

IN THE SUPREME COURT OF THE STATE OF NEVADA

VITO BRUNO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50848

FILED

FEB 26 2009

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; Valerie Adair, Judge.

On November 17, 2005, the district court convicted appellant, pursuant to a jury verdict, of grand larceny (Count 1), attempt to obtain money under false pretenses (Count 2), and two counts of burglary (Counts 3 and 4). The district court adjudicated appellant a habitual criminal pursuant to NRS 207.010 and sentenced appellant to serve four concurrent terms of 5 to 20 years in the Nevada State Prison. This court affirmed the judgment of conviction on direct appeal. Bruno v. State, Docket No. 46418 (Order of Affirmance, June 30, 2006). The remittitur issued on October 6, 2006.

On September 21, 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. The district court denied the petition on January 17, 2008. This appeal followed.

In his petition, appellant raised nine claims of 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 but for counsel's errors there would be a reasonable probability of a different outcome of the proceedings. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697.

First, appellant claimed that his trial counsel was ineffective for failing to file a motion to suppress his confession. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. "The question of the admissibility of a confession is primarily a factual question addressed to the district court: where that determination is supported by substantial evidence, it should not be disturbed on appeal." Chambers v. State, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997). Moreover, in determining whether a confession is voluntary, the court looks at the totality of the circumstances. Id. Upon his arrest, appellant was read his Miranda rights and then agreed to talk with the police. Miranda v. Arizona, 384 U.S. 436 (1966). The circumstances indicate that

appellant's confession was voluntary. As such, appellant failed to demonstrate that a motion to suppress had a reasonable likelihood of success. Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to review materials and documents disclosed by the State. Appellant failed to demonstrate his trial counsel was deficient or that he was prejudiced. Appellant failed to identify what documents his trial counsel failed to review or how those items would have had a reasonable probability of altering the outcome of his trial. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Further, as there was overwhelming evidence due to his confession, the testimony of the stores' employees, and the physical evidence, appellant failed to demonstrate that there was a reasonable probability of a different outcome of the trial had his counsel reviewed additional documents provided by the State. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to file a motion to sever offenses. Appellant failed to demonstrate that his trial counsel was deficient. NRS 173.115(2) provides that two or more charges may be charged on the same indictment if the charges are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." "To require severance, the defendant must demonstrate that a joint trial would be "manifestly prejudicial." Honeycutt v. State, 118 Nev. 660, 667-68, 56

P.3d 362, 367 (2002) (citing United States v. Bronce, 597 F.2d 1300, 1302 (9th Cir. 1979)) (overruled on other grounds by Carter v. State, 121 Nev. 759, 121 P.3d 592, (2005)). As the evidence produced at trial indicated that the charges stemmed from a common scheme, appellant failed to demonstrate that a motion to sever the charges would have had a reasonable probability of success. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to file a motion to dismiss the charges and a motion challenging the presumption of probable cause to arrest him for stealing the wallet from Nordstrom. Appellant claimed that there was no evidence that he stole the wallet, therefore his arrest was illegal and any charges stemming from that arrest should have been dismissed. Appellant failed to demonstrate that his trial counsel was deficient. There was probable cause to support the arrest. There is probable cause to arrest “when police have reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution to believe that [a crime] has been . . . committed by the person to be arrested.” Doleman v. State, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991). After viewing appellant over the surveillance video, security approached appellant. Appellant saw security come near him, then he reentered the store and dropped the wallet inside. The mall security guards then detained appellant until the police arrived. Thus, appellant failed to demonstrate that there was not probable cause to arrest him. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was deficient for failing to file a motion to suppress evidence of the videotape of him at Nordstrom. Appellant claimed that the videotape was of such low quality that it should have been suppressed. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. "District courts are vested with considerable discretion in determining the relevance and admissibility of evidence." Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006) (citing Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004)). "A district court's decision to admit or exclude evidence will not be reversed on appeal unless it is manifestly wrong." Id. (citing Vallery v. State, 118 Nev. 357, 371, 46 P.3d 66, 76 (2002)). We conclude that appellant did not demonstrate that the district court's decision was manifestly wrong. Nothing in the record supports appellant's contention that the videotape was of poor quality. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to file a motion in limine to preclude reference to his evading arrest. At trial, the security guards and the officers testified that appellant struggled when they attempted to arrest him. Appellant claimed that, as evading arrest is not an element of burglary, any reference to his evading arrest should have been excluded. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. The security guards and police officers simply stated the events that occurred as they attempted to arrest appellant. Further, as there was overwhelming evidence due to his confession, the testimony of

the stores' employees, and the physical evidence, appellant failed to demonstrate that there was a reasonable probability of a different outcome of the trial had his counsel attempted to exclude reference to his evading arrest. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel failed to adequately investigate arguments for a lesser included offense. Appellant claimed that he knew of witnesses who would have aided him in getting a lesser offense and that he would have received a lesser offense had his trial counsel interviewed them. Appellant failed to demonstrate that he was prejudiced. The witnesses that appellant named in his petition were character witnesses who would have testified concerning his good character and lack of propensity for violence. Appellant failed to demonstrate how these witnesses' testimony would have had a reasonable probability of resulting in a lesser included offense to his charges. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225 (1984). Further, as there was overwhelming evidence due to his confession, the testimony of the stores' employees, and the physical evidence, appellant failed to demonstrate that there was a reasonable probability of a different outcome of the trial had his counsel interviewed those witnesses. Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for filing a motion to disqualify Judge Stewart Bell prior to sentencing. Appellant appeared to claim that this motion caused Judge Bell to sentence him more harshly than was warranted. Appellant failed to

demonstrate that his trial counsel was deficient or that he was prejudiced. “Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances” and appellant failed to demonstrate any such circumstances. See Ford v State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Further, appellant failed to demonstrate that the outcome of his sentencing hearing would have been different had his trial counsel not filed the challenged motion. Means v. State, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004). Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that his trial counsel was ineffective at sentencing for failing to object, to present mitigating circumstances, or to call mitigating witnesses. Appellant attached a list of witness names to his petition that he claimed would have testified concerning his good character and lack of propensity for violence. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. Appellant’s trial counsel filed a sentencing memorandum and argued against appellant’s adjudication as a habitual criminal. Appellant did not identify any objections that his trial counsel should have made. Id. In addition, appellant had a lengthy criminal history, including a charge of conspiracy and solicitation to commit murder. As such, appellant failed to demonstrate that there was a reasonable probability of a different outcome had his character witnesses testified at the sentencing hearing. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that he received ineffective assistance of appellate counsel. 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 a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford, 105 Nev. at 853, 784 P.2d at 953.

Appellant claimed that his appellate counsel was ineffective for failing to challenge Todd Sato's in-court identification of appellant. Todd Sato was a manager at Nordstrom when the incident occurred. During his testimony before the grand jury, Sato was shown the mugshot from appellant's arrest and Sato stated that he recognized appellant as the person he saw in Nordstrom with the stolen jacket. The mugshot was not disclosed to appellant until the day of trial, at which time appellant's trial counsel moved to suppress Sato's in-court identification of appellant due to the suggestive nature of the mugshot. Sato testified that he recognized appellant from the store and his memory did not rely on the mugshot. The district court then denied the motion to suppress the in-court identification. Appellant claimed that the grand jury proceeding and the failure of the State to disclose the mugshot prior to trial caused the in-court identification by Sato to be impermissibly suggestive.

Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. The applicable standard for pre-trial

identifications is whether, considering the totality of the circumstances, “the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that (appellant) was denied due process of law.” Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) (quoting Stovall v. Denno, 388 U.S. 293, 301-02 (1967)). This court analyzes this issue in a two-step inquiry: (1) whether the procedure was unnecessarily suggestive; and (2) whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure. Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 550 (1990).

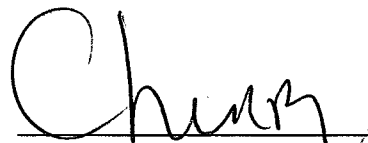
Trial counsel thoroughly cross-examined Sato regarding his grand jury testimony and the lack of any photo line-up to identify appellant prior to trial, thereby exposing any deficiencies in the procedure to the jury, which was charged with evaluating the weight and credibility of such testimony. See Steese v. State, 114 Nev. 479, 498, 960 P.2d 321, 333 (1998). As Sato testified that he remembered appellant from Nordstrom, appellant failed to demonstrate that this claim had a reasonable probability of success on appeal. Further, as there was overwhelming evidence due to his confession, the testimony of the store employees, and the physical evidence, appellant failed to demonstrate that he was prejudiced by the failure to include this claim in his direct appeal. See Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996) Therefore the district court did not err in denying this claim.

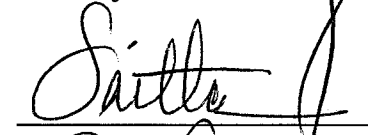
Next, appellant claimed that there was insufficient evidence to prove the intent element of burglary. This claim was considered and

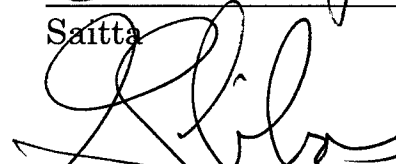
rejected on direct appeal. The doctrine of law of the case prevents further litigation of this issue and cannot be avoided by a more detailed and precisely focused argument. See Hall v State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, the district court did not err in denying this claim.

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

ORDER the judgment of the district court AFFIRMED.¹


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

¹We 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.

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