

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND A. GARRETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50434

FILED

NOV 14 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
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; Sally L. Loehrer, Judge.

On April 5, 2006, the district court convicted appellant Raymond A. Garrett, pursuant to a jury verdict, of five counts of robbery, two counts of battery causing substantial bodily harm, one count of battery with the intent to commit a crime, one count of conspiracy to commit robbery, and one count of possession of a credit or debit card without the cardholder's consent. The district court sentenced appellant to serve various consecutive and concurrent terms of imprisonment totaling 16 to 40 years. This court affirmed appellant's judgment of conviction and sentence on appeal.¹ The remittitur issued on August 4, 2006.

¹Garrett v. State, Docket No. 46931 (Order of Affirmance, July 10, 2006).

On October 16, 2005, appellant filed a timely 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 December 6, 2007, the district court denied appellant's petition. This appeal followed.

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.² The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.³

First, appellant claimed that his trial counsel was ineffective for advising him not to testify at trial. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. The record reveals that, on two occasions outside the presence of the jury, the district court inquired as to whether appellant would testify. On the first occasion, the district court personally canvassed appellant concerning his right to testify and appellant indicated that he would think about the decision overnight. On the second occasion, appellant's trial counsel

²See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting test set forth in Strickland).

³Strickland, 466 U.S. at 697.

stated that appellant had accepted the advice of counsel and decided not to testify. Further, appellant had a pending murder charge, for which appellant's counsel stated a concern that testimony from appellant in this case could be used against him during the trial for the murder charge. In addition, appellant had multiple prior convictions, which suggests that he may have decided not to testify in order to avoid being impeached in front of the jury with his criminal history. In light of these facts, appellant failed to demonstrate that his trial counsel's advice was deficient or that he was prejudiced by that advice. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to file several pretrial motions. Appellant argued that his trial counsel should have filed a motion to dismiss, a motion to suppress evidence obtained from a search warrant, and a motion to suppress statements he gave to police. Appellant failed to demonstrate that he was prejudiced. Appellant failed to identify any grounds upon which any of these motions could have succeeded.⁴ Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to investigate. Appellant argued that further investigation may have shown that: (1) his brother committed the crimes; (2) the wallet found at his home could have belonged to someone other than Hector Mendoza; (3) there were license plate numbers similar to appellant's plate numbers; and (4) he was gainfully employed at the time of the robberies.

⁴See Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996); Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that an investigation into the suggested areas would have resulted in a reasonable probability of a different outcome given the overwhelming evidence of guilt due to numerous witness identifications of appellant as the robber.⁵ Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for allowing the jury to view appellant's hand during trial. Appellant argued that he did not want to display his hands due to a condition unrelated to the instant case. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. During the trial, Detective Sanborn testified that during an interview with appellant, he noticed that appellant's right hand was swollen, which was noteworthy because the robberies all involved a person punching the victims. Appellant displayed his hands for the jury to demonstrate that his right hand is always more swollen than his left because of an injury sustained long before the robberies. Appellant's trial counsel's strategy was to display appellant's hands to refute the State's allegation that appellant injured his hand by hitting the robbery victims. Tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances and appellant failed to demonstrate any such circumstances here.⁶ Therefore, the district court did not err in denying this claim.

⁵Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

⁶See Ford v State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

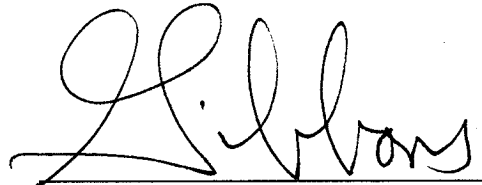
Fifth, appellant claimed that his trial counsel was ineffective for failing to adequately cross-examine the State's witnesses. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. The record reveals that defense counsel cross-examined the State's witnesses extensively. Moreover, appellant failed to explain what further cross-examination he desired his counsel to undertake.⁷ Therefore, the district court did not err in denying this claim.

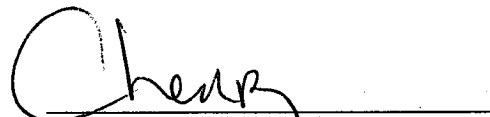
Sixth, appellant claimed that his trial counsel was ineffective for facilitating the return of property to the victim. Appellant claimed that allowing the State return items with the name of Hector Mendoza that were found during a search of appellant's home to Mendoza made appellant look guilty. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. The items had the victim's name on them, thus appellant failed to demonstrate that the items should not have been returned to Mendoza. Further, appellant failed to demonstrate how withholding the items from Mendoza would have a reasonable probability of changing the outcome at trial. Therefore, the district court did not err in denying this claim.

⁷See Strickland, 466 U.S. at 690 (stating that "[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment"); Pellegrini v. State, 117 Nev. 860, 866, 34 P.3d 519, 523 (2001); Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

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.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. Sally L. Loehrer, District Judge
Raymond A. Garrett
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).