

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDGAR HUMBERTO PONCIANO A/K/A
EDGAR PONCIANO HUMBERTO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50787

FILED

OCT 28 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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; Elizabeth Goff Gonzalez, Judge.

On July 20, 2006, the district court convicted appellant, pursuant to a jury verdict, of one count of discharging a firearm at or into a structure, vehicle, aircraft or watercraft and one count of assault with a deadly weapon. The district court sentenced appellant to serve two concurrent terms of 28 to 72 months in the Nevada State Prison. This court affirmed the judgment of conviction on direct appeal.¹ The remittitur issued on April 3, 2007.

On June 25, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹Ponciano v. State, Docket No. 47847 (Order of Affirmance, March 8, 2007).

State opposed the petition, and appellant filed a supplemental document. 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 14, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended 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 was ineffective for failing to request that the district court inform the jury that appellant did not own a gun when the jury sent a note asking if appellant owned a gun. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. No testimony was presented regarding ownership of a gun during either the State's or defense's presentation of the case, and no more specific information could be provided to the jury than the testimony and evidence presented during the

²Strickland 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).

³Strickland, 466 U.S. at 697.

State's and defense's presentation of the case. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to file a pretrial suppression motion to challenge the victim's identification and bullets found in the victim's car. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to set forth the factual basis for such a motion or demonstrate that any pretrial suppression motion would have had a reasonable probability of success. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to prepare appellant to testify at trial. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to provide any specific facts in support of this claim and failed to demonstrate that further preparation would have had a reasonable probability of altering the outcome at trial. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel failed to obtain a casino videotape showing that appellant was in a casino at the time of the shooting. Appellant failed to demonstrate that his trial counsel's performance was deficient. Appellant's testimony belies the underlying premise of this claim. Specifically, appellant testified that he was in a pool bar near a 7-Eleven convenience store at the time of the shooting and that he went to a casino after he telephoned his wife and learned that he

was accused of shooting at the victim and after he telephoned the victim.⁴ Thus, trial counsel was not deficient in failing to obtain a videotape from the casino. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to investigate the victim's prior conviction for driving under the influence in order to impeach his credibility. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant acknowledged that his trial counsel told him of the prior conviction, and thus, appellant failed to demonstrate that trial counsel was ineffective for failing to investigate the victim's background. Appellant further failed to demonstrate that any such conviction would have been admissible as he failed to demonstrate that the conviction was admissible pursuant to NRS 50.095. Even assuming that the prior conviction was admissible, appellant failed to demonstrate that there was a reasonable probability of a different outcome had this evidence been presented. No testimony was presented that the victim was intoxicated at the time of the shooting and impaired in his ability to make an identification. On the other hand, both appellant and the victim testified that appellant was drinking, or appeared to be intoxicated, before the shooting. Therefore, we conclude that the district court did not err in denying this claim.⁵

⁴Notably, the victim testified that appellant did not call him on the night of the shooting, but called him six months later to apologize.

⁵To the extent that appellant claimed that the State committed a violation of Brady v. Maryland, 373 U.S. 83 (1963) regarding this
continued on next page . . .

Sixth, appellant claimed that his trial counsel was ineffective for failing to obtain and introduce a tape of appellant's purported call to the police on the night of the shooting. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The purported call to the police made by appellant was not mentioned during appellant's direct examination, but rather during cross-examination. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had such a tape been played. The victim testified that appellant pointed a gun at him and then shot the gun at him. Appellant's testimony indicated that he telephoned the police to inquire if he was wanted in relation to any incident that night and that he was informed his name was not in the police-computer system. Appellant failed to demonstrate that this telephone call would have had a reasonable probability of calling the victim's testimony into doubt. 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 to testify that appellant's mother had telephoned the victim and told the victim that appellant was beating on the door, screaming and threatening appellant's wife and children. Appellant claimed that this was impermissible hearsay testimony that should have been objected to. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The

... continued

conviction, appellant's own statement indicates that information regarding this conviction was provided to trial counsel and not withheld by the State.

victim did not testify about what appellant's mother told him on the telephone only that she telephoned him and that her telephone call caused him to go to appellant's wife's residence and that appellant's wife was panicked and the children frantic. The statement that appellant objected to which specifically referenced the content of the telephone call was made during opening statements. The jury was informed in jury instruction 15 that statements, arguments and opinions of counsel were not evidence. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel objected to the State's opening statement. Therefore, we conclude that the district court did not err in denying this claim.

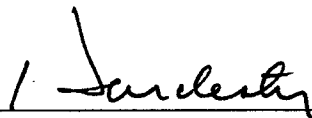
Eighth, appellant claimed that his trial counsel was ineffective for refusing to call his mother as a witness. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to set forth the testimony that would have been offered by his mother or demonstrate that any such testimony would have had a reasonable probability of altering the outcome. On the day that trial began, appellant's trial counsel explained that he decided not to call appellant's mother for trial because she resided in California, she had health problems, and her memory was not good. Trial counsel also expressed the opinion that appellant's mother's testimony might hurt appellant's case. Tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances, and appellant


demonstrated no such extraordinary circumstances here.⁶ Therefore, we conclude that the district court did not err in denying this claim.

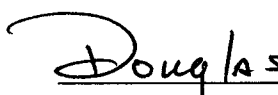
Finally, appellant claimed that the district court erred in denying his motion to dismiss counsel. This claim was raised and rejected on direct appeal. The doctrine of the law of the case prevents further litigation of this issue.⁷ Therefore, we conclude that the district court did not err in denying 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.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

⁶See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

⁷See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

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

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Edgar Humberto Ponciano
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk