

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ANTONETTI A/K/A JOSEPH
GOZDZIEWICZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52074

FILED

JUN 18 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 denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On March 6, 2007, the district court convicted appellant, pursuant to a jury verdict, of one count of attempted escape and one count of possession by a prisoner of tools to escape.¹ The district court sentenced appellant to serve a term of 24 to 120 months in the Nevada State Prison for the escape count and a concurrent term of 24 to 60 months for the tools count. The district court entered an amended judgment of conviction and corrected the term for the escape count from a term of 24 to 120 months to a term of 12 to 60 months. This court affirmed the judgment of conviction

¹We note that appellant represented himself at trial.

on appeal. Gozdiewicz v. State, Docket No. 49073 (Order of Affirmance, March 6, 2008). The remittitur issued on April 1, 2008.

On April 11, 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 July 17, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of appellate counsel.² 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).

²To the extent that appellant raised his claim independently from his claim of ineffective assistance of counsel, the claim was waived as it should have been raised on direct appeal, and appellant failed to demonstrate good cause and prejudice for his failure to do so. NRS 34.810(1)(b).

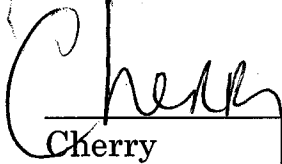
Appellant claimed that his appellate counsel was ineffective for failing to argue that the prosecutor committed misconduct when the prosecutor failed to turn over evidence. Appellant asserted that he had filed pretrial motions requesting material evidence in support of his defense strategy, including files from the Inspector General's Office, files from gang intelligence, files from the police, and Clark County investigators. Appellant claimed that these sources would reveal information about a prison gang that appellant alleged posed a threat to his life. Appellant finally asserted that he had a "good reason to suggest a great deal of evidence exist[ed] that was not turned over."


Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Brady v. Maryland, 373 U.S. 83 (1963) requires a prosecutor to disclose material evidence favorable to the defense. See Evans v. State, 117 Nev. 609, 626, 28 P.3d 498, 510 (2001). Appellant's claim of misconduct was based on a bare and naked allegation that the prosecutor withheld evidence, and notably, appellant failed to demonstrate that any evidence was withheld from the defense in the instant case. Throughout the pretrial proceedings appellant argued that the prosecutor had not disclosed all of the evidence, and the prosecutor stated that the evidence in their files had been turned over to appellant and his former trial counsel. A number of continuances were granted to provide appellant access to the prosecutor's files. Appellant presented his defense theory regarding the alleged gang threats to the jury. Appellant failed to demonstrate that this issue of prosecutorial misconduct would have had a reasonable probability of

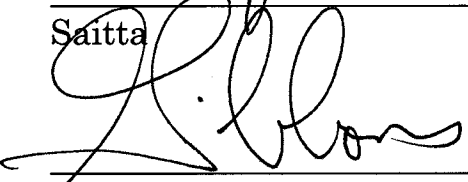
success on direct appeal. Therefore, we conclude that the district court did not err in denying this claim.

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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Eighth Judicial District Court Dept. 8, District Judge
Joseph Antonetti
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk