

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN KINSTON COZY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50818

JOHN KINSTON COZY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51962

FILED

MAR 10 2009

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

ORDER OF AFFIRMANCE

Docket No. 50818 is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Docket No. 51962 is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. We elect to consolidate these appeals for disposition. See NRAP 3(b).

On October 18, 2004, the district court convicted appellant, pursuant to a jury verdict, of one count of each of conspiracy to commit larceny (Count I), possession of a debit/credit card without the cardholder's consent (Count II), and grand larceny (Count III). The district court adjudicated appellant a habitual criminal and sentenced him

to serve two concurrent prison terms of life with parole eligibility after 10 years for Counts II and III. The district court further sentenced appellant to a concurrent term of 12 months in the Clark County Detention Center for Count I. This court affirmed the judgment of conviction on appeal. Cozy v. State, Docket No. 44226 (Order of Affirmance, June 8, 2007). The remittitur issued on July 5, 2007.

Docket No. 50818

On September 19, 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 December 9, 2007, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of trial 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 in that it fell below an objective standard of reasonableness, and prejudice such that but for counsel's errors there would be a reasonable probability of a different outcome of the proceedings. Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). 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.

First, appellant claimed that his trial counsel was ineffective for failing to object to the admission of the Luxor casino surveillance

videotape. Appellant claimed that the videotape was of such low quality that it should not have been admitted. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. "District courts are vested with considerable discretion in determining the relevance and admissibility of evidence." Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006) (citing Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004)). We conclude that appellant failed to demonstrate that the district court abused its discretion in admitting the tape and that an objection would have been sustained. Nothing in the record supports appellant's contention that the videotape was of poor quality. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to object to jury instruction no. 6, which discussed coconspirator liability. Appellant claimed that this instruction allowed the jury to convict without proof of the necessary state of mind. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate a reasonable probability of a different outcome had his trial counsel objected to the challenged instruction given the overwhelming evidence of appellant's guilt, including the testimony of the victim and the police officers. Notably, appellant was found with the victim's credit card and her driver's license shortly after the theft and his statement to the police that he was holding these items for a friend was directly contradicted by the victim. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to object to jury instruction no. 14.¹ Appellant claimed this instruction improperly minimized the State's burden of proof and allowed for conviction due to "guilt by association." Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. The challenged instruction informs the jury that it need only be concerned with the guilt or innocence of the defendant, and not the culpability of any other individuals. Appellant failed to demonstrate how instructing the jury to focus on the guilt or innocence of appellant alone lessened the State's burden of proof. In addition, the jury was properly instructed on the reasonable doubt standard as required by NRS 175.191. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to adequately prepare a defense for the lesser offense of possession of stolen property. Appellant claimed that he should have only been convicted of the lesser offense of possession of stolen property. Appellant appeared to argue that possession of stolen property was a lesser included offense to the crime of possession of credit card without the cardholder's consent. Appellant failed to demonstrate that his trial

¹Jury instruction no. 14 read: "You are here to determine the guilt or innocence of the Defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty."

counsel was deficient or that he was prejudiced. Appellant's trial counsel requested that the jury be instructed on possession of stolen property, and the request was denied by the district court. Appellant failed to demonstrate that further preparation would have had a reasonable probability of altering the outcome at trial. There was overwhelming evidence of appellant's guilt of possession of a credit card without the cardholder's consent, given the testimony of the victim and the police officers, and the fact that appellant was found with the victim's credit card and her driver's license shortly after the theft. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to object to his adjudication as a habitual criminal. Appellant claimed that he was improperly adjudicated as a habitual criminal because he was not notified of the State's intent to seek it in the charging document, the issue of habitual criminality was not presented to a jury, or proven beyond a reasonable doubt. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. The State filed an amended information which noted its intent to seek habitual criminal adjudication. We have held that a defendant is not entitled to a jury determination of criminal habituality. See O'Neill v. State, 123 Nev. 9, 153 P.3d 38 (2007); see also Howard v. State, 83 Nev. 53, 422 P.2d 548 (1967) (holding that the Nevada Constitution does not require that status as a habitual criminal be determined by a jury.). The State filed three judgments of convictions in the district court; therefore, appellant failed to demonstrate that there were insufficient convictions to adjudicate him a

habitual criminal. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that he received ineffective assistance of appellate counsel. 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. 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 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Appellant claimed that his appellate counsel was ineffective for failing to raise all the claims discussed above on direct appeal. For the reasons discussed previously, we conclude that appellant failed demonstrate that he was prejudiced by his appellate counsel's failure to raise them on direct appeal. Therefore, we conclude that the district court did not err in denying these claims.

In addition, appellant claimed that his appellate counsel was ineffective for failing to submit a complete and adequate record for appellate review in his direct appeal. Appellant claimed that his appellate counsel failed to submit a complete transcript of the sentencing hearing, a complete copy of the jury instructions, and a copy of the casino surveillance videotape. Appellant failed to demonstrate that he was

prejudiced. As his direct appeal did not raise any challenges to his sentencing, the jury instructions, or the surveillance videotape, appellant failed to demonstrate how the failure to include these additional items would have had a reasonable probability of altering the outcome of his direct appeal. Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred in denying an instruction for the lesser included offense of possession of stolen property. Appellant failed to demonstrate that he was prejudiced. Even assuming the district court erred in denying his request for a lesser included offense jury instruction, appellant failed to demonstrate that there was a reasonable probability of a different outcome on appeal because the error was harmless. As discussed above, the jury found that appellant committed all of the elements for the crime of possession of a credit card without the cardholder's consent and there was overwhelming evidence of his guilt of that crime. Therefore, the district court did not err in denying this claim.

For the reasons discussed previously we affirm the order of the district court denying the petition.

Docket No. 51962

On February 28, 2008, 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 June 10, 2008, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of trial counsel and appellate counsel for failing to challenge to the following: the aiding and abetting jury instructions, the lack of a "mere presence" jury instruction, and the lack of a jury instruction that stated that an accomplice can be convicted of a "lesser related crime" if the accomplice did not have the specific intent to commit the greater crime.

Appellant's petition was successive because he had previously filed a post-conviction petition and his prior petition was decided on the merits. See NRS 34.810(1)(b); NRS 34.810(2). Further, appellant's petition constituted an abuse of the writ as he raised new and different claims from those raised in his previous post-conviction petition. See NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.810(3).

This court has recognized that even if a petitioner has procedurally defaulted claims and cannot demonstrate good cause and prejudice, judicial review of the petitioner's claims would nevertheless be required if the petitioner demonstrated that failure to consider them would result in a "fundamental miscarriage of justice." Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). A "fundamental miscarriage of justice" typically involves a claim that a constitutional error has resulted in the conviction of someone who is actually innocent. See Coleman v. Thompson, 501 U.S. 722, 748-50 (1991); Murray v. Carrier, 477 U.S. 478, 495-96 (1986).

Appellant did not attempt to excuse his procedural defects, but rather appellant claimed he was actually innocent and only recently learned of this claim. Appellant claimed that he was actually innocent because he did not have the specific intent needed to commit the crimes.

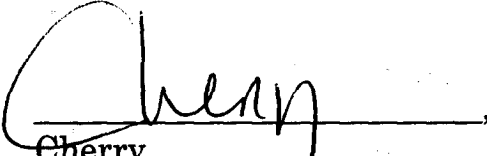
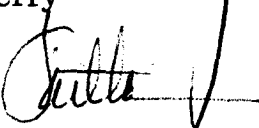

Based upon our review of the record on appeal, we conclude that the district court did not err in dismissing appellant's petition as procedurally barred. Appellant failed to demonstrate that an impediment external to the defense excused the procedural defects. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

Appellant failed to demonstrate that he was actually innocent in the instant case. Appellant's claim that he did not have the specific intent to commit the crimes he was convicted of is not sufficient to demonstrate that he is actually innocent. Appellant challenged the sufficiency of the evidence to sustain his convictions in his direct appeal, and this court rejected that challenge. The doctrine of law of the case prevents further litigation of this issue and cannot be avoided by a more detailed and precisely focused argument. See Hall v State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Thus, he failed to demonstrate that failure to consider his petition on the merits would result in a fundamental miscarriage of justice. See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan, 112 Nev. at 842, 921 P.2d at 922; see also Bousley v. United States, 523 U.S. 614, 623 (1998); Murray, 477 U.S. at 495-96. Therefore, we conclude that the district court did not err in determining that appellant's petition was procedurally barred.

Conclusion

Having reviewed the records 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 judgments of the district court AFFIRMED.²

 _____ J.
Cherry
 _____ J.
Saitta
 _____ J.
Gibbons

cc: Hon. Jackie Glass, District Judge
John Kinston Cozy
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

²We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in these matters, 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.