

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND G. PHENIX,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 33543

FILED

APR 10 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Ruben*
CHIEF DEPUTY CLERK

RAYMOND G. PHENIX,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 34063

RAYMOND G. PHENIX,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

ORDER OF AFFIRMANCE AND DISMISSING APPEAL

Docket No. 33543 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Docket No. 34063 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Docket No. 34601 is a proper person appeal from an order of the district court denying appellant's proper person motion for specific discovery or Brady¹ material not previously disclosed by the State. We elect to consolidate these appeals for

with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This court affirmed appellant's conviction and sentence.³

Docket No. 33543

On August 14, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition and appellant filed a reply. 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 23, 1998, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised several claims that should have been raised in his direct appeal. Specifically, he claimed that: (1) prosecutorial misconduct occurred during his trial because the prosecutor allowed a false statement to go uncorrected, there were possible Brady violations, and the prosecutor made improper remarks during his closing argument; (2) there was insufficient evidence to support his conviction; (3) there was lost exculpatory evidence; (4) he was being subjected to double jeopardy; and (5) there was cumulative error. We conclude that the district court did not err in denying these claims. Appellant waived these claims by failing to raise them in his direct appeal.⁴

Next, appellant raised several claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's

jury's verdict unreliable.⁵ Furthermore, tactical decisions of defense counsel are virtually unchallengeable absent extraordinary circumstances.⁶

First, appellant claimed that his counsel was ineffective because he failed to move for a dismissal of the case after learning that several pieces of exculpatory evidence were lost or mishandled. We conclude that the district court did not err in denying this claim. Appellant's counsel adequately and thoroughly cross-examined the pertinent witnesses regarding the lost or mishandled pieces of evidence. Therefore, appellant failed to show that his counsel's performance fell below an objective standard of reasonableness or that he was prejudiced.⁷

Next, appellant contended that his counsel was ineffective because he failed to file an immediate appeal when the court denied his motion for a mistrial regarding a lost tape recorded conversation between the appellant and Michelle Pro, a witness. We conclude that the district court did not err in denying this claim. Appellant's counsel adequately argued for a mistrial regarding the lost tape recorded conversation. Moreover, a defendant may only appeal from a final judgment or verdict.⁸ Therefore, appellant failed to show that his counsel was ineffective.⁹

Next, appellant contended that his counsel failed to subpoena or have testify a known "alibi" witness by the name of J. Glosten. Based on the documents attached to the petition, we conclude that the district court did not err in denying this claim because counsel's decision not to have J. Glosten testify

at appellant's trial was a tactical decision of defense counsel.¹⁰

Next, appellant contended that his counsel failed to argue vindicating evidence. This vindicating evidence was (1) that appellant did not know the time of the murder which prevented him from creating an untruthful alibi; and (2) that two men murdered the victim. We conclude that the district court did not err in denying this claim. Appellant failed to show that his counsel was ineffective.¹¹

Next, appellant claimed that his counsel failed to argue contradictions in witness testimony regarding the whereabouts of appellant at the approximate time when the murder took place, the color of his clothing, and whether he was seen wearing glasses on the night of the murder. We conclude that the district court did not err in denying this claim. Appellant's counsel adequately cross-examined the relevant witnesses regarding these contradictions. Therefore, appellant failed to show that counsel was ineffective.¹²

Next, appellant claimed that his counsel's performance was hindered by a conflict of interest. Appellant claimed a conflict of interest existed because his counsel had knowledge of appellant's attempt to bribe a witness, Rob Curell, to testify on his behalf. We conclude that the district court did not err in denying this claim. Appellant failed to support this claim with specific, understandable facts that would entitle him to relief.¹³

Next, appellant contended that his counsel failed to personally interview seven witnesses. We conclude that the district court did not err in denying this claim. Appellant did

not state what these interviews would have revealed. Moreover, each of the seven witnesses testified at trial and appellant's counsel thoroughly cross-examined them. Therefore, appellant failed to provide sufficient facts in support of these claims that would entitle him to relief.¹⁴

Next, appellant claimed that his counsel was ineffective for failing to present "best evidence." It appears that appellant was claiming that his attorney failed to present appellant's alternative theories of the case. Appellant did not support this claim with sufficient facts.¹⁵

Next, appellant claimed that his counsel refused to allow appellant to testify. We conclude that the district court did not err in denying this claim. The district court advised appellant of his right to testify. Appellant stated that he understood his right and then declined to testify. Therefore, this claim is belied by the record.¹⁶

Appellant's last claim of ineffective assistance of counsel was that his counsel failed to make various objections. Specifically, appellant claimed that his counsel did not object to: (1) Miranda¹⁷ violations; (2) possible Brady violations; (3) use of suppressed evidence in the jury room; (4) incomplete trial transcripts; (5) exclusionary violations; and (6) the prosecutor's improper remarks. We conclude that the district court did not err in denying these claims. These claims are belied by the record on appeal. Moreover, appellant failed to support these claims with sufficient factual allegations, which if true, would have entitled him to relief.¹⁸

Next, appellant contended that he received ineffective assistance of appellate counsel. Specifically, appellant claimed

that his counsel was ineffective for: (1) failing to raise the denial of due process for the loss of evidence; (2) failing to raise the district court's denial of appellant's motion for a mistrial regarding the lost tape recorded conversation between appellant and a witness; (3) failing to raise the denial of confrontation because transcripts from an alleged interview with a witness was missing; and (4) failing to raise ineffective assistance of trial counsel. We conclude that the district court did not err in denying these claims. Appellant failed to demonstrate that his counsel acted unreasonably or that he was prejudiced by appellate counsel's performance.¹⁹ Furthermore, appellate counsel is not required to raise every non-frivolous issue on appeal and is most effective when every conceivable issue is not raised on direct appeal.²⁰

Accordingly, we conclude that the district court did not err in denying appellant's petition and we affirm the order of the district court.

Docket No. 34063

On January 22, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court.²¹ 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 April 21, 1999, the district court denied appellant's petition. This appeal followed.

¹⁹See Strickland, 466 U.S. at 687.

²⁰See Jones v. Barnes, 463 U.S. 745 (1983); Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

²¹Appellant labeled his petition a "motion for relief from

Appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.²² Therefore, appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice.²³ Appellant failed to demonstrate good cause to excuse the procedural bar. Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition, and we affirm the order of the district court.

Docket No. 34601

On May 10, 1999, appellant filed a proper person motion for specific discovery of Brady material not previously disclosed by the State. The State opposed the motion and appellant filed a reply. The district court denied the motion on July 29, 1999. This appeal followed. Our review of this appeal reveals a jurisdictional defect. The right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists.²⁴ No statute or court rule provides for an appeal from a motion for specific discovery or Brady material not previously disclosed by the State.

Accordingly, we dismiss this appeal.

Conclusion

Having reviewed the records 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.²⁵ Accordingly, we

ORDER the judgments of the district court AFFIRMED in
Docket Nos. 33543 and 34063 and DISMISS the appeal in Docket No.
34601.²⁶

Young, J.
Young
Leavitt, J.
Leavitt
Becker, J.
Becker

cc: Hon. Ronald D. Parraguirre, District Judge
Attorney General
Clark County District Attorney
Raymond G. Phenix
Clark County Clerk