IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE EDWARD BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50308

FILED

OCT 03 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. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

On May 5, 2006, the district court convicted appellant, pursuant to a jury verdict, of conspiracy to commit robbery and robbery. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve two concurrent terms of 5 to 20 years in the Nevada State Prison. This court affirmed the conviction on appeal.[1] The remittitur issued on April 10, 2007.

On June 29, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

[1]Brown v. State, Docket No. 47473 (Order Affirming and Remanding to Correct Judgment of Conviction, March 14, 2007). This court remanded for correction of the judgment of conviction to reference NRS 207.010(1)(a).

08-25578

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 4, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.[2] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[3]

Appellant claimed that his trial counsel was ineffective for failing to perform proper and adequate pretrial investigation. Specifically, appellant claimed that if his trial counsel had investigated or interviewed the victim or Officer Carlos Hank that trial counsel would have learned that the victim had never made a statement implicating appellant as an agent of the robbery prior to trial and that the robbery was perpetrated by Peter Deshotel, appellant's co-defendant. Appellant failed to demonstrate

---

[2]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 the test in Strickland).

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

that he was prejudiced. The victim testified at trial that both appellant and Deshotel approached her in the parking lot of Wal-Mart at approximately 1 o'clock in the morning. The victim testified that Deshotel demanded the keys to her car and said to her that he had the "heat" and that appellant said to Deshotel, "hey the purse," after which Deshotel demanded the victim hand over her purse. Both appellant and Deshotel left in the victim's vehicle. Subsequently, appellant and Deshotel were pursued by the police in a car chase. Appellant himself testified that he was present during the robbery and that the robber was an individual named Robert and that Deshotel was not present during the robbery. Appellant failed to demonstrate that further investigation would have produced evidence such that there was a reasonable probability of a different outcome at trial. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that he received ineffective assistance of appellate counsel.[4] 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

---

[4]To the extent that appellant raised any of the underlying claims independently from the ineffective assistance of counsel claims, those claims were waived, and appellant failed to demonstrate good cause and prejudice for his failure to raise them earlier. See NRS 34.810(1)(b).

probability of success on appeal.[5] Appellate counsel is not required to raise every non-frivolous issue on appeal.[6] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[7]

First, appellant claimed that his appellate counsel was ineffective for failing to challenge his habitual criminal adjudication on appeal despite appellant's request that he do so. Appellant claimed that his right to a jury trial was violated when the issue of habitual criminality was not presented to a jury because habitual criminal adjudication increased the sentence beyond the statutory maximum for conspiracy and robbery. Appellant failed to demonstrate that any challenge to the habitual criminal adjudication on this basis had a reasonable likelihood of success on appeal. The district court may adjudicate a defendant a habitual criminal without submission of the issue before a jury upon presentation and proof of the requisite number of prior convictions.[8] In the instant case, the requirements of NRS 207.010(1)(a) were satisfied as the State presented proof of at least two prior convictions in the form of

---

[5]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

[6]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[7]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

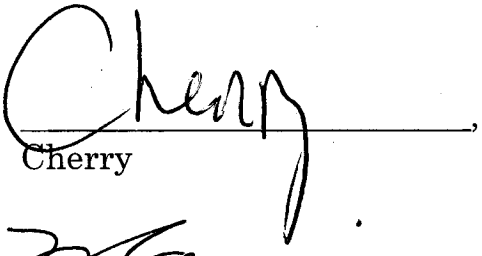
[8]O'Neill v. State, 123 Nev. 9, 16, 153 P.3d 38, 43 (2007).

certified copies of judgments of conviction. Therefore, we conclude that the district court did not err in denying this claim.

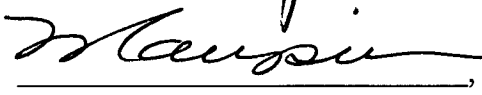
Second, appellant claimed that his appellate counsel was ineffective for raising a frivolous claim on direct appeal. Appellant failed to demonstrate that an alternative argument had a reasonable likelihood of success on appeal. Therefore, we conclude that the district court did not err in denying this 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.[9] Accordingly, we

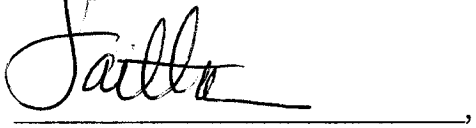
ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry



_____, J.
Maupin



_____, J.
Saitta

[9]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. James M. Bixler, District Judge
Willie Edward Brown
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk