

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL EUGENE ABRAHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 34600

FILED

MAR 29 2002

ORDER OF AFFIRMANCE

JANE ITE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Appellant was originally convicted, pursuant to a jury verdict, of one count of first degree kidnapping with the use of a deadly weapon and six counts of sexual assault with the use of a deadly weapon. The district court sentenced appellant: for kidnapping, to life in prison with parole eligibility after ten years, with an equal and consecutive term for the use of a deadly weapon; and for sexual assault, to six terms of life in prison with parole eligibility after five years, with equal and consecutive terms for the use of a deadly weapon. The district court further ordered that: three of the terms for sexual assault would run concurrent with each other, and consecutive to the kidnapping charge; and the remaining three terms for sexual assault would run concurrent with each other and consecutive to the other sentences for sexual assault and kidnapping.

Appellant filed a timely direct appeal, arguing that the district court erred by failing to hold a hearing to determine whether the victim was competent to testify, and the district court abused its discretion by

denying appellant's motion for a continuance. This court affirmed the judgment of conviction, concluding that the district court did not abuse its discretion by denying the motion for a continuance, and that the issue of the victim's competence was not preserved for appellate review because appellant had withdrawn his motion for a hearing on the victim's competence.¹ The remittitur issued on June 23, 1998. Appellant filed the instant petition on April 19, 1999. The district court denied the petition without conducting an evidentiary hearing.

In his petition, appellant claimed that the district court erred by failing, sua sponte, to hold a hearing to determine whether the victim was competent to testify. This issue, however, could have been raised on direct appeal, and the district court therefore did not err by dismissing this petition as to this ground.²

Appellant also claimed that the district court erred by denying his motion for a continuance. As previously noted, this issue was raised on direct appeal, and this court held that the district court did not err. This issue is therefore barred by doctrine of the law of the case.³

Finally, appellant presented a claim of ineffective assistance of trial counsel. Specifically, appellant argues that his trial counsel should

¹Abraham v. State, Docket No. 25368 (Order Dismissing Appeal, June 2, 1998).

²NRS 34.810(1)(b)(2) (the district court shall dismiss a petition if the grounds for the petition could have been raised in a direct appeal).

³See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

have challenged the competence of the victim to testify. To state a claim of ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's performance, the outcome of the proceedings would have been different.⁴ The court need not consider both prongs of the test if the petitioner makes an insufficient showing on either prong.⁵

In this case, we conclude that appellant cannot show that he was prejudiced by counsel's failure to challenge the victim's competence. In particular, we note that although the victim had suffered a head injury prior to trial, her testimony was virtually identical to the statement given to police four months prior to the accident in which she sustained the head injury. Moreover, a witness is presumed to be competent unless proven otherwise.⁶ The competency of a witness is a matter within the discretion of the district court.⁷ Apart from the fact that the victim suffered a head injury, Abraham makes no allegations that indicate that the victim was incompetent to testify. We therefore conclude that the district court did not err by finding that appellant's trial counsel was not ineffective.

⁴Strickland v. Washington, 466 U.S. 668, 694 (1984).

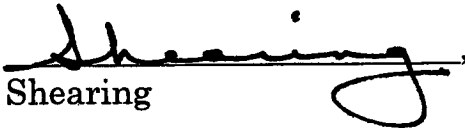
⁵Id. at 697.

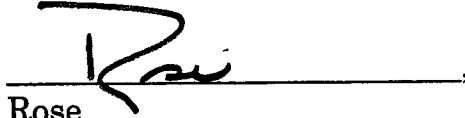
⁶NRS 50.015.

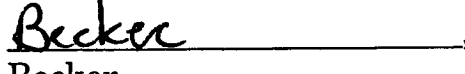
⁷Shuff v. State, 86 Nev. 736, 738, 476 P.2d 22, 24 (1970).

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.⁹


Shearing, J.


Rose, J.


Becker, J.

cc: Hon. Ronald D. Parraguirre, District Judge
Samuel Eugene Abraham
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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

⁹We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.