

IN THE SUPREME COURT OF THE STATE OF NEVADA

DELL MARVIN ROBERTS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51334

FILED

MAY 22 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Ingerson
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Dell Marvin Roberts' post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On October 7, 2003, the district court convicted Roberts, pursuant to a jury verdict, of one count of burglary. The district court sentenced Roberts to serve a prison term of 24 to 120 months and imposed the sentence to run consecutively to the sentence in another case. We affirmed the judgment of conviction on direct appeal. Roberts v. State, Docket No. 42193 (Order of Affirmance, April 8, 2004).

On July 23, 2004, Roberts filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Roberts, counsel filed a supplemental petition, and the State moved to dismiss both the petition and supplemental petition. Thereafter, the district court dismissed all but two of Roberts' claims; conducted an evidentiary hearing on the remaining claims; and entered findings of fact, conclusions of law, and an order denying the petition. This appeal followed.

Roberts contends that the district court erred by denying his 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 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 (1987)). 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). A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). The district court's factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, Roberts claims that he was not afforded effective assistance of counsel prior to trial due to an irreconcilable conflict arising from his lack of meaningful communication with defense counsel. However, the district court found that (1) "counsel's attitude toward [Roberts] did not interfere with his professional obligation to defend him against the charge of burglary;" (2) there was "no convincing evidence that the relationship between [Roberts] and [defense counsel] had completely broken down at or after the Petrocelli hearing and there was no showing of any collapse during the trial;" and (3) it had entertained Roberts' complaint about defense counsel prior to the Petrocelli hearing and found that "although they did not seem to like each other, [defense counsel] was

prepared to represent and defend [Roberts],” “the relationship had not collapsed to the point where a replacement counsel was required,” and Roberts had not taken “the position that he would not cooperate with his lawyer.” Roberts has not demonstrated that the district court’s findings are not supported by substantial evidence or are clearly wrong. Nor has he shown that the district court erred as a matter of law. Therefore, he has not demonstrated that the district court erred in dismissing this claim.

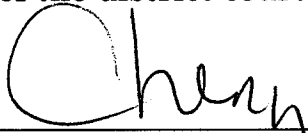
Second, Roberts claims that defense counsel failed to investigate and present mitigating evidence at sentencing. Roberts asserts that “[a]n investigation would have located Reverend Luther Dupree, who is a colonel and pastor, and would have been able to testify that [he] was a gentle human being of good character.” And Roberts argues that had counsel provided mitigating evidence on his behalf, his sentence “may have been significantly different.” However, the district court found that (1) “Reverend Dupree could not offer any persuasive character testimony since he was unaware of [Roberts] except knowing him in passing from the latter’s church attendance,” (2) defense counsel helped prevent Roberts from being adjudicated a habitual criminal, (3) its sentencing decision was based on Roberts’ criminal history, (4) Reverend Dupree’s testimony would not have affected the sentencing decision, and (5) “there was no showing that a different result would have resulted from calling any witness.” Roberts has not demonstrated that the district court’s findings are not supported by substantial evidence or are clearly wrong. Nor has he shown that the district court erred as a matter of law. Therefore, he has not demonstrated that the district court erred in dismissing this claim.


Third, Roberts claims that defense counsel failed to act upon the notes Roberts wrote during the trial regarding the trial and materials claimed to have been stolen during the burglary. However, Roberts did not present this claim below and the district court did not consider its merit; therefore, we will not consider it on appeal. See McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998). To the extent that Roberts further claims that defense counsel failed to subpoena any defense witnesses for the trial, we note that the district court determined that this claim was non-specific and ordered it dismissed. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Roberts has not demonstrated that the district court erred in dismissing this claim.


Additionally, Roberts claims that (1) he was convicted and sentenced in violation of the Double Jeopardy Clause because he was tried twice for the same offense, and (2) "the charging document did not specifically put [him] on notice of the acts which he allegedly committed." However, these claims 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. Roberts did not allege good cause for failing to raise these claims on direct appeal, nor did he demonstrate that he would be prejudiced by the district court's failure to consider the claims on their merits. Accordingly, we conclude that the district court did not err in dismissing these claims.

Having considered Roberts' claims and concluded that he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.¹


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
O'Mara Law Firm, P.C.
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹We have reviewed all of the documents that Roberts has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based on those submissions is warranted.