

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT WILLIAM ELLIOTT, JR.
A/K/A ROBERT W. ELLIOT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51166

FILED

MAR 05 2009

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 appellant Robert William Elliott's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On October 25, 2005, the district court convicted Elliott, pursuant to a jury verdict, of one count each of robbery of a person 60 years of age or older and robbery with the use of a deadly weapon. The district court sentenced Elliott to serve four consecutive prison terms of 72 to 180 months. We affirmed the judgment of conviction on direct appeal. Elliott v. State, Docket No. 46282 (Order of Affirmance, May 31, 2006).

On February 13, 2007, Elliott filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Elliott, and counsel supplemented Elliott's petition. The State filed an answer and a motion to dismiss. Elliott filed an opposition and a request for an evidentiary hearing. The district court dismissed the habeas petition without a hearing. This appeal followed.

First, Elliott contends that his post-conviction claims that the district court abused its discretion by (1) denying his motion for self-representation, (2) denying his motions for substitution of counsel,¹ and (3) imposing a sentence that violates the Eighth Amendment prohibition against cruel and unusual punishment were erroneously denied. However, these are claims that could have been raised on direct appeal. NRS 34.810(1)(b)(2) requires a court to dismiss a petition if the petitioner's conviction was the result of a trial and the grounds for the petition could have been raised in a direct appeal, unless the court finds cause for the failure to present the grounds and prejudice to the petitioner. Elliott did not allege good cause for failing to raise his claims for relief on direct appeal, nor did he demonstrate that he would be prejudiced by the district court's failure to consider the claims on the merits. Accordingly, we conclude that the district court did not err.

Second, Elliott contends that the district court abused its discretion by failing to conduct an evidentiary hearing on his claims of ineffective assistance of counsel.

"A post-conviction habeas petitioner is entitled to an evidentiary hearing 'only if he supports his claims with specific factual allegations that if true would entitle him to relief.'" Means v. State, 120 Nev. 1001, 1016, 103 P.3d 25, 35 (2004) (quoting Thomas v. State, 120

¹Elliott also claims that we abused our discretion by returning, unfiled, the proper person documents in which he protested the fact that trial counsel was to be his appellate counsel pursuant to NRAP 3C(b). Because Elliott was represented by counsel, we declined to give him permission to file the documents in proper person. See NRAP 46(b). Our determination was not reviewable by the district court.

Nev. 37, 44, 83 P.3d 818, 823 (2004)). 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, and that the petitioner was prejudiced by counsel's performance. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). To demonstrate prejudice, the petitioner "must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Id. at 988, 923 P.2d at 1107 (citing Strickland, 466 U.S. at 694). The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong. See Strickland, 466 U.S. at 697.

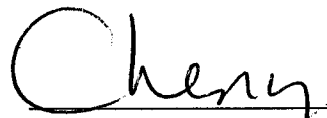
Here, Elliott claims that the district court should have conducted an evidentiary hearing on his allegations that (1) trial counsel did not present any suppression or other pretrial motions, (2) "[t]he exigencies of [trial counsel's] practice as a member of the 'Alian Contract' could never have afforded him the time and resources necessary to properly defend a case such as [this]," and (3) "[i]f the surveillance video had been kept out of the jury, it would likely have produced a different outcome." However, Elliott failed to allege facts that would indicate a reasonable probability that a pretrial motion to suppress the surveillance video would be granted, the trial result would have been different if the jury had not seen the video, or that the trial result would have been different if trial counsel had had more time and resources. Moreover, Elliott did not indicate what "other pretrial motions" trial counsel should have filed, let alone whether they would have had a reasonable probability of being granted and altering the trial results. Accordingly, Elliott has not demonstrated that the district court erred by denying his claims of


ineffective assistance of counsel without conducting an evidentiary hearing.


To the extent that Elliott contends that appellate counsel was ineffective for failing to challenge the district court's denial of his motion for self-representation, we decline to consider this contention because it was not presented to the court below in the first instance. McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998) ("Where a defendant fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal.").

Having considered Elliott's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.²


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

²On February 25, 2009, appellant's counsel filed a motion to withdraw as counsel of record in this appeal. In light of this order, we deny the motion to withdraw.

cc: Hon. Steven R. Kosach, District Judge
Stephen G. Young
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk