IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL L. DIX,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34691

FILED

JUL 31 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF 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.

On December 7, 1994, the district court convicted appellant, pursuant to a jury verdict, of burglary (Count I), battery with use of a deadly weapon (Count II), robbery (Count III), and possession of a stolen vehicle (Count IV). The district court sentenced appellant to serve terms totaling twenty-nine years in the Nevada State Prison. This court dismissed appellant's appeal from his judgment of conviction and sentence.[1] The remittitur issued on October 6, 1998.

On April 9, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a supplement to 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 July 26, 1999, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that his trial counsel rendered ineffective assistance for several reasons.

[1]Dix v. State, Docket No. 26623 (Order Dismissing Appeal, September 14, 1998).

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This court has held that "a trial attorney is presumed to have provided effective assistance unless petitioner demonstrates 'strong and convincing proof to the contrary.'"[2] 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 errors were so severe that they rendered the jury's verdict unreliable.[3] The court need not consider both prongs of the Strickland test if the defendant fails to make a showing on either prong.[4]

First, appellant argued that his trial counsel was ineffective for failing to object to the prosecution's use of the court bailiff as a witness against appellant. Appellant failed to demonstrate that his trial counsel acted unreasonably or that he was prejudiced by trial counsel's performance. Immediately before trial, appellant made an incriminating statement to the court bailiff that appellant was shot by the victim. Thus, we conclude that appellant failed to demonstrate that his trial counsel's performance was deficient in this regard.[5]

Second, appellant argued that his trial counsel was ineffective for failing to properly investigate and prepare a defense. Appellant has not supported these claims with specific factual allegations, which if true, would entitle him

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[2]Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991) (quoting Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981)).

[3]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[4]Strickland, 466 U.S. at 697.

[5]Id. at 668.

to the relief requested.[6] Thus, we conclude that appellant failed to demonstrate that his trial counsel's performance was deficient in this regard.[7]

Next, appellant claimed his appellate counsel rendered ineffective assistance. This court has held that "[t]he constitutional right to effective assistance of counsel extends to a direct appeal."[8] Further, "[a] claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."[9] Appellate counsel is not required to raise every non-frivolous issue on appeal.[10] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[11] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[12] With these principles in mind, we address appellant's contention.

Appellant claimed his appellate counsel rendered ineffective assistance by failing to raise the argument on direct appeal that the victim's pretrial identification of

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[6]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[7]See id.

[8]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

[9]See id.

[10]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[11]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

[12]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

appellant was unduly suggestive.[13] The victim identified appellant to police officers immediately after the attack while both appellant and the victim were being treated in the same hospital room. Moreover, the victim had opportunity to observe the appellant during the incident, and the identity of appellant was corroborated by testimony regarding the car appellant was driving and fingerprints found therein.[14] Given the evidence of appellant's guilt, appellant failed to demonstrate that his appellate counsel acted unreasonably or that he was prejudiced by appellate counsel's performance.[15]

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.[16] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Young, J.

Leavitt, J.

Becker, J.

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[13]Appellant also raises this issue as a constitutional violation independent of his ineffective assistance of appellate counsel claim. To the extent that this issue could have been raised on direct appeal, it is waived. Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). We nevertheless address appellant's claim in connection with his contention that appellate counsel should have raised it on direct appeal.

[14]See generally Bias v. State, 105 Nev. 869, 784 P.2d 963 (1989) (holding that even if identification is unduly suggestive, it can be reliable based on the totality of circumstances).

[15]Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

[16]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

cc: Hon. Donald M. Mosley, District Judge
Attorney General
Clark County District Attorney
Paul L. Dix
Clark County Clerk