

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN PITTS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51589

**FILED**

**DEC 09 2009**

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court granting in part and denying in part a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

On February 13, 2007, the district court convicted appellant, pursuant to a jury verdict, of driving and/or being in actual physical control while under the influence of intoxicating liquor causing death and/or substantial bodily harm. The district court sentenced appellant to serve a term of 36 to 144 months in the Nevada State Prison. No direct appeal was taken.

On December 31, 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. The district court granted in part and denied in part appellant's petition. In particular, the district court granted relief on appellant's appeal deprivation claim and appointed counsel to pursue appellant's remedy pursuant to Lozada v. State, 110

Nev. 349, 871 P.2d 944 (1994), but denied appellant's remaining claims. This appeal followed.<sup>1</sup>

The district court denied nine of the claims of ineffective assistance of trial counsel that appellant raised in his petition. 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 in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697.

#### Competency

First, appellant claimed that his trial counsel was ineffective for failing to investigate his competency to stand trial. Appellant claimed that he was an alcoholic, was a military veteran, and suffered from post-traumatic stress. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. This court has held that the test for determining competency is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." Melchor-Gloria

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<sup>1</sup>The State did not appeal the district court's determination that appellant was deprived of his right to a direct appeal.

v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (alteration in original) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)). Appellant failed to demonstrate that his alleged alcoholism or post-traumatic stress precluded him from aiding his counsel or understanding the charges against him. Further, appellant did not cite to anything in the record that indicated appellant was incompetent to stand trial. Accordingly, appellant failed to demonstrate a reasonable probability of a different outcome of the proceedings had his counsel argued he was incompetent. Therefore, the district court did not err in denying this claim.

### Mental State

Second, appellant claimed that his trial counsel failed to investigate whether his mental state would have allowed him to be convicted of a lesser included offense or was relevant for mitigation of his sentence. Appellant claimed his post-traumatic stress and alcoholism affected his mental state. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. One's mental state is not an element of driving and/or being in actual physical control while under the influence of intoxicating liquor causing death and/or substantial bodily harm. NRS 484.3795. Further, given the facts of the crime and the injuries sustained by the victim, appellant failed to demonstrate a reasonable probability of a different outcome at trial or the sentencing hearing had mitigation evidence of this type been presented. Therefore, the district court did not err in denying this claim.

### Expert Witness

Third, appellant claimed that his trial counsel was ineffective for failing to interview witnesses in a timely manner. Appellant claimed that he was forced to waive his right to a speedy trial because his trial

counsel needed a continuance to allow time to interview an expert witness. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At a pretrial hearing, appellant personally informed the district court that he waived his right to a speedy trial and made no indications that he was being forced to waive his speedy trial rights against his wishes. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to provide timely notice of an expert witness. Appellant claimed that, because the State was not provided with timely notice of the expert witness, the district court limited the testimony of the expert and appellant was not able to adequately present his defense. Appellant failed to demonstrate that he was prejudiced. There is no support in the record for appellant's statement. Further, at trial, the defense accident reconstructionist testified extensively concerning his conclusions regarding the accident. Appellant failed to identify what other type of testimony the reconstructionist could have provided. Further, as there was substantial evidence of appellant's guilt given his blood alcohol level, admission that he had been drinking, and witness testimony that appellant was driving recklessly, appellant failed to demonstrate a reasonable probability that the outcome of trial would have been different had the reconstructionist testified further. Therefore, the district court did not err in denying this claim.

#### Evidence of Accident Scene

Fifth, appellant claimed that his trial counsel was ineffective for failing to object to the intentional destruction of exculpatory evidence. Appellant claimed that, after the accident, the police moved the vehicles

and the fire department hosed down the accident site. Appellant claimed that this caused the destruction of exculpatory evidence and did not allow for an accurate review of the accident scene. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The police testified that the accident scene was recorded through pictures, measurements, and diagrams. Appellant failed to demonstrate that the loss or destruction of evidence caused him to suffer undue prejudice or that the exculpatory value of the evidence was apparent before it was lost or destroyed. Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001). Appellant failed to demonstrate a reasonable probability of a different outcome at trial had his counsel argued that the State intentionally destroyed exculpatory evidence. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to discover and review video made by the police of the accident scene. Appellant asserted that there should be video because police cars contain dashboard cameras which videotaped the accident scene. Appellant failed to demonstrate he was prejudiced. As discussed previously, the police took pictures, measurements, and made diagrams of the accident scene. Further, given the substantial evidence of appellant's guilt also discussed previously, he failed to demonstrate a reasonable probability that the outcome of trial would have been different had his trial counsel sought the dashboard camera video from the police vehicles at the accident scene. Therefore, the district court did not err in denying this claim.

### Medical Reports

Seventh, appellant claimed that his trial counsel was ineffective for failing to review the victim's medical reports and medical history to determine if the victim's injuries were caused by a preexisting condition. Appellant failed to demonstrate that he was prejudiced. At trial, the victim testified that he had had knee problems before the accident, but that the severe injuries leading to numerous surgeries were a result of the accident. Further, every eyewitness, including appellant, testified that the victim had sustained severe damage to his legs as a result of the traffic accident. Accordingly, appellant failed to demonstrate a reasonable probability of a different outcome of the trial had his trial counsel performed an investigation into preexisting conditions that the victim may have had. Therefore, the district court did not err in denying this claim.

### Jury Members

Eighth, appellant claimed that his trial counsel was ineffective for failing to object to a jury of only 11 members. During trial, a juror came down with an illness that prevented that juror from continuing on the jury. Appellant claimed that the district court did not appoint an alternate juror to the jury and allowed trial to continue with only 11 jurors. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Thirteen jurors were seated at the beginning of trial and, when one was not able to attend the second day, the district court stated "now nobody can get sick. You're it. You're the 12." As there were 12 jurors ready for the second day of trial, it was not necessary for the district court to halt the trial. Therefore, the district court did not err in denying this claim.

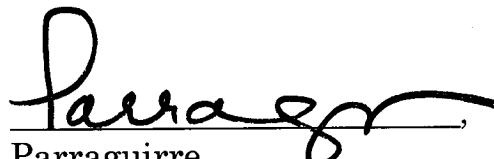
Deprivation of Counsel

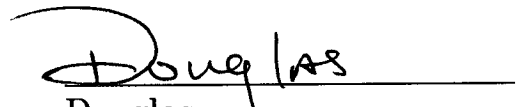
Ninth, appellant claimed that the representation he received was so inadequate that he was totally deprived of counsel. As appellant failed to demonstrate that his trial counsel's performance was deficient and/or that he was prejudiced by any of the claims discussed earlier, appellant failed to demonstrate that he was totally deprived of counsel. Therefore, the district court did not err in denying this claim.

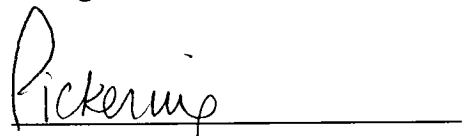
Conclusion

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.

 J.  
Parraguirre

 J.  
Douglas

 J.  
Pickering

cc: Eighth Judicial District Court Dept. 7, District Judge  
Kevin Pitts  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk