

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES VAUGHN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49858

JAMES VAUGHN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50732

FILED

JUL 15 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Docket No. 49858 is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Docket No. 50732 is a proper person appeal from an order of the district court denying a motion to vacate an illegal sentence. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

On April 13, 2006, the district court convicted appellant, pursuant to a jury verdict, of one count of robbery with the use of a deadly weapon. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve two consecutive terms of 5 to 20 years. On July 18, 2006, the district court entered an amended judgment of conviction striking the equal and consecutive sentence for the deadly

weapon enhancement. This court affirmed the judgment of conviction and sentence on direct appeal.¹ The remittitur issued on January 16, 2007.

Docket No. 49858

On May 10, 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 July 26, 2007, the district court denied the 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

First, appellant claimed that his trial counsel were ineffective for failing to properly represent petitioner. Appellant claimed that trial counsel failed to file a motion to suppress the "gun et. al" on the basis that the female victim did not identify appellant in a line-up or at the crime

¹Vaughn v. State, Docket No. 47199 (Order of Affirmance, December 21, 2006).

²Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984) (adopting the test in Strickland).

³Strickland, 466 U.S. at 697.

scene and did not ever state that appellant had used a gun or was involved in the robbery. Appellant failed to demonstrate that his trial counsel were deficient or that he was prejudiced. First, appellant failed to sufficiently identify the evidence or statements that should have been suppressed. Although appellant indicated that "gun et. al" should have been suppressed, notably, a gun was never recovered in the instant case. Appellant was read his Miranda⁴ rights immediately after being pulled over and exiting the car and failed to demonstrate that any of his statements to the police should have been suppressed. The money recovered from appellant's vehicle was recovered pursuant to a search based upon a warrant, and appellant failed to demonstrate any defects in the search. Finally, although the female victim did not identify appellant as the driver of the getaway vehicle, the off-duty police officer who witnessed the robbery and engaged in pursuit of appellant positively identified appellant as the driver of the vehicle. Thus, appellant failed to demonstrate that a motion to suppress was meritorious and that there was a reasonable likelihood that excluding evidence would have altered the outcome of the trial.⁵ Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel were ineffective for failing to perform proper and adequate investigation, interview or subpoena witnesses in order to establish a defense to the charges. Appellant failed to demonstrate that his trial counsel's

⁴Miranda v. Arizona, 384 U.S. 436 (1966).

⁵Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996).

performance was deficient or that he was prejudiced. “An attorney must make reasonable investigations or a reasonable decision that particular investigations are unnecessary.”⁶ Appellant failed to specifically identify the information or witnesses his counsel should have discovered had trial counsel conducted further investigation into the case.⁷ Thus, appellant failed to demonstrate that there was a reasonable likelihood of a different result. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective failing to object to the State’s deadly weapon enhancement jury instruction. Jury instruction 9 read, “An unarmed aider and abettor must have knowledge that a weapon was used in the commission of the crime in order to be held liable for the ‘use’ of a deadly weapon.” Appellant further claimed that trial counsel learned shortly after trial that two of the jurors expressed confusion regarding this instruction and would have returned a not guilty verdict had they been provided with a more accurate jury instruction. Appellant claimed that his trial counsel failed to deliver this information to his appellate counsel.

Appellant failed to demonstrate that his trial counsel’s performance was deficient or that he was prejudiced. Trial counsel

⁶State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006) (citing Strickland, 466 U.S. at 691).

⁷Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that “bare” or “naked” claims, which are unsupported by specific facts, are insufficient to grant relief).

proffered the following jury instruction that included language about constructive possession for the unarmed aider and abettor:

An unarmed defendant, charged as an aider or abettor or co-conspirator, cannot be held criminally responsible for use of a deadly weapon unless he has actual or constructive control over the deadly weapon. An unarmed defendant does not have constructive control over a weapon unless the State proves he had knowledge the armed offender was armed and he had the ability to exercise control over the firearm.

The State objected to the jury instruction, and the district court sustained the objection. Trial counsel then offered the language that was included in jury instruction 9, which the district court permitted. Appellate counsel argued on direct appeal that the district court had erred in the unarmed aider and abettor deadly weapon enhancement jury instruction because the jury instruction failed to inform the jury that the unarmed aider and abettor had to have the ability to exercise control over the weapon. This court determined that the jury instruction was erroneous because it did not include the required element that the unarmed aider and abettor have the ability to control the weapon in addition to the knowledge element. However, this court concluded that it was persuaded beyond a reasonable doubt that the verdict would have been the same absent the erroneous instruction given appellant's active role in the robbery as a getaway driver. Because this court has already determined that there would not have been a different outcome absent the erroneous jury instruction, appellant failed to demonstrate that he was prejudiced in the instant case. Additionally, because appellant is not serving an enhancement for the use of the deadly weapon, appellant cannot demonstrate any prejudice in the instant case. Finally, we note that any juror affidavits or testimony

regarding their confusion would not have been admissible.⁸ Therefore, we conclude that the district court did not err in denying this claim.⁹

Fourth, appellant claimed that his trial counsel was ineffective for failing to request an alibi jury instruction. Appellant claimed that because he had no knowledge or intent to commit robbery and just gave the codefendant a ride to the store that he had an alibi for the offense. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. An "alibi" is defined as being "elsewhere . . . in another place" at the time the crime was committed.¹⁰ Appellant's theory of defense was that he was merely present at the scene of the crime. Appellant was not entitled to an alibi jury instruction because he did not present an alibi defense and there was no evidence to support an alibi defense.¹¹ Therefore, we conclude that the district court did not err in denying this claim.

⁸See NRS 50.065(2) (providing that into an inquiry into the validity of a verdict that "[a] juror shall not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict . . . or concerning his mental processes in connection therewith").

⁹To the extent that appellant claimed appellate counsel was ineffective, we conclude that appellant likewise failed to demonstrate that his appellate counsel was ineffective.

¹⁰Black's Law Dictionary 95 (4th Ed. 1968).

¹¹See Runion v. State, 116 Nev. 1041, 1050, 13 P.3d 52, 58 (2000) (recognizing defense right to a jury instruction on theory of case as disclosed by evidence, no matter how weak or incredible).

Fifth, appellant claimed that his trial counsel were ineffective for failing to consult with him and visit in order to prepare a defense strategy. Appellant failed to demonstrate that he was prejudiced. Appellant failed to indicate how further consultation and visits would have had a reasonable probability of altering the outcome of the trial.¹² Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to challenge his habitual criminal adjudication on the ground that he was not provided sufficient notice. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The notice of habitual criminality was filed in the district court on February 13, 2006, well in advance of the sentencing hearing. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for allowing the victim of the robbery identify him at the preliminary hearing. He claimed that it was unfair as he was the only black man in a county jail uniform at the hearing and he was not identified in a line-up by the robbery victim. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. The victim of the robbery did not identify appellant at the preliminary hearing. The off-duty police officer who witnessed the robbery positively identified appellant at the preliminary hearing. The fact that

¹²Hargrove, 100 Nev. at 502, 686 P.2d at 225.

the robbery victim could not identify appellant in a line-up had no bearing upon whether the witness could identify appellant. The off-duty police officer testified at trial that he made eye contact with appellant when he attempted to block appellant's vehicle from leaving the parking space. Appellant did not demonstrate that his appearance in a county jail uniform during the preliminary hearing warranted any relief.¹³ Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed the district court was biased and abused its discretion in refusing to allow trial counsel to give the proper jury instruction regarding the deadly weapon enhancement. This claim was substantially raised on direct appeal and considered and rejected by this court. 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 made upon reflection of the prior proceedings.¹⁴ Therefore, the district court did not err in denying this claim.

Next, appellant claimed the district court abused its discretion in sentencing appellant as a habitual criminal because the sentence was disproportionate to the crime, the district attorney did not file a notice of intent to seek habitual criminal adjudication or introduce certified copies of the judgments of conviction, and the issue should have been presented

¹³But see Grooms v. State, 96 Nev. 142, 144, 605 P.2d 1145, 1146 (1980) ("A criminal defendant clearly has the right, barring exceptional circumstances not here relevant, to appear before his jurors clad in the apparel of an innocent person.") (emphasis added) (internal citations omitted). Notably, this decision applies only to the guilt-innocence phase of the trial. Duckett v. State, 104 Nev. 6, 11, 752 P.2d 752, 755 (1988).

¹⁴Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

to the jury and proven beyond a reasonable doubt. These claims were waived as they could have been raised on direct appeal, and appellant failed to demonstrate good cause for his failure to do so.¹⁵ Therefore, the district court did not err in denying these claims.

Finally, appellant claimed that the Public Defender's Office refused to send appellant a copy of his transcripts and documents. This claim does not challenge the validity of the judgment of conviction and sentence; thus, it was improperly raised in his post-conviction petition for a writ of habeas corpus.¹⁶ Therefore, this claim is not a basis for habeas corpus relief.

Having reviewed the district court's denial of appellant's post-conviction petition for a writ of habeas corpus and the record on appeal, we affirm the order of the district court.

Docket No. 50732

On November 17, 2007, appellant filed a proper person motion to vacate an illegal sentence in the district court. The State opposed the motion. On January 17, 2008, the district court denied the motion. This appeal followed.

In his motion, appellant contended that his prior convictions should only have been counted as one prior felony conviction, he had an insufficient number of qualifying prior felony convictions, the State failed to prove that he was represented by counsel in the prior convictions, and

¹⁵NRS 34.810(1)(b).

¹⁶NRS 34.724.

the district court failed to weigh mitigating factors and make a finding regarding habitual criminal status.

A motion to correct an illegal sentence may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence or the sentence was imposed in excess of the statutory maximum.¹⁷ “A motion to correct an illegal sentence ‘presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.’”¹⁸ A motion to correct an illegal sentence cannot be used as a vehicle to challenge errors occurring at trial or sentencing.¹⁹

Our review of the record on appeal reveals that the district court did not err in denying the motion. Appellant’s claims fell outside the scope of claims permissible in a motion to correct an illegal sentence. Appellant’s sentence was facially legal, and appellant failed to demonstrate that the district court was without jurisdiction in this matter.²⁰ Appellant failed to demonstrate that he was ineligible for habitual criminal adjudication in the instant case as the record indicates two prior felony convictions were presented.²¹ Therefore, we conclude that

¹⁷Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

¹⁸Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

¹⁹Id.

²⁰NRS 207.010(1)(a).


²¹See id. (requiring proof of at least two prior felony convictions for small habitual criminal treatment).

the district court did not err in denying this claim, and we affirm the denial of appellant's motion.

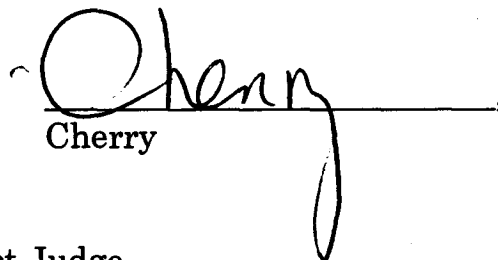
Conclusion

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.²² Accordingly, we

ORDER the judgments of the district court AFFIRMED.²³


_____, C.J.
Gibbons


_____, J.
Maupin


_____, J.
Cherry

cc: Hon. Valorie Vega, District Judge
James Vaughn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

²²Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²³On January 14, 2008, appellant submitted a proper person motion to consolidate Docket Nos. 49858, 50726 and 50732. Good cause appearing, we direct the clerk of this court to file the motion. We grant the motion to consolidate Docket Nos. 49858 and 50732, but deny the motion as it relates to Docket No. 50726. See NRAP 3(b).