

IN THE SUPREME COURT OF THE STATE OF NEVADA

JESSE B. GREENBERG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50631

FILED

NOV 21 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's proper person post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

On July 6, 2005, appellant Jesse B. Greenberg was convicted, pursuant to a jury verdict, of burglary, grand larceny, felony possession of stolen property,¹ and gross misdemeanor possession of burglary tools. The district court adjudicated appellant as a habitual criminal on the felony counts and sentenced him to three concurrent terms of life with parole eligibility after ten years in the Nevada State Prison and credit for time served for the gross misdemeanor. This court affirmed appellant's conviction on direct appeal.² The remittitur issued on August 4, 2006.

¹Appellant was originally convicted of two counts of possession of stolen property, but one count was later vacated as duplicitous with the grand larceny count.

²Greenberg v. State, Docket No. 45529 (Order of Affirmance, July 6, 2006).

On October 12, 2006, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On November 1, 2006, the district court denied the motion. This court affirmed the district court's order.³

On July 24, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On October 2, 2007, appellant filed a proper person supplement to his 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 January 25, 2008, the district court denied appellant's petition. This appeal followed.

Appellant's conviction arose from an incident in which he was discovered in a casino nightclub during the nightclub's off hours. Appellant was apprehended and found in possession of stolen electronics—two camcorders and a laptop computer—as well as burglary tools. In his petition, appellant raised a number of claims of ineffective assistance of trial and appellate counsel.

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 fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced the defense.⁴ To establish prejudice, a defendant must show that but for counsel's errors,

³Greenberg v. State, Docket No. 48409 (Order of Affirmance, April 24, 2007).

⁴Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

there is a reasonable probability that the result of the proceeding would have been different.⁵ The court may dispose of a claim if the petitioner makes an insufficient showing on either prong.⁶

First, appellant claimed that trial counsel was ineffective for failing to develop a theory of defense. Appellant failed to demonstrate that trial counsel's performance was deficient. Appellant claimed that there were "available defenses to the crimes with which [he] was charged," but failed to describe any possible theories of defense or specify what trial counsel should have done differently.⁷ Therefore, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to investigate or interview potential witnesses and for failing to present evidence that would cast doubt on the testimony of the witnesses that identified him. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant did not provide counsel with the names of any potential witnesses in preparation for trial. Nor did appellant identify which witnesses counsel should have interviewed or specify what additional evidence could have been presented at trial such that there was a reasonable probability of a different outcome.⁸ Therefore, the district court did not err in denying this claim.

⁵Id. at 694.

⁶Id. at 697.

⁷See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁸Id.

Third, appellant claimed that trial counsel was ineffective for failing to review the discovery and disclosure provided to him by the district attorney's office. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant did not demonstrate that there was any evidence in the prosecution's disclosures of which his counsel was unaware. Nor did appellant specify what evidence a review would have uncovered that had a reasonable probability of changing the outcome of trial.⁹ Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to communicate with him about the facts and circumstances that led to his arrest. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant did not specify the facts or circumstances that he was unable to communicate to counsel.¹⁰ He thus failed to demonstrate that further communication would have changed the result of trial. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to file discovery motions for "evidence in the files of the prosecutor, pursuant to the chain of custody of the camcorders and IBM computer." Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant failed to specify what kind of motion should have been filed.¹¹ To the extent that appellant argues

⁹Id.

¹⁰Id.

¹¹Id.

counsel should have filed a motion to suppress, we note that the camcorders and computer were not admitted at trial. Thus, appellant failed to demonstrate that such a motion would have changed the result of trial. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to file “beneficial” pre-trial motions. Appellant failed to demonstrate that trial counsel’s performance was deficient. Again, appellant did not specify what kind of pre-trial motion he thought counsel should have filed.¹² Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for trying to coerce him into plea negotiations. Appellant did not enter into a guilty plea but elected to proceed to trial. Therefore this claim is moot.

Eighth, appellant claimed that trial counsel was ineffective for failing to present mitigating evidence at sentencing. Appellant failed to demonstrate that he was prejudiced. The court asked appellant if he wanted to say anything and appellant replied, “You’ve heard everything there is to say.” Appellant had the opportunity to present mitigating evidence and he declined to do so. Moreover, appellant failed to specify what mitigation evidence could have been presented at sentencing.¹³ We also note that at the outset of the sentencing hearing the district court highlighted the fact that appellant was a career criminal who steals “every day of his life for a living and has every day of his adult life.” The court

¹²Id.

