

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWAN THURMOND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51073

EDWAN THURMOND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51290

FILED

JUN 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Docket No. 51073 is a proper person appeal from an order of the district court denying a "motion for writ of mandamus to disqualify Judge Donald Mosley." Docket No. 51290 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; Donald M. Mosley, Judge. We elect to consolidate these appeals for disposition. See NRAP 3(b).

On April 6, 2005, appellant was convicted, pursuant to a jury verdict, of three counts of robbery with the use of a deadly weapon and two counts of conspiracy to commit robbery. The district court sentenced appellant to serve terms totaling 12 to 42 years in the Nevada State Prison. On appeal, this court affirmed the judgment and sentence, but issued a limited remand to correct a clerical error in the judgment of conviction. Thurmond v. State, Docket No. 45055 (Order of Affirmance

and Limited Remand to Correct the Judgment of Conviction, November 8, 2006). The remittitur issued on December 5, 2006. An amended judgment of conviction was entered on January 18, 2007.

Docket No. 51073

On January 28, 2008, appellant filed a proper person "motion for writ of mandamus to disqualify Judge Donald Mosley." The State opposed the motion. On March 6, 2008, the district court denied the motion. This appeal followed.

In his motion, appellant claimed that Judge Mosley was biased against him due to Judge Mosley's decisions during the trial and that his petition for a writ of habeas corpus should be before a different judge. At the hearing on this motion, appellant claimed that Judge Mosley should have recused himself from the trial because a wife of a former judge was one of the witnesses.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). A writ of mandamus may issue only where there is no plain, speedy, and adequate remedy at law. NRS 34.170. Petitions for extraordinary writs are addressed to the sound discretion of the court. State ex rel. Dep't Transp. v. Thompson, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983).

Mandamus is the improper vehicle to disqualify a district court judge. It does not appear that appellant followed all of the procedures under NRS 1.235. Regardless, appellant suffered no prejudice because there was no merit to his claim. Appellant claimed bias based on the outcome of trial rulings. Adverse rulings "during the course of official judicial proceedings do not establish legally cognizable grounds for

disqualification.” In re Petition to Recall Dunleavy, 104 Nev. 784, 789-90, 796 P.2d 1271, 1275 (1988). To the extent appellant attempted to reargue his motion to disqualify Judge Mosley based upon the fact that one of the victims was the wife of a former district court judge, mandamus is not a proper vehicle to relitigate that motion. NRS 34.170. Finally, NRS 34.730(3)(b) provides that a post-conviction habeas petition should be assigned to the original judge or court. Therefore, we conclude that the district court did not err in denying the motion and we affirm the order of the district court.

Docket No. 51290

On October 2, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. Pursuant to NRS 34.750 the district court declined to appoint counsel to represent appellant. After conducting an evidentiary hearing, the district court denied the petition on April 3, 2008. This appeal followed.

Appellant raised thirteen claims of ineffective assistance of appellate counsel.¹ 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 v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). 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

¹We note that appellant represented himself at trial.

Nev. 850, 853, 784 P.2d 951, 953 (1989). A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Wiretaps

First, appellant claimed that his appellate counsel was ineffective for failing to argue that his right to confrontation was violated because the officer who applied for the search warrant for the wiretap never testified at trial. Appellant appeared to further claim that the information obtained through the wiretap was inadmissible because the officer who sought the warrant did not testify. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Pursuant to NRS 179.465(1), any law enforcement officer who gains knowledge from a wire intercept may share that knowledge with another law enforcement officer. At trial, Detective Clifford Mogg testified that while he did not apply for the warrant, he was the lead detective in this case and had reviewed all of the wiretap evidence. As such, appellant failed to demonstrate that the testifying officers should not have been allowed to testify concerning the wiretap evidence or that the wiretap evidence should not have been admitted. Further, appellant thoroughly cross-examined Detective Mogg and challenged the legality of the wiretaps in a pretrial motion to suppress. Thus, appellant failed to demonstrate that his right to confrontation was violated. The district court concluded that appellate counsel was not ineffective for failing to raise this issue on direct appeal and substantial

evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the officer who signed the affidavit for the warrant authorizing the wiretap of appellant's phone committed perjury. Appellant claimed that, under 18 USCA Section 2518(1)(c), an officer must include a statement of other investigative procedures along with the affidavit and application for a search warrant. Appellant appears to claim that, as the officer did not include a statement listing the other investigative procedures that were taken, the officer must have perjured himself by claiming there was criminal activity afoot. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant made only a bare allegation that the affiant officer perjured himself. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Appellant failed to demonstrate that the officers violated the procedures for authorizing wiretaps in Nevada. See NRS 179.410 through NRS 179.515. As the warrant for the wiretap was obtained in a Nevada court, appellant failed to demonstrate that the laws regarding federally authorized wiretaps should have applied in the instant case. Further, appellant's appellate counsel testified at the evidentiary hearing that she reviewed the warrants and wiretap procedures conducted in this case and concluded that there were no appealable issues. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances" and appellant failed to demonstrate any such circumstances here. See Ford, 105 Nev. at 853, 784 P.2d at 953. The district court concluded that appellate counsel was not ineffective for failing to raise this issue on direct appeal and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that appellant was denied due process because the entire wiretap tapes were admitted into evidence without being played in their entirety before the jury. Appellant failed to demonstrate that his appellate counsel's performance was ineffective or that he was prejudiced. At the evidentiary hearing, appellant's appellate counsel testified that she did not find any appealable issues in this area. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances" and appellant failed to demonstrate any such circumstances here. See id. Further, appellant was given the wiretap recordings before trial and introduced portions of the recordings himself. Thus, if he wished to play a different portion, he had the opportunity to introduce it himself. In addition, as there was substantial evidence of appellant's guilt due to his confession and the wiretap evidence, appellant failed to demonstrate a reasonable probability of a different outcome on appeal had his appellate counsel argued that the entirety of the wiretaps should have been played to the jury. The district court concluded that appellate counsel was not ineffective for failing to raise this issue on direct appeal and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Notice of Charges

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that the information was unconstitutionally vague. The information and the amended information listed the statute for the deadly weapon enhancement as "NRS 199.165" and the judgment of conviction listed the statute for the deadly weapon enhancement as "NRS 103.165." As the correct statute for the deadly weapon enhancement is NRS 193.165, appellant claimed that he was not given proper notice of the deadly weapon enhancement. Appellant further claimed that

vagueness of the deadly weapon enhancement violated separation of powers.

Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Pursuant to NRS 173.075(3), error in the citations in the information is not a ground for dismissal or reversal of conviction if the error "did not mislead the defendant to his prejudice." The correct statute for the deadly weapon enhancement was listed in the complaint. Further, during the Faretta canvass, the district court explained in detail how the deadly weapon enhancement would affect the sentence and gave appellant a hypothetical example of how the sentencing would work should appellant be found guilty. Faretta v. California, 422 U.S. 806 (1975). Appellant responded that he understood the penalties he faced, still wanted to represent himself, and believed he had sufficient time to learn how best to defend himself. As such, appellant failed to demonstrate that he was prejudiced by the error in the information. Further, appellant failed to demonstrate that the deadly weapon enhancement violated separation of powers. At the evidentiary hearing, appellant's appellate counsel testified that in her opinion the statutes were not vague; therefore, she did not raise this issue. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances" and appellant failed to demonstrate any such circumstances here. See Ford, 105 Nev. at 853, 784 P.2d at 953. The district court concluded that appellate counsel was not ineffective for failing to raise this issue on direct appeal and substantial evidence

supports that conclusion. Therefore, the district court did not err in denying this claim.²

