

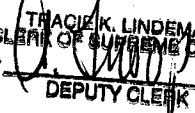
IN THE SUPREME COURT OF THE STATE OF NEVADA

DENTON RAY WHITE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51302

**FILED**

NOV 21 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

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. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On August 5, 2005, the district court convicted appellant, pursuant to a jury verdict, of resisting a public officer, discharging a firearm at or into a structure, attempted robbery with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon, assault with a deadly weapon, coercion with the use of a deadly weapon, and battery with a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life with parole eligibility after five years, and seven definite terms, in the Nevada State Prison. This court affirmed appellant's conviction on direct appeal.<sup>1</sup> The remittitur issued on April 24, 2007.

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<sup>1</sup>White v. State, Docket No. 45869 (Order of Affirmance, March 27, 2007).

On July 6, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. 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 8, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that: (1) the district court erred in giving Jury Instruction Nos. 22, 23, 28, and 30; (2) the district court erred in "restructuring" the indictment; and (3) the prosecution committed misconduct by commenting on his post-arrest silence, eliciting testimony of his prior arrest, vouching for the victim's credibility, attacking the moral credibility of defense witnesses, asking a witness if he received any information pointing to the defendant's innocence, and improperly characterizing the reasonable doubt jury instruction. These claims could have been raised on direct appeal and appellant failed to demonstrate good cause for his failure to do so.<sup>2</sup> Therefore, the district court did not err in denying these claims.

Appellant also claimed that the district court erred in (1) giving Jury Instruction Nos. 10 and 12, (2) denying his motions for mistrial, (3) admitting the hearsay statements of a coconspirator, (4) permitting questioning about whether he had requested independent fingerprint analysis, and (5) denying his motion to dismiss the kidnapping charge. Further, appellant claimed that his convictions violated the Double Jeopardy Clause of the Fifth Amendment and that cumulative

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<sup>2</sup>NRS 34.810(1)(b).

error mandated reversal of his convictions. This court rejected these claims on direct appeal. The doctrine of the law of the case prevents further litigation of these issues and cannot be avoided by a more detailed and focused argument.<sup>3</sup> Therefore, the district court did not err in denying these claims.

Next, appellant claimed that trial counsel was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced the defense.<sup>4</sup> To establish prejudice, a defendant must show that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different.<sup>5</sup> The court may dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>6</sup>

First, appellant claimed that trial counsel was ineffective for failing to file a pretrial writ of habeas corpus challenging the charge of first-degree kidnapping. Appellant failed to demonstrate that he was prejudiced. Appellant filed a motion to dismiss the kidnapping count in the district court, which was denied. Furthermore, appellant's conviction for first-degree kidnapping was affirmed on direct appeal. Thus, appellant failed to demonstrate that a pretrial petition for a writ of habeas corpus

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<sup>3</sup>Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

<sup>4</sup>Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

<sup>5</sup>Id. at 694.

<sup>6</sup>Id. at 697.

had a reasonable probability of success. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to file a pretrial motion for a paraffin test of his clothing and the scene of the alleged crime to ascertain the presence of gunpowder residue. Appellant failed to demonstrate that he was prejudiced. Appellant did not explain this claim or provide any evidence demonstrating what such a test would have revealed.<sup>7</sup> Thus, appellant failed to demonstrate a reasonable likelihood that a motion for such a test would have been successful or changed the result of trial. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to request a continuance when fingerprint evidence and two interview transcripts were disclosed by the State during trial. Appellant failed to demonstrate that he was prejudiced. The evidence was disclosed by the State as soon as it was available and the defense had the opportunity to review it and present it at trial. Because the evidence was favorable to the defense, was fully reviewed, and was presented at trial, appellant failed to demonstrate a reasonable likelihood that, had a continuance been granted, the results of trial would have been different. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to move the court for a second fingerprint analysis of the rifle and shotgun. Specifically, appellant claimed that a separate analysis should

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<sup>7</sup>See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

have been conducted in order to eliminate the fingerprints as the victim's in order to call into question the victim's story that at some point during the incident, he pushed the barrel of a gun out of his face. Appellant failed to demonstrate that he was prejudiced. Appellant's claim was purely speculative and is not supported by the record. The only fingerprints that were recovered were taken from an area near the stock of the gun. The victim testified that he touched the barrel. Thus, even if an independent analysis demonstrated that these fingerprints did not belong to the victim, there is no reasonable likelihood that this fact would have changed the result of trial. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to file a motion in limine to prevent the introduction of hearsay statements made by his coconspirator. Appellant failed to demonstrate that he was prejudiced. Trial counsel objected to the admission of these statements at trial and the district court overruled the objection. Moreover, this issue was raised on direct appeal and this court affirmed appellant's conviction. Thus, appellant failed to demonstrate a reasonable probability that a motion in limine would have been granted by the district court or that it would have changed the result of trial. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to "request that the verdict be set aside after the trial court restructured the indictment and constructively amended the resisting public officer with use of a deadly weapon to resisting public officer

charge.” Appellant failed to demonstrate that he was prejudiced. Appellant failed to explain this claim.<sup>8</sup> Particularly, appellant failed to explain how he was prejudiced by the removal of the deadly weapon language. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for failing to object to Jury Instruction Nos. 10, 12, 23, and 30. Appellant claimed that these instructions “affected the reliability of the trial” and misled the jury on the law and “their right to disagree.” Appellant failed to demonstrate that he was prejudiced. First, Jury Instruction Nos. 10 and 12 were challenged unsuccessfully on direct appeal. Second, Jury Instruction Nos. 23 and 30 are standard instructions that accurately state Nevada law. Instruction No. 23 informs the jury that if they are convinced beyond a reasonable doubt of the defendant’s guilt, they should convict even if they believe other persons are also guilty.<sup>9</sup> Instruction No. 30 informs the jury that their verdict must be unanimous.<sup>10</sup> Thus, appellant failed to demonstrate a reasonable probability that an objection to any of these instructions would have been sustained. Therefore, the district court did not err in denying these claims.

Finally, appellant raised two claims that his appellate counsel was ineffective. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel’s performance was

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<sup>8</sup>See id.

<sup>9</sup>See Guy v. State, 108 Nev. 770, 778, 839 P.2d 578, 583 (1992).

<sup>10</sup>See NRS 175.481; Davidson v. State, 124 Nev. \_\_\_, \_\_\_, 192 P.3d 1185, 1190 (2008).

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.<sup>11</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>12</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>13</sup>

First, appellant claimed that his appellate counsel was ineffective for failing to “federalize” his claims on direct appeal. Appellant failed to demonstrate that appellate counsel’s performance was deficient. He failed to demonstrate a reasonable likelihood that the results of his direct appeal would have been different if counsel had “federalized” the issues, and we decline to opine as to what claims the federal courts may or may not review. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel was ineffective for failing to challenge Jury Instruction Nos. 23 and 30 on direct appeal. Appellant failed to demonstrate that appellate counsel’s performance was deficient or that he was prejudiced. As stated above, those instructions are accurate statements of Nevada law and have been sustained by this court.<sup>14</sup> Accordingly, there is no reasonable probability

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<sup>11</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

<sup>12</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

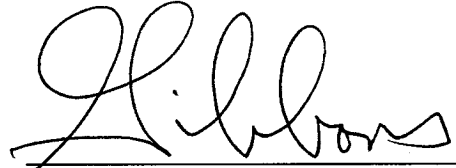
<sup>13</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

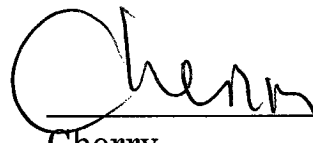
<sup>14</sup>See NRS 175.481; Davidson, 124 Nev. at \_\_\_, 192 P.3d at 1190; Guy, 108 Nev. at 778, 839 P.3d at 583.

that such a claim would have been successful on appeal. Therefore, the district court did not err in denying this claim.

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.<sup>15</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C. J.  
Gibbons

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

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

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<sup>15</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).