IN THE SUPREME COURT OF THE STATE OF NEVADA

SALLY D. VILLAVERDE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51000

FILED

MAY 10 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an 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; Douglas W. Herndon, Judge.

On appeal, appellant argues that the district court erred in denying seven claims of ineffective assistance of trial counsel without conducting an evidentiary hearing. To prove 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. 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). Both components of the inquiry must be proven. Strickland, 466 U.S. at 697. A petitioner is only entitled to an evidentiary hearing on claims supported by specific facts not belied by the

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record, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

First, appellant claims that his trial counsel was ineffective for failing to locate and interview a witness, T.G. Appellant fails to demonstrate that trial counsel was deficient or that he was prejudiced. Trial counsel did attempt to locate T.G. and told the district court at a hearing on this issue that their court appointed investigator "has done some extensive legwork in an attempt to locate [T.G.]." Further, the cases cited by appellant in support of his contention that failure to locate and interview T.G. constituted ineffective assistance of counsel can be distinguished from this case. Those cases dealt with situations where counsel failed to do any investigation. See generally Rios v. Rocha, 299 F.3d 796 (9th Cir. 2002); United States v. Tucker, 716 F.2d 576 (9th Cir. 1983); Reynoso v. Giurbino, 462 F.3d 1099 (9th Cir. 2006). In this case, counsel attempted to locate and interview T.G., and appellant has failed to demonstrate what more could have been done to locate T.G. Appellant has also failed to demonstrate a reasonable probability of a different outcome at trial had trial counsel located and interviewed T.G. given the other evidence of guilt presented at trial. Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Second, appellant claims that his trial counsel was ineffective for failing to adequately cross-examine T.G. at the preliminary hearing. Appellant fails to demonstrate that trial counsel's performance was deficient for failing to anticipate that T.G. would be unavailable for trial. Further, appellant failed to demonstrate what questions trial counsel

should have asked T.G. about had he anticipated T.G. would have been unavailable. Other than naked generalizations that the cross-examination by trial counsel was inadequate, appellant failed to allege specific facts, that if true, would entitle him to relief. Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Third, appellant claims that his trial counsel was ineffective for conceding appellant's participation in a conspiracy. Specifically, trial counsel admitted during opening statements that appellant participated in a conspiracy to procure a hotel room for a drug transaction. Appellant claims that this admission caused the jury to believe that appellant had knowledge that the robbery was going to occur. Appellant fails to demonstrate that his trial counsel was deficient or that he was prejudiced. Trial counsel did not admit that appellant committed a crime for which he was charged. Rather it appears that trial counsel admitted to conduct that minimized appellant's role in the crime while explaining his involvement at the motel. This was a strategic decision by trial counsel and does not violate our holding in Jones v. State, 110 Nev. 730, 877 P.2d 1052 (1994). Further, appellant has failed to demonstrate a reasonable probability of a different outcome at trial had his trial counsel not made the admission in the opening statement. Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Fourth, appellant claims that his trial counsel was ineffective for failing to object to eight instructions relating to the crime of conspiracy when appellant was not charged with conspiracy. Appellant fails to demonstrate that trial counsel's performance was deficient because one of

the State's theories of criminal liability for the crimes of murder and robbery was co-conspirator vicarious liability. The State is allowed to pursue alternate theories of criminal liability and it is not error for the district court to instruct the jury on conspiracy when it is pleaded in the information as an alternate theory of criminal liability. See Walker v. State, 116 Nev. 670, 673-74, 6 P.3d 477, 479 (2000). Thus, trial counsel was not deficient for failing to make a futile objection. See Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (noting that counsel cannot be deemed ineffective for failing to file futile motions). Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Fifth, appellant claims that his trial counsel was ineffective for failing to object to the instruction on common sense because it diluted the reasonable doubt instruction. Appellant fails to demonstrate that trial counsel's performance was deficient because this court has stated that "jurors may rely on their common sense and experience." Meyer v. State, 119 Nev. 554, 568, 80 P.3d 447, 458 (2003). Counsel was not deficient for failing to make a futile objection. See Donovan, 94 Nev. at 675, 584 P.2d at 711. Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Sixth, appellant claims that his trial counsel was ineffective for failing to move to have Gamboa's testimony redacted to remove prior uncharged bad acts. Specifically, appellant claims that references to his having spent time in prison should have been redacted. This claim is belied by the record. Gamboa never testified that appellant had

previously spent time in prison. Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Seventh, appellant claims that his trial counsel was ineffective for failing to object to the State's inference in closing arguments that appellant was guilty for failing to testify. Appellant failed to demonstrate that he was prejudiced. Even assuming that the comment by the State was improper, appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected to the comment. Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Appellant also claims that his Sixth Amendment right to confront the witnesses against him was violated when Gamboa's preliminary hearing testimony was read to the jury. This claim was raised and rejected on direct appeal. See Villaverde v. State, Docket No 43443 (Order of Affirmance, February 16, 2006). The doctrine of law of the case precludes further litigation of this issue. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

Finally, appellant claims that his constitutional right to due process of law was violated by the district court and previous post-conviction counsel because the district court failed to hold an evidentiary hearing and previous post-conviction counsel failed to conduct an independent investigation or interview witnesses.[1] Appellant's claims are

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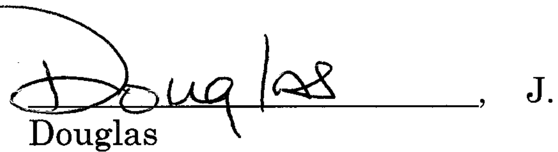
[1]Appellant was represented by different counsel below.

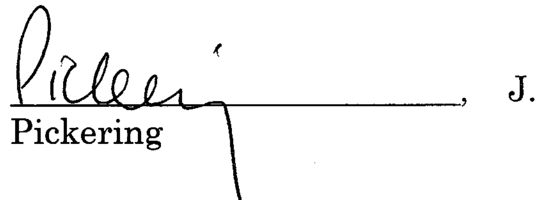
without merit. Appellant was not entitled to an evidentiary hearing, see Hargrove, 100 Nev. at 502, 686 P.2d at 225, and appellant was not entitled to the effective assistance of post-conviction counsel, see McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 257-58 (1996). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_______________________, J.
Hardesty



_______________________, J.
Douglas



_______________________, J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Daniel J. Albregts, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk