IN THE SUPREME COURT OF THE STATE OF NEVADA

GEOFFREY JEROME JONES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50825

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; Valerie Adair, Judge.

On September 14, 2005, the district court convicted appellant, pursuant to a jury verdict, of two counts of burglary and one count of possession of burglary tools. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve concurrent terms of 10 to 25 years in the Nevada State Prison for the burglary counts and a concurrent term of one year for the burglary tools count. This court affirmed appellant's judgment of conviction on appeal.[1] The remittitur issued on October 10, 2006.

On May 18, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

[1]Jones v. State, Docket No. 46096 (Order of Affirmance, September 14, 2006).

08-28308

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 November 28, 2007, 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 there was a reasonable probability of a different outcome in the proceedings.[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 file a pretrial petition for a writ of habeas corpus or a motion to dismiss one count of burglary, the count involving the Nissan, based upon insufficient evidence at the preliminary hearing. Appellant claimed that there was no evidence presented at the preliminary hearing that he entered the vehicle.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Probable cause to

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[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.

support a criminal charge "may be based on slight, even 'marginal' evidence, because it does not involve a determination of the guilt or innocence of an accused."[4] "To commit an accused for trial, the State is not required to negate all inferences which might explain his conduct, but only to present enough evidence to support a reasonable inference that the accused committed the offense."[5] "Although the [S]tate's burden at the preliminary examination is slight, it remains incumbent upon the [S]tate to produce some evidence that the offense charged was committed by the accused."[6] There was slight or marginal evidence to support a reasonable inference that appellant committed the crime of burglary as the testimony at the preliminary hearing established that appellant was seen at least three separate times "interacting" with the Nissan and a rear-side window of the car had been removed.[7] Further, even assuming that appellant's

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[4]Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (citations omitted).

[5]Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971).

[6]Woodall v. Sheriff, 95 Nev. 218, 220, 591 P.2d 1144, 1144-45 (1979).

[7]See NRS 205.060(1) ("A person who . . . enters any . . . vehicle . . . with the intent to commit grand or petit larceny, assault or battery on any person or any felony, or to obtain money or property by false pretenses, is guilty of burglary."); NRS 193.0145 ("'Enter,' when constituting an element or part of a crime, includes the entrance of the offender, or the insertion of any part of his body, or of any instrument or weapon held in his hand and used or intended to be used to threaten or intimidate a person, or to detach or remove property."); see also People v. Valencia, 46 P.3d 920, 925-28 (Cal. 2002) (defining "entry" for purposes of a substantially similar burglary statute as the penetration of the "outer

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trial counsel had filed a successful pretrial petition for a writ of habeas corpus, the correct vehicle in the district court to challenge the lack of probable cause,[8] the granting of such a petition would not have barred the State from prosecution of those same charges.[9] Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective. 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 had a reasonable probability of success on appeal.[10] Appellate counsel is not required to raise every non-frivolous issue on appeal.[11] This court has held that

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boundary" of the structure and noting that the penetration need only be minimal such as the removal of a screen from a window); Williams v. State, 997 S.W.2d 415, 417 (Tex. App. 1999) (recognizing that "entry" for purposes of burglary is the "'breaking of the close' . . . [t]he protection is to the interior or enclosed part of the described object" (quoting Griffin v. State, 815 S.W.2d 576, 579 (Tex. Crim. App. 1991))).

[8]See NRS 34.710.

[9]See NRS 34.590; State v. Dist. Ct. (Warren), 114 Nev. 739, 742, 964 P.2d 48, 50 (1998) (recognizing that a discharge pursuant to the grant of a pretrial petition for a writ habeas corpus does not bar subsequent proceedings).

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

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

appellate counsel will be most effective when every conceivable issue is not raised on appeal.[12]

First, appellant claimed that his appellate counsel was ineffective for failing to argue that insufficient evidence was presented at trial to support the count of burglary of the Nissan vehicle. Appellant noted that he was detained approximately 10 minutes after the burglary of the Nissan vehicle and he was not carrying any speakers. He further noted that no fingerprints were found in the vehicle.

Appellant failed to demonstrate that his appellate counsel's performance was deficient or that this issue had a reasonable probability of success on appeal. Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[13] A person commits burglary when that person "enters any . . . vehicle . . . with the intent to commit grand or petit larceny, assault or battery on any person or any felony, or to obtain money or property by false pretenses."[14] Testimony was presented at trial that a rear-side window of the Nissan was removed, that appellant's hands were seen extending into the interior to some degree, and that speakers and a cable inside the vehicle were missing from the vehicle. Further, appellant

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

[13]See Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); Jackson v. Virginia, 443 U.S. 307, 319 (1979).

[14]NRS 205.060(1).

admitted to the arresting officer that he was attempting to steal stereo equipment out of the Nissan vehicle. The jury could reasonably infer from the evidence presented that appellant committed a burglary by entering a vehicle with the intent to commit a theft. It was for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict is not disturbed on appeal where substantial evidence supports the verdict.[15] Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective for failing to file a petition for rehearing. On direct appeal, appellant raised a claim that his right to confrontation was violated when a 9-1-1 recording was played for the jury; notably, the individual who placed the telephone call did not testify during the trial. Appellate counsel did not present this court with a transcript of the telephone call, and thus, this court concluded that review of the confrontation right claim was not possible and consequently appellant failed to demonstrate that the district court abused its discretion in the admission of this evidence. This court further determined that any error would have been harmless due to the overwhelming evidence of guilt. In his petition below, appellant claimed that this court should not have conducted a harmless error analysis when the transcript of the 9-1-1 recording was not presented before the court.

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[15]See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Rather, appellant claimed this court should have found his due process rights were violated and granted him relief on the claim.

Appellant failed to demonstrate that his appellate counsel was deficient for failing to file a petition for rehearing or that a petition for rehearing would have had a reasonable probability of success. In Archanian v. State, this court stated, "Meaningful and effective appellate review is dependent upon the availability of an accurate record, and the 'failure to provide an adequate record on appeal handicaps appellate review and triggers possible due process clause violations.'"[16] This court further noted that it was the appellant's burden to "show that the subject matter of the omitted portions of the record was so significant that this court cannot meaningfully review his claims of error and the prejudicial effect of any error."[17] In the instant case, appellant failed to carry his burden as this court was able on direct appeal to review the prejudicial effect of the alleged error. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed cumulative error existed. Because appellant's claims lacked merit, appellant failed to demonstrate cumulative error. Therefore, the district court did not err in denying this claim.

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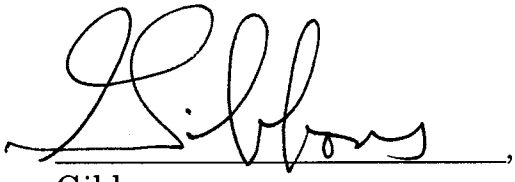
[16]122 Nev. 1019, 1033, 145 P.3d 1008, 1018 (2006) (quoting Daniel v. State, 119 Nev. 498, 508, 78 P.3d 890, 897 (2003)) (internal quotation omitted).

[17]122 Nev. at 1033, 145 P.3d at 1019.

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.[18] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[19]



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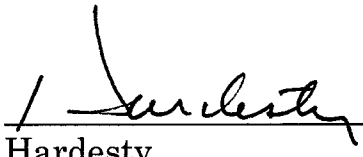
Gibbons



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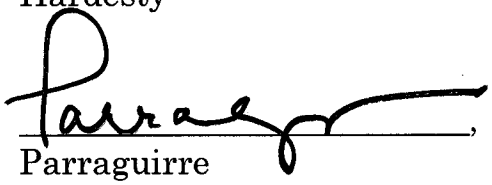

_____, J.
Parraguirre

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

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

[19]We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.