Fifth, appellant claimed that his appellate counsel was ineffective for failing to argue that the amended information allowed the State to change its theories of the crimes and did not provide notice of crimes charged. Appellant also claimed that the State changed theories of the crimes in the middle trial, which also did not provide him notice of the charges. Appellant failed to demonstrate that his appellate counsel's performance was ineffective or that he was prejudiced. Appellate counsel testified that she reviewed the charging documents and concluded that appellant was properly given notice of the charges and the State's theory of the crimes. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances" and appellant failed to demonstrate any such circumstances here. See Ford, 105 Nev. at 853, 784 P.2d at 953. A review of the record reveals that the State's theory was that appellant planned and helped to carry out the robberies. The State's theory of the crime was consistent throughout the trial and the charging documents provided notice of that theory. The district court concluded that appellate counsel was not ineffective for failing to raise this issue on direct appeal and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Standby Counsel

Sixth, appellant claimed that his appellate counsel was ineffective for failing to appeal the denial of stand-by counsel after the

²We note that an amended judgment of conviction was entered on January 18, 2007. The amended judgment of conviction lists the correct statute, NRS 193.165, for the deadly weapon enhancement.

Faretta canvass. Faretta, 422 U.S. 806. Appellant failed to demonstrate that his appellate counsel was deficient or that he was prejudiced. Prior to trial, appellant informed the district court that he wanted to represent himself. The district court then conducted a Faretta canvass and allowed appellant to represent himself. Approximately three months later, appellant informed the district court that he wanted standby counsel to help him question witnesses and with his own testimony. The district court denied appellant's request for standby counsel.

A defendant who waives his right to counsel and chooses to represent himself does not have a constitutional right to standby counsel. Harris v. State, 113 Nev. 799, 804, 942 P.2d 151, 155 (1997); accord U.S. v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994); U.S. v. Morrison, 153 F.3d 34, 55 (2nd Cir. 1998). The district court has the discretion to appoint standby counsel to aid in presentation of the defense or in saving the record for appeal. Harris, 113 Nev. at 804, 942 P.2d at 155. Appellant failed to demonstrate that the district court abused its discretion by refusing to appoint standby counsel. Further, appellant's appellate counsel testified that she looked into the issue of standby counsel and concluded that it did not have merit on appeal. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances" and appellant failed to demonstrate any such circumstances here. See Ford, 105 Nev. at 853, 784 P.2d at 953. The district court concluded that appellate counsel was not ineffective for failing to raise this issue on direct appeal and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Jury Instructions

Seventh, appellant claimed that his appellate counsel was ineffective for failing to argue that the jury instructions were erroneous.

Appellant claims that the jury instructions were improper because the State did not prove the facts alleged in the instructions, the instructions allowed the State to alter its theory of the case, and the deadly weapon instruction contained the wrong statute number. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. As appellant failed to demonstrate a reasonable probability of a different outcome on appeal had his appellate counsel argued the instructions were improper. Further, appellant's appellate counsel testified that in her review of the case, she did not find anything that would indicate to her that the challenged instructions were inappropriate. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances" and appellant failed to demonstrate any such circumstances here. See id. The district court concluded that appellate counsel was not ineffective for failing to raise this issue on direct appeal and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Hearsay

Eighth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred in admitting "double hearsay" evidence. At trial, Detective Clifford Mogg testified that other officers had conducted investigations into possible suspects, and through those investigations he learned the names of appellant's co-conspirators. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant's counsel testified that she reviewed the trial transcripts and did not find any double hearsay, and therefore, did not argue this issue on direct appeal. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances" and appellant failed to demonstrate any such circumstances here. See id. Here, the challenged testimony was not

concerning out-of-court statements, but rather a description of how the investigation into the conspiracy was performed. Further, appellant failed to demonstrate a reasonable probability of a different outcome on appeal had his appellate counsel argued the district court erred in admitting "double hearsay." The district court concluded that appellate counsel was not ineffective for failing to raise this issue on direct appeal and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Post-Trial

Ninth, appellant claimed that his appellate counsel was ineffective for failing to "federalize" the arguments on direct appeal. Appellant claimed that this precluded him from seeking relief in federal court. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that he would have gained a more favorable standard of review of on direct appeal had his appellate counsel federalized the arguments. See Browning v State, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004). The district court concluded that appellate counsel was not ineffective for failing to federalize appellant's claims on direct appeal and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that his trial counsel was ineffective for failing to argue that Judge Mosley and other court officers conspired to keep matters off the record so as to avoid appellate review. Appellant claimed that Detective Mogg talked with members of the jury during a break in the trial and that Judge Mosley refused to put this allegation on the record. Appellant failed to demonstrate that he was prejudiced. Appellant put forth only bare and naked allegations and thus, failed to demonstrate that there would have been a reasonable probability of

altering the outcome on direct appeal had his appellate counsel included this claim. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Therefore, the district court did not err in denying this claim.

Eleventh, appellant claimed that his appellate counsel was ineffective for failing to argue that the evidence produced at trial was insufficient to sustain a guilty verdict. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. At the evidentiary hearing, appellant's appellate counsel testified that she did not raise this argument because she felt there was sufficient evidence and that it would not have merit on appeal. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances" and appellant failed to demonstrate any such circumstances here. See Ford, 105 Nev. at 853, 784 P.2d at 953. As there was substantial evidence of appellant's guilt due to his confession and the wiretap evidence, appellant failed to demonstrate a reasonable probability of a different outcome on appeal had his appellate counsel argued there was insufficient evidence. The district court concluded that appellate counsel was not ineffective for failing to raise this issue on direct appeal and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Twelfth, appellant claimed that his appellate counsel was ineffective for failing to meet with him and follow his instructions. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellate counsel testified that she met with him for several hours and had correspondence through the mail with appellant in which she explained her reasoning for not raising the claims that appellant wished her to raise. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances" and appellant failed to demonstrate any such

circumstances here. See id. Appellant failed to demonstrate a reasonable probability that the outcome of the direct appeal would have been different had he met more often with counsel or if counsel had raised all of the claims he wished. The district court concluded that appellate counsel was not ineffective for failing to failing to meet with appellant and follow his direction. Substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Thirteenth, appellant claimed that his appellate counsel was ineffective for failing to argue that appellant was entitled to relief due to cumulative error. Appellant failed to demonstrate that that he was prejudiced. As appellant failed to demonstrate error, he failed to demonstrate that there was a reasonable probability that the outcome of his direct appeal would have been different had this claim been raised on direct appeal. Therefore, the district court did not err in denying this claim.

Credits

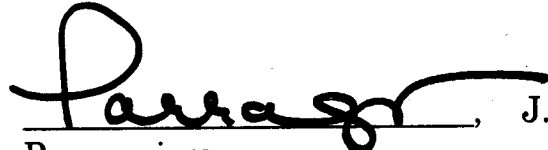
Next, appellant claimed that the Department of Corrections incorrectly calculated his good time credits. The district court dismissed this claim without prejudice. Pursuant to NRS 34.738(3), a petition must not challenge both the validity of a judgment of conviction or sentence and the computation of time served pursuant to that judgment. If a petition challenges both validity of a judgment of conviction or sentence and the computation of time served pursuant to that judgment, the district court shall resolve the portion challenging the judgment of conviction or sentence and dismiss the remainder without prejudice. Id. Thus, we conclude that the district court did not err in dismissing this claim.

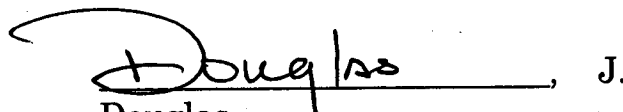
Having reviewed the record on appeal and the claims raised in the petition, we affirm the order of the district court denying the petition.

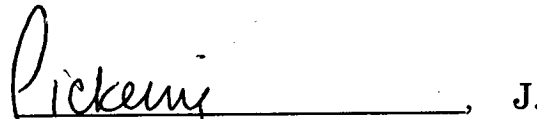
Conclusion

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

ORDER the judgment of the district court AFFIRMED.³


Parraguirre J.


Douglas J.


Pickering J.

cc: Hon. Donald M. Mosley, District Judge
Edwan Thurmond
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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.