed that his trial counsel was ineffective for advising appellant to stipulate to habitual criminal status despite the fact that no notice of habitual criminal treatment had been filed. Further, his counsel failed to challenge the fact that no notice had been filed. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. As we concluded in appellant's appeal from the district court order denying his motion to withdraw a guilty plea, the record contains a notice filed on July 19, 2005. We further concluded that appellant did not merely stipulate to habitual criminal status, but waived proof of his prior convictions. Thus, as appellant's guilty plea was not invalid for these reasons, appellant failed to demonstrate that he was

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<sup>36</sup>NRS 48.045(2); NRS 48.055(1).

<sup>37</sup>See NRS 48.045(2) (providing that evidence of prior wrongs may be admissible for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident").

prejudiced by his counsel's advice. Further, as noted above, appellant received a substantial benefit for the entry of his guilty plea. In view of this benefit, his counsel was not unreasonable for recommending that appellant enter a plea for a reduced sentence. Therefore, the district court did not err in denying this claim.

Nineteenth, appellant claimed that his trial counsel was ineffective for failing to file a timely motion to recuse Judge Glass and failing to file a notice of appeal from the order denying that motion. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant's counsel did in fact file a motion to recuse Judge Glass, which was considered on the merits. To the extent that appellant claimed that his counsel failed to effectively argue the motion for recusal, we conclude that appellant did not demonstrate that he was prejudiced as his claim of bias is supported entirely by rulings that appellant claimed Judge Glass erred in making or otherwise failed to make.<sup>38</sup> Further, no statute or court rule provides for an appeal from an

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<sup>38</sup>See In re Petition to Recall Dunleavy, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988) (providing that "rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification," but "personal bias necessary to disqualify must 'stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case'") (quoting United States v. Beneke, 449 F.2d 1259, 1260-61 (8th Cir. 1971)).

order denying a motion for recusal of a district court judge.<sup>39</sup> Therefore, the district court did not err in denying this claim.

Twentieth, appellant claimed that his trial counsel was ineffective for failing to object to meetings which occurred on August 16, 2005, and October 11, 2005, which were not recorded, nor was appellant permitted to be present. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant did not identify what occurred at the hearings and how it impacted his decision to enter a guilty plea.<sup>40</sup> Therefore, the district court did not err in denying this claim.

Twenty-first, appellant claimed that his trial counsel was ineffective for errors that occurred during his trial which concluded in a mistrial. Specifically, appellant claimed that his counsel: (1) failed to introduce facts that would show that appellant acted in self-defense; (2) failed to interview the victim prior to trial in order to impeach the victim with his grand jury testimony and the results of the interview; (3) failed to object to the State's subornation of perjury; (4) failed to object to the State's question of the victim concerning lawful custody as hearsay; (5) failed to seek an instruction for the lesser included charge of misdemeanor simple assault; (6) failed to object to the prosecution's misstatement of the evidence during closing arguments; (7) failed to object to the victim's testimony about whether appellant was in lawful custody as hearsay; (8) failed to object to the victim's testimony because the victim admitted he

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<sup>39</sup>See Castillo v. State, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990) (providing that the right to appeal is statutory and no right to appeal exists where no statute or court rule provides for an appeal).

<sup>40</sup>Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

did not have personal knowledge of the events; (9) failed to move for a directed verdict; and (10) failed to move for a mistrial. Appellant did not demonstrate that he was prejudiced. As appellant's first trial did not result in a guilty verdict, he did not establish that he was prejudiced by any of the alleged errors. Further, as appellant's trial had concluded prior to appellant pleading guilty, appellant did not demonstrate that the alleged errors so shook his confidence in the outcome of the proceedings that he was compelled to plead guilty. Therefore, the district court did not err in denying these claims.

Twenty-second, appellant claimed that his trial counsel was ineffective for not pursuing appellant's motion to withdraw his guilty plea. Appellant failed to demonstrate that his counsel was deficient. Several days before appellant filed his motion to withdraw his guilty plea, appellant filed a motion to withdraw his counsel of record. The district court granted appellant's motion to withdraw. As appellant had dismissed his counsel, he did not demonstrate that his counsel was deficient for failing to pursue appellant's motion to withdraw his guilty plea. Therefore, the district court did not err in denying this claim.

Twenty-third, appellant claimed that his trial counsel was ineffective for proceeding under a conflict of interest. Specifically, he claimed that his counsel (1) would not present evidence that the victim stabbed appellant; (2) would not present supporting medical expert testimony that the victim stabbed appellant; (3) never read the victim's grand jury testimony; (4) failed to file a motion to disqualify Judge Glass; (5) failed to file a motion to change venue; and (6) failed to dismiss the indictment. Further, he claimed that his counsel failed to inform the court of the conflict. Appellant failed to demonstrate that his counsel was

deficient or that he was prejudiced. To show a Sixth Amendment violation of his right to counsel, appellant must demonstrate both an actual conflict and an adverse effect on his attorney's performance.<sup>41</sup> "In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties."<sup>42</sup> Where a petitioner demonstrates an actual conflict of interest that adversely affects a lawyer's performance, this court presumes prejudice to the petitioner.<sup>43</sup> Appellant did not allege that an actual conflict of interest existed, merely that he disagreed with decisions made by counsel during the course of appellant's representation.<sup>44</sup> As discussed above, appellant's counsel's actions did not prejudice appellant. Therefore, the district court did not err in denying this claim.<sup>45</sup>

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<sup>41</sup>Cuyler v. Sullivan, 446 U.S. 335, 348 (1980); see also Burger v. Kemp, 483 U.S. 776, 783 (1987) (providing that prejudice is presumed "only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance" (internal quotes and citation omitted) (emphasis added)).

<sup>42</sup>Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

<sup>43</sup>Id.

<sup>44</sup>See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (holding that "[t]actical decisions by counsel are virtually unchallengeable absent extraordinary circumstances").

<sup>45</sup>To the extent that appellant claimed his appellate counsel was ineffective for failing to argue this claim, we conclude that the district court did not err in denying this claim for the reasons discussed above.

To the extent that appellant claimed that his plea was invalid due to his trial counsel's ineffectiveness, appellant failed to demonstrate that his plea was invalid for the reasons discussed above.

Next, appellant contended 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>46</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>47</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>48</sup>

First, appellant claimed that his appellate counsel was ineffective for failing to argue that (1) appellant was denied counsel prior to his arraignment; (2) appellant was not given a probable cause hearing within 48 hours of his arrest; (3) the State maintained two prosecutions for the same offense; (4) the State failed to file notice of its intent to seek habitual criminal adjudication; (5) the district court erred in denying appellant's motion to disqualify Judge Glass; (6) there was insufficient evidence to sustain the indictment or a conviction; and (7) appellant was not permitted to testify before the grand jury. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. By entering a guilty plea, appellant waived all errors, including deprivation of constitutional rights, which occurred prior to the entry of his plea, except

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<sup>46</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

<sup>47</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>48</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

for those errors that were specifically reserved.<sup>49</sup> Appellant only reserved the right to appeal from the district court's denial of his motion to represent himself. As appellant waived the aforementioned claims, he did not demonstrate that any of the alleged errors had a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying these claims.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that his trial counsel was ineffective. Claims of ineffective assistance of counsel are generally raised in the district court in the first instance by filing a post-conviction petition for a writ of habeas corpus, as the record is generally insufficient to raise such claims on direct appeal.<sup>50</sup> Therefore, the district court did not err in denying these claims.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that appellant was denied his right to self-representation. Appellant claimed that his counsel failed to make the following arguments within the context of this issue: (1) that the justice court denied appellant counsel and the right to self-representation, (2) that the justice court failed to conduct a probable cause hearing, (3) that the prosecution proceeded upon two prosecutions and two bails, (4) that evidence was lost, (5) that his counsel failed to argue for the change of venue, (6) that his counsel failed to move to recuse Judge Glass, (7) that he

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<sup>49</sup>See Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975).

<sup>50</sup>See Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001); Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

did not have notice of the grand jury proceedings, (8) that appellant was denied the right to testify before the grand jury, and (9) that counsel failed to pursue expert testimony. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. On appeal from his judgment of conviction, appellant's counsel argued that the district court abused its discretion in denying appellant's motions for self-representation. This court affirmed the district court's orders holding that the district court's conclusion that appellant's motions were "part of a pattern of dilatory behavior" was supported by substantial evidence. As noted above, appellant's proffered arguments lacked merit and did not undermine this court's conclusion. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that Judge Glass improperly took part in the plea negotiations and compelled appellant to plead guilty. Appellant failed to demonstrate that he was prejudiced. Appellant raised this claim in his motion to withdraw a guilty plea. In affirming the district court's denial of the motion to withdraw a guilty plea, this court held that the district court did not impermissibly participate in the plea negotiations. Therefore, appellant failed to demonstrate that this issue had a reasonable probability of success on appeal, and the district court did not err in denying this claim.

Fifth, appellant claimed that his appellate counsel was ineffective for failing to argue that appellant could not stipulate to habitual criminality. Appellant failed to demonstrate that his appellant counsel was deficient or that he was prejudiced. In affirming the district court's denial of appellant's motion to withdraw a guilty plea, this court



held that appellant did not merely stipulate to habitual criminal status, but waived proof of his prior convictions. The doctrine of the law of the case prevented further litigation of this issue.<sup>51</sup> Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his appellate counsel was ineffective for failing to respond to this court's order to show cause regarding the notice of appeal from the district court's order denying appellant's motion for self-representation. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. This court's order to show cause requested appellant's counsel to support its appeal with authority that showed that an appeal could properly lie from an intermediate order denying a motion for self-representation. Appellant did not identify what authority his counsel should have cited in response to this court's order.<sup>52</sup> Moreover, as appellant was permitted to argue whether the district court erred in denying his motion for self-representation in the appeal from his judgment of conviction, appellant failed to show that the failure to respond to the order to show cause hindered his ability to argue the issue. Therefore, the district court did not err in denying this claim.<sup>53</sup>

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<sup>51</sup>Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

<sup>52</sup>Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

<sup>53</sup>To the extent that appellant claimed his appellate counsel was ineffective for failing to inform this court during his direct appeal that counsel failed to respond to the order to show cause, appellant failed to establish that he was prejudiced for the reasons discussed above.

Next, appellant claimed that his plea was invalid. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently.<sup>54</sup> Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.<sup>55</sup> In determining the validity of a guilty plea, this court looks to the totality of the circumstances.<sup>56</sup>

First, appellant claimed that his plea was invalid because his counsel was ineffective. Appellant failed to demonstrate that his plea was invalid. As noted above, appellant failed to demonstrate that his counsel was ineffective. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his plea was invalid because counsel advised appellant that he would not prevail at trial, he would receive a sentence of life without the possibility of parole if convicted at trial, and counsel had not prepared a defense and would not obtain expert testimony to support appellant's claim of self-defense. Appellant failed to demonstrate that his plea was invalid. In his plea agreement, which appellant acknowledged that he read and signed, appellant acknowledged that he was not pleading guilty as a result of duress or coercion. Moreover, the fact that appellant's first trial ended with a deadlocked jury

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<sup>54</sup>Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

<sup>55</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

<sup>56</sup>State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); Bryant, 102 Nev. at 271, 721 P.2d at 367.

demonstrated that a conviction was not a certain outcome. Thus, he did not demonstrate that his counsel's advice concerning the potential for a conviction and life sentence was so influential as to render his plea involuntary. Regarding counsel's failure to seek evidence, the asserted evidence was not so significant as to establish appellant's innocence or substantially undermine the victim's testimony as we have noted above. Appellant did not identify the possible experts that would have testified or demonstrate how the lack of expert testimony impacted his decision to enter a guilty plea.<sup>57</sup> Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his plea was invalid because he believed that he could not receive a fair trial before Judge Glass, was prosecuted by a vindictive district attorney, and was ineffectively represented by his counsel. Appellant failed to demonstrate that his guilty plea was invalid. As noted above, appellant did not put forth sufficient facts upon which to conclude that Judge Glass was biased against appellant or that the prosecution was vindictive. Further, appellant failed to demonstrate that his counsel was ineffective. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his plea was invalid because his counsel advised him that his conditional plea permitted him to appeal all trial and pretrial errors. Appellant failed to demonstrate that his plea was invalid. In his plea agreement, appellant acknowledged that his guilty plea waived "[t]he right to appeal, with the assistance of an

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<sup>57</sup>Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

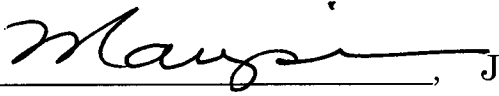
attorney, either appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035.” Further, at the plea hearing, appellant’s counsel stated that appellant wanted to preserve the single issue related to the district court’s order denying appellant’s motion for self-representation. As appellant was aware of the appeal rights he waived as a result of his guilty plea, the district court did not err in denying this claim.

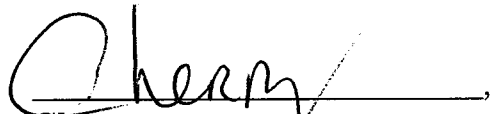
Fifth, appellant claimed that his plea was invalid because he was not given a timely probable cause hearing, was denied counsel for 24 days, the victim committed perjury, and there were two prosecutions. Appellant failed to demonstrate that his plea was invalid. As noted above, appellant did not demonstrate that he was prejudiced by the failure to have a probable cause hearing or the denial of counsel. Therefore, the district court did not err in denying this claim.

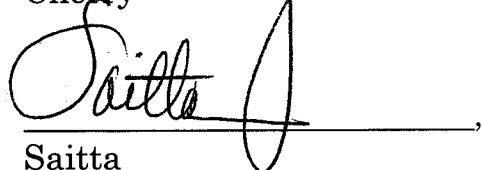
Sixth, appellant claimed that his plea was invalid because his counsel informed him that he had no right to argue that the victim committed perjury. Appellant failed to demonstrate that his plea was invalid. As noted above, appellant failed to demonstrate that the victim’s testimony was so significant that appellant would not have pleaded guilty and would have insisted upon going to trial. Further, the district court permitted appellant’s counsel to cross-examine the victim concerning inconsistencies between his trial and grand jury testimony during the first trial which ended in a mistrial. Therefore, the district court erred 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>58</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Jackie Glass, District Judge  
John Tole Moxley  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>58</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).