¹³See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

mentioned that appellant's record reflected more probation revocations than actual convictions. And before defense counsel argued in appellant's behalf, the court had already stated that appellant was being sentenced to life in prison based not upon "what he did in this case," but "what he's done all his life." Accordingly, it is not reasonably probable that the presentation of mitigation evidence by trial counsel would have changed the result of the proceeding. Therefore, the district court did not err in denying this claim.

Ineffective assistance of appellate counsel

"A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington."¹⁴ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁵ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹⁶ "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."¹⁷

Appellant claimed that appellate counsel was ineffective for failing to communicate with him about his appeal and failing to raise certain claims on direct appeal. First, appellant claimed that appellate counsel was ineffective for failing to raise a claim that he was denied his

¹⁴Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

¹⁵Jones v. Barnes, 463 U.S. 745, 751 (1983).

¹⁶Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

¹⁷Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

due process rights when the State failed to keep the two camcorders and the computer that he had stolen, and instead returned these items to their rightful owners. Specifically, appellant claims that those items were necessary to establish an element of the offense; namely, the value of the stolen goods. Appellant claimed that the total value of those items was less than \$250.00, and thus that the evidence was exculpatory because it would have established that he was guilty of a misdemeanor rather than a category C felony.¹⁸ Appellant failed to demonstrate that he was prejudiced. In order to support a conviction for felony possession of stolen property, the prosecution must establish, beyond a reasonable doubt, that the stolen goods had a fair market value over \$250.00.¹⁹ There is no requirement that the goods themselves be produced at trial.²⁰ Multiple witnesses described the stolen property. Moreover, testimony at trial established that the two camcorders had a combined value of about \$700.00 and the laptop computer had a fair market value of at least \$1,500.00 dollars. Because there was sufficient evidence to support the jury's conclusion that the value of the stolen property exceeded \$250.00, we conclude that appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

¹⁸See NRS 205.275(2).

¹⁹Bryant v. State, 114 Nev. 626, 629-30, 959 P.2d 964, 966 (1998).

²⁰In fact, NRS 205.290 requires that all property found "in the possession of any receiver or wrongful possessor of stolen property, shall be restored to the owner."

Second, appellant claimed that his appellate counsel was ineffective for failing to raise a direct appeal claim that he was erroneously adjudicated a habitual criminal. Appellant claimed that he did not have the requisite number of prior felony convictions. Appellant's claim was without merit. The sentencing transcript indicates that proof of four prior felony convictions was presented to the district court. Appellant also claimed that two of his prior convictions arose out of the same act or occurrence. In this regard, appellant failed to demonstrate that he was prejudiced. Even if this was true, he would still have the three prior felony convictions required for a habitual criminal adjudication.²¹ Accordingly, appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that appellate counsel was ineffective for failing to raise a claim that his habitual criminal enhancement was unconstitutional because it was not determined by a jury pursuant to the United States Supreme Court's decision in Apprendi v. New Jersey.²² Appellant failed to demonstrate that he was prejudiced. This court has previously decided that Nevada's habitual criminal statute does not violate Apprendi.²³ Accordingly, appellant failed to demonstrate

²¹See NRS 207.010(1)(b).

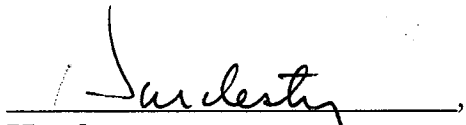
²²530 U.S. 466 (2000).

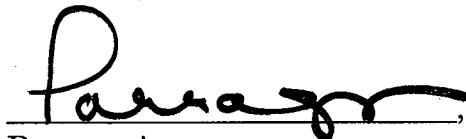
²³See O'Neill v. State, 123 Nev. 9, 17, 153 P.3d 38, 43 (2007).

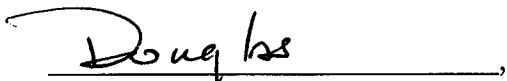
that this claim had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.²⁴

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.²⁵ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

²⁴In addition to claiming that appellate counsel was ineffective for failing to include these claims in his direct appeal, appellant also presented these claims as direct appeal claims for the first time in this petition. Such claims are procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.810(1)(b)(2). Because we conclude that appellant's claims of ineffective assistance of appellate counsel are without merit, we conclude that appellant did not demonstrate good cause for raising these claims in the petition. Nor has he demonstrated prejudice. Therefore, the district court did not err in denying these claims.

²⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Valerie Adair, District Judge
Jesse B. Greenberg
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk