


IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT MEDINA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50977

FILED

JUN 26 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
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 May 19, 2004, the district court convicted appellant, pursuant to a jury verdict, of five counts of sexual assault on a victim 65 years or older, one count of battery with intent to commit a crime on a victim 65 years or older, and one count of first-degree kidnapping of a victim 65 years or older. Pursuant to NRS 207.012, the court adjudicated appellant as a habitual felon on the sexual assault and battery counts. The district court sentenced appellant to serve six concurrent terms of life in the Nevada State Prison without the possibility of parole, plus a consecutive term of life with the possibility of parole after five years for the kidnapping count, with an equal and consecutive term of life with the possibility of parole after five years for the older victim enhancement. This court affirmed the judgment of conviction on appeal. Medina v.

State, 122 Nev. 346, 143 P.3d 471 (2006). The remittitur issued on October 31, 2006.

On August 7, 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 January 9, 2008, the district court denied the petition. This appeal followed.

TRIAL COUNSEL

In his petition, appellant raised eight 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 fell below an objective standard of reasonableness, and there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different. See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting test set forth in Strickland). The court need not consider both prongs if the petitioner makes an insufficient showing on either prong. Strickland, 466 U.S. at 697.

Pre-trial Petition for a Writ of Habeas Corpus

First, appellant claimed that his trial counsel was ineffective for failing to file an interlocutory appeal from the denial of a pre-trial writ of habeas corpus. Appellant failed to demonstrate that his trial counsel's

performance was deficient. The right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists. Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990). No statute or court rule provides for an appeal from an order denying a pre-trial petition for a writ of habeas corpus. Gary v. Sheriff, 96 Nev. 78, 605 P.2d 212 (1980). Therefore, the district court did not err in denying this claim.

Explanation of Indictment

Second, appellant claimed that his trial counsel was ineffective for failing to fully explain the indictment to him. Appellant failed to demonstrate that he was prejudiced. Appellant failed to indicate how a further explanation of the indictment would have had a reasonable probability of altering the outcome of the proceedings. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Further, appellant failed to indicate which portions of the indictment he did not understand. Therefore, the district court did not err in denying this claim.

DNA Evidence

Third, appellant claimed that his trial counsel was ineffective for failing to object to DNA evidence admitted at trial. Appellant claimed that, as his defense was that the sex was consensual, DNA evidence linking him to the victim was unnecessary and prejudicial. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1). Relevant evidence "may [also] be

excluded if its probative value is substantially outweighed by considerations of . . . [the] needless presentation of cumulative evidence.” NRS 48.035(2) (emphasis added). Appellant failed to demonstrate that the probative value of the DNA evidence was substantially outweighed by the danger of confusing or misleading the jury. Further, as there was substantial evidence of appellant’s guilt, given the victim’s statements and the physical evidence of a violent rape, appellant failed to demonstrate that there was a reasonable probability of a different outcome had his trial counsel objected to the admittance of the DNA evidence. Therefore, the district court did not err in denying this claim.

Hearsay Statements

Fourth, appellant claimed that his trial counsel was ineffective for failing to object to the hearsay statements of the victim admitted through the testimony of Nurse Adams. Appellant claimed that his trial counsel should have moved for all of the hearsay statements from the nurse’s testimony to be stricken from the record. Appellant failed to demonstrate that his trial counsel’s performance was deficient or that he was prejudiced. Appellant’s trial counsel objected during trial to the admission of statements the victim made to the nurse. However, the district court overruled those objections. On direct appeal, this court concluded that the district court erred by admitting the statements, but that the error was harmless. Medina v. State, 122 Nev. 346, 353, 143 P.3d 471, 475 (2006). In light of the ruling on direct appeal, appellant failed to demonstrate that there would have been a reasonable probability that the

outcome of the trial would have been different had his trial counsel also moved for the statements to be stricken from the record. Therefore, the district court did not err in denying this claim.

Cross-Examination

Fifth, appellant claimed that his trial counsel was ineffective for failing to adequately cross-examine Nurse Adams. Appellant claimed that his trial counsel should have more effectively countered the claims that the victim was penetrated anally. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. During cross-examination, appellant's trial counsel challenged the nurse's observations and conclusions made during the examination of the victim. Appellant failed to demonstrate that there was a reasonable probability of a different outcome of the trial had his trial counsel further delved into this line of questioning. Therefore, the district court did not err in denying this claim.

Testifying on His Own Behalf

Sixth, appellant claimed that his trial counsel was ineffective for forcing him to testify at trial. Appellant claimed that evidence of his previous sexual assault convictions was heard by the jury because he was forced to testify. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. "The accused has the ultimate authority to make certain fundamental decisions regarding the case, such as whether to plead guilty, waive a jury, testify on one's own behalf, or take an appeal." Raquepaw v. State, 108 Nev. 1020, 1022, 843 P.2d 364,

366 (1992), overruled on other grounds by DeRosa v. Dist. Ct., 115 Nev. 225, 985 P.2d 157 (1999). Here, appellant chose to testify on his own behalf after being canvassed by the district court. The district court explained to appellant that if he decided to testify, the jury would be allowed to hear information concerning his criminal record. Appellant informed the district court that he understood. Further, nothing in the record indicated that appellant was forced to testify against his wishes. Therefore, the district court did not err in denying this claim.

Injuries and Medical Records

Seventh, appellant claimed that his trial counsel was ineffective for failing to argue that it was not possible for him to cause the injuries sustained by the victim and that the medical records were inaccurate. Appellant claimed that he was not anatomically able to cause serious damage and that the medical records were from a different person and not the victim in this case because a different middle name was on the records. Appellant failed to demonstrate that he was prejudiced. As there was substantial evidence of appellant's guilt due to the statements of the victim and the observations of Dorothy Golden and the Nurse Adams, appellant failed to demonstrate that there was a reasonable possibility of different outcome at trial had trial counsel preserved these arguments. Therefore, the district court did not err in denying this claim.¹

¹To the extent that appellant claimed his appellate counsel was ineffective for failing to raise this claim on direct appeal, we conclude that
continued on next page . . .

Directed Verdict

Eighth, appellant claimed that his trial counsel was ineffective for failing to move for a directed verdict at the close of trial. Appellant claimed that there was insufficient evidence to sustain a conviction. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. As there was substantial evidence of appellant's guilt, given the victim's statements and the physical evidence indicating a violent rape, appellant failed to demonstrate that a motion for a directed verdict 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.

APPELLATE COUNSEL

Next, appellant raised five claims of 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. See Kirksey, 112 Nev. at 998, 923 P.2d at

... continued

appellant failed to demonstrate that this claim had a reasonable probability of success on direct appeal. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

1114. 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 v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Grand Jury Proceedings

First, appellant claimed that his appellate counsel was ineffective for failing to argue that the State did not follow proper procedures with the proceedings before the grand jury. Appellant claimed as follows: (1) he was not given proper notice of the grand jury proceedings; (2) he was not allowed to appear before the grand jury; (3) the State improperly introduced evidence of his criminal history and sexual assault charges to the grand jury; (4) the State coerced witness testimony and presented perjured testimony to the grand jury; and (5) the State improperly instructed the grand jury. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. With his petition, appellant included letters from his appellate counsel. In those letters, counsel informed appellant that he did not wish to raise arguments about the grand jury proceedings because counsel felt there were more meritorious issues to be raised on appeal. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances" and appellant failed to demonstrate any such circumstances here. See id. Further, there was no prejudice to appellant because appellant was ultimately convicted by a jury of the charged

offenses. United States v. Mechanik, 475 U.S. 66 (1986) (holding that a jury's verdict of guilty beyond a reasonable doubt demonstrated that there was probable cause to charge the defendants with the offenses for which they were convicted despite a violation of a rule relating to the grand jury proceedings); see also Lisle v. State, 114 Nev. 221, 954 P.2d 744 (1998). Therefore, the district court did not err in denying these claims.²

Excited Utterance

Second, appellant claimed that appellate counsel was ineffective for informing this court that the victim made statements to Dorothy Golden 17 to 20 hours after the incident when a police report indicated the statements occurred 2 days after the incident. This court concluded on direct appeal that the district court did not err in admitting the victim's statements to Golden as an excited utterance. Medina v. State, 122 Nev. 349, 143 P.3d 471 (2006). Appellant claimed that two days was too long of a time period for the victim to have still been under the influence of a startling event and that the victim's statements would not have been admitted as excited utterances if this court had been correctly

²To the extent appellant raised the underlying claims concerning the grand jury proceedings independent of his claims of ineffective assistance of appellate counsel the claims are waived as appellant failed to raise these claims on direct appeal and failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b); see also Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

informed. Appellant failed to demonstrate that he was prejudiced. Golden stated that she spoke with the victim at approximately 8:30 p.m. on May 5, 2002, which was 19 to 20 hours after the incident occurred. As such, appellant failed to demonstrate that his appellate counsel misstated the length of time between the incident and the statements. Further, as this court stated on direct appeal, time is only one factor in determining an excited utterance. See NRS 51.095; see also Medina, 122 Nev. at 352, 143 P.2d at 475. Appellant failed to demonstrate that there would have been a reasonable probability of a different outcome on direct appeal had his appellate counsel stated two days passed between the incident and the victim's statements. Therefore, the district court did not err in denying this claim.

Double Jeopardy

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that he received multiple convictions for the same incident in violation of double jeopardy. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. "The great weight of authority supports the proposition that separate and distinct acts of sexual assault committed as a part of a single criminal encounter may be charged as separate counts and convictions entered thereon." Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981) (citing Hamill v. State, 602 P.2d 1212 (Wyo. 1979); People v. Perez, 23 Cal.3d 545, 153 Cal.Rptr. 40, 591 P.2d 63 (1979); People v. Saars, 196 Colo. 294, 584 P.2d 622 (Colo. 1978); People v.

Robinson, 80 Mich.App. 559, 264 N.W.2d 58 (1978); State v. Hill, 104 Ariz. 238, 450 P.2d 696 (1969)); see also Wicker v. State, 95 Nev. 804, 806, 603 P.2d 265, 267 (1979). Appellant forcibly penetrated the victim anally and orally, repeatedly penetrated the victim vaginally, and forcibly performed oral sex upon the victim. Thus, the record indicated that separate and distinct acts of sexual assault occurred, even though all acts occurred as part of a single encounter. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Habitual Felon

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that he should not have been sentenced as a habitual felon. Appellant claimed that he should not have been subject to both the enhancement for a victim over 65 and as a habitual felon. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. "Imposition of consecutive enhancements applied to a primary offense is inconsistent with the application of the habitual offender statute and the permissible uses of enhancement under . . . NRS 193.167." Barrett v. State, 105 Nev. 361, 365, 775 P.2d 1276, 1278 (1989). Here, only one enhancement was imposed for each primary offense. The district court sentenced appellant as a habitual felon for the sexual assault and battery charges. The district court separately enhanced appellant's conviction for kidnapping with the older victim enhancement pursuant to NRS 193.167. Thus, the district

court did not impose two sentencing enhancements on any one primary offense. Appellant failed to demonstrate that this issue had a reasonable probability of success on direct appeal. Therefore, the district court did not err in denying this claim.

Raising Ineffective Assistance of Counsel on Direct Appeal

Fifth, appellant claimed that his appellate counsel was ineffective for failing to argue that his trial counsel was ineffective for failing to move to dismiss the charges. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Claims of ineffective assistance of counsel should be raised in post-conviction proceedings in the district court in the first instance and are generally not appropriate for review on direct appeal. Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). Thus, appellant failed to demonstrate that there was a reasonable probability of success on direct appeal had his appellate counsel raised this claim. Therefore, the district court did not err in denying this claim.

Excited Utterance Exception


Next, appellant claimed that the district court erred in admitting the out of court statements of the victim to Dorothy Golden under the excited utterance exception. Appellant challenged the admission of the statements in his direct appeal, and this court rejected that challenge. The doctrine of law of the case prevents further litigation of this issue and cannot be avoided by a more detailed and precisely

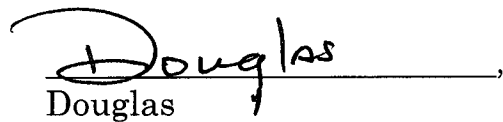
focused argument. See Hall v State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, the district court did not err in denying this claim.

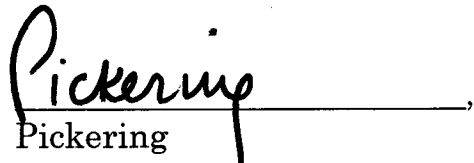
Conclusion

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.³

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

³We 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
Albert Medina
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk