

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID LEE MIMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 34700

FILED

JUN 27 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus.

On July 25, 1996, the district court convicted appellant, pursuant to a jury verdict, of one count of sexual assault with the use of a deadly weapon, two counts of first degree kidnapping with the use of a deadly weapon, and one count of robbery with the use of a deadly weapon. The district court sentenced appellant to serve six consecutive terms of life in prison with the possibility of parole and two consecutive terms of ten years in prison. This court dismissed appellant's direct appeal from the judgment of conviction.¹ The remittitur issued on October 13, 1998.

On March 29, 1999, 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 July 23, 1999, the district court denied the petition. This appeal followed.

¹Mims v. State, Docket No. 29141 (Order Dismissing Appeal, September 24, 1998).

In his petition, appellant alleged eleven instances of ineffective assistance of trial counsel. Based on our review of the record, we conclude that the district court did not err in rejecting appellant's claims of ineffective assistance of trial counsel. Each claim is addressed below.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must meet the two-part test set forth in Strickland v. Washington.² A petitioner must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's errors were so severe that they rendered the jury's verdict unreliable.³ The court, however, need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁴ Moreover, we have held that a petitioner is not entitled to an evidentiary hearing on claims that are belied or repelled by the record or are not sufficiently supported by specific factual allegations that would, if true, entitle the petitioner to relief.⁵

First, appellant alleged that trial counsel were ineffective for failing to move to dismiss the charges on the basis of an erroneous remand for a preliminary hearing after the plea negotiations failed. Appellant claims the remand was improper because prior counsel withdrew from the case and then appeared at the arraignment in district court and requested a remand for a preliminary hearing. Appellant's claim is belied by the record, which indicates that prior counsel had not

²466 U.S. 668 (1984); accord Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

³Strickland, 466 U.S. at 687.

⁴Id. at 697.

⁵Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

withdrawn at the time he made the oral motion for a remand. Moreover, appellant was present at the time and did not object to the remand. We therefore conclude that trial counsel were not deficient for failing to raise this issue.

Second, appellant alleged that trial counsel were ineffective for failing to move to dismiss the information on the ground that it erroneously charged appellant with a felony for violating NRS 193.165, which is an enhancement statute, not an offense. We conclude that the information properly charged appellant with the primary offenses and referred to the enhancement statute to put appellant on notice that the State would be seeking an enhancement; it did not charge appellant with a separate offense for using a deadly weapon. Moreover, because the deadly weapon issue generally must be decided by the trier of fact and is not, as appellant alleged, a matter to be addressed only at sentencing,⁶ it was appropriate for the State to allege the enhancement in the charging document. We therefore conclude that trial counsel were not deficient for failing to challenge the information on this ground.

Third, appellant alleged that trial counsel were ineffective for failing to investigate alleged jury tampering. In particular, appellant suggests that the jury foreman was part of a conspiracy to convict appellant because the guilty verdicts were filed two months prior to the trial. This claim is belied by the record, which indicates that the guilty verdicts were signed by the foreman and filed after the jury deliberated at the conclusion of the trial. We therefore

⁶See Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that any fact that increases penalty for an offense beyond the prescribed statutory maximum, other than fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt).

conclude that trial counsel were not deficient for failing to investigate appellant's claim of jury tampering.

Fourth, appellant alleged that trial counsel were ineffective for failing to act on his belief that the police had fabricated the charges against him and coerced the sexual assault complainant to fabricate that charge. The facts alleged by appellant do not support any such charges of fabrication or coercion. Accordingly, we conclude that appellant failed to support this claim with sufficient factual allegations demonstrating that counsels' performance fell below an objective standard of reasonableness or that counsels' errors were so severe that they rendered the jury's verdict unreliable.

Fifth, appellant alleged that trial counsel Jack Alian was ineffective because he had a conflict of interest and violated his duty of loyalty to appellant by asking the court to appoint Dennis Cameron as co-counsel. Appellant's claim was primarily based on disagreements with trial counsel and his belief that Mr. Cameron was hostile toward him. We conclude that appellant was not entitled to relief on this claim. The United States Supreme Court has held that the Sixth Amendment guarantee of counsel does not require a "meaningful relationship" between the defendant and his counsel.⁷ We therefore conclude that the district court did not err in rejecting this claim of ineffective assistance.⁸

Sixth, appellant alleged that trial counsel were ineffective for failing to object to the admission of two knives because there was no evidence that they were the exact

⁷Morris v. Slappy, 461 U.S. 1, 14 (1983).

⁸Appellant also raised this claim as an independent claim of trial court error. We conclude that appellant waived any claim that the trial court erred by failing to raise the issue on direct appeal. See NRS 34.810(1)(b).

knives used by appellant. The victims testified that the knives appeared to be similar to the ones used by appellant, which appellant got from a set of knives in the victims' apartment. Appellant's claim goes to the weight of the evidence, not its admissibility.⁹ Accordingly, we conclude that trial counsel were not deficient for failing to object to the admission of the knives.

Seventh, appellant alleged that trial counsel were ineffective for failing to object to the admission of DNA evidence based on allegedly inconsistent testimony by the sexual assault victim and a police officer. Our review of appellant's allegations indicates that the relevant testimony is not necessarily inconsistent. Moreover, the allegedly inconsistent testimony was brought to the jury's attention during the trial. Finally, we conclude that any inconsistencies go to the weight of the evidence, not its admissibility. Accordingly, we conclude that trial counsel were not deficient for failing to object to the admissibility of the DNA evidence.

Eighth, appellant alleged that trial counsel were ineffective for failing to cross-examine the victims about alleged inconsistencies between their testimony. Our review of appellant's allegation indicates that the alleged inconsistencies would not have affected the jury's verdict. Accordingly, we conclude that appellant cannot demonstrate prejudice as a result of trial counsels' failure to cross-examine the victims about inconsistencies between their testimony.

⁹See Harrison v. State, 96 Nev. 347, 350-51, 608 P.2d 1107, 1109-10 (1980) (explaining that the State need not produce deadly weapon at trial and that victim's testimony describing deadly weapon was sufficient to support conviction for robbery with the use of a deadly weapon).

Ninth, appellant alleged that trial counsel were ineffective for failing to move to dismiss the charges based on alleged constitutional errors with respect to the determination of probable cause to arrest appellant. Based on our review of the record, we conclude that, even assuming that appellant's factual allegations are true, appellant is not entitled to relief because trial counsel were not deficient for failing to raise this issue.

Tenth, appellant alleged that trial counsel were ineffective for failing to move to dismiss the charges based on an illegal arrest. Based on our review of the record, we conclude that trial counsel were not deficient for failing to raise this issue.

Eleventh, appellant alleged that trial counsel were ineffective for failing to challenge the deadly weapon enhancement on count III because the verdict form did not indicate that the jury found that appellant had used a deadly weapon as to that count. Appellant's claim is belied by the record. Accordingly, we conclude that trial counsel were not deficient for failing to challenge the weapon enhancement for count III.

In his petition, appellant also alleged four instances of ineffective assistance of appellate counsel. Based on our review of the record, we conclude that the district court did not err in rejecting appellant's claims of ineffective assistance of appellate counsel. Each claim is addressed below.

A claim of ineffective assistance of appellate counsel is reviewed under the two-part test set forth in Strickland.¹⁰ We have explained that "[a]n attorney's decision

¹⁰Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

not to raise meritless issues on appeal is not ineffective assistance of counsel."¹¹ Moreover, to succeed on a claim of ineffective assistance of appellate counsel, a petitioner must "show that the omitted issue would have a reasonable probability of success on appeal."¹²

First, appellant alleged that appellate counsel was ineffective for failing to challenge the district court's admission of a police officer's testimony on the ground that the testimony was false and included inadmissible hearsay. Based on our review of the record, we conclude that appellate counsel was not ineffective for failing to raise these claims because neither claim would have a reasonable probability of success on appeal.¹³

Second, appellant alleged that appellate counsel was ineffective for failing to argue that appellant's right to be present during all critical stages of the criminal proceeding was violated because he was not present when the district court received the competency evaluations and determined that appellant was competent to stand trial. This claim is belied by the record. The district court minutes for the April 10, 1996 hearing indicate that appellant was present with counsel. Moreover, even assuming that appellant was not present at the hearing, he has not shown that he was prejudiced by the absence.¹⁴ Accordingly, we conclude that appellate counsel was not ineffective for failing to raise this claim because it would not have a reasonable probability of success on appeal.

¹¹Id. at 998, 923 P.2d at 1114.

¹²Id.

¹³We note that appellate counsel did challenge the admissibility of the testimony on other grounds. This court rejected that claim on direct appeal.

¹⁴See Kirksey, 112 Nev. at 1000, 923 P.2d at 1115.

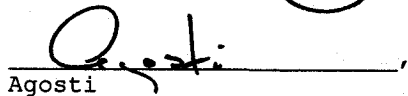
Third, appellant alleged that appellate counsel was ineffective for failing to challenge the deadly weapon enhancement for count III because the verdict form did not include the enhancement. This claim is belied by the record. Accordingly, we conclude that appellate counsel was not ineffective for failing to raise this issue.

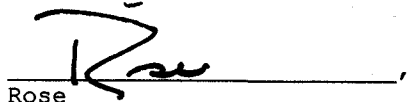
Fourth, appellant alleged that appellate counsel was ineffective for failing to argue that the trial court erred by accepting a plea of not guilty by reason of insanity because the legislature had eliminated that plea. We disagree. The legislative amendment that removed the plea of not guilty by reason of insanity does not apply where, as here, the offense was committed before October 1, 1995.¹⁵ We therefore conclude that appellate counsel was not ineffective for failing to raise this issue.

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.¹⁷


Shearing J.


Agosti J.


Rose J.

¹⁵1995 Nev. Stat., ch. 637, § 61, at 2485.

¹⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁷We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Janet J. Berry, District Judge
Attorney General
Washoe County District Attorney
David Lee Mims
Washoe County Clerk