

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD ROBIN BARREN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52076

FILED

SEP 03 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
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; Valerie Adair, Judge.

On November 18, 2005, the district court convicted appellant, pursuant to a jury verdict, of possession of a firearm by an ex-felon. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after 10 years. This court affirmed appellant's judgment of conviction and sentence on appeal. Barren v State, Docket No. 46247 (Order of Affirmance, September 25, 2007). The remittitur issued on December 12, 2007.

On April 3, 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 August 28, 2008, the district court denied appellant's petition. This court affirmed the order of the district court on appeal. Barren v. State, Docket No. 52076 (Order of Affirmance, June 25, 2009). On August 7, 2009, this court granted appellant's petition

for rehearing and reinstated the appeal. Barren v. State, Docket No. 52076 (Order Granting Petition for Rehearing and Reinstating Appeal, August 7, 2009).

In his petition, appellant raised 10 claims of ineffective assistance of appellate counsel.¹ 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. See 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).

Exculpatory Evidence

First, appellant claimed that his appellate counsel was ineffective for failing to argue that the State withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). Appellant claimed that the State failed to disclose evidence concerning firearm serial numbers. Appellant claimed that the gun's owner initially told police the incorrect serial number for the handgun shortly after discovering the weapon was stolen. Appellant claimed that he should have been given the police report indicating the incorrectly reported serial number. Appellant failed to demonstrate that he was prejudiced. Brady and its progeny require a prosecutor to disclose favorable exculpatory and impeachment

¹We note that appellant represented himself at trial.

evidence that is material to the defense. See Strickler v. Greene, 527 U.S. 263, 280 (1999); see also Bennett v. State, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). A claim that the State committed a Brady violation must show that (1) the evidence at issue is favorable to the accused; (2) the State failed to disclose the evidence, either intentionally or inadvertently; and (3) prejudice ensued, *i.e.*, the evidence was material. Strickler, 527 U.S. at 281-82. “If a defendant makes no request or only a general request for information, the evidence is material when a reasonable probability exists that the result would have been different had it been disclosed.” Bennett v. State, 119 Nev. at 600, 81 P.3d at 8 (citing Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000)). “However, if the defense request is specific, the evidence is material upon the lesser showing that a reasonable possibility exists of a different result had there been disclosure.” Id.

As appellant was not charged with the theft of the weapon, only possession of it, he failed to demonstrate how the gun owner’s initial report to police about the theft would have had a reasonable probability of altering the outcome of his trial. A review of the record reveals that there was substantial evidence of appellant’s guilt given that a firearm was found along the path of appellant’s flight from police and bullets of the same caliber as the firearm were found in appellant’s jacket. Thus, appellant failed to demonstrate that this claim regarding the withholding of exculpatory evidence would have had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Petrocelli Hearing

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred by not holding a Petrocelli hearing concerning uncharged prior bad acts that were admitted

during the trial. Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985). During trial, Fred Burns testified that the weapon that appellant was found with had been stolen from him. Also, there was testimony from police officers concerning the stop of a vehicle that was reported stolen. The vehicle contained friends of appellant, bullets of the same caliber of the weapon appellant possessed and appellant had been seen in the vehicle at some time prior to the stop. Appellant claimed that there should have been a hearing to weigh the probative value of these bad acts before they were admitted. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant's reliance on Petrocelli is misplaced because the State did not allege that appellant committed the acts and only discussed them to inform the jury about the nature of the investigation. Id. Thus, a Petrocelli hearing concerning these acts was not warranted and appellant failed to demonstrate that a claim concerning a Petrocelli hearing had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Prior Convictions

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that it was prejudicial for the State to introduce four prior convictions at trial because he admitted he was an ex-felon. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellate counsel raised the underlying claim on direct appeal and this court considered and rejected that claim. Because this court has rejected the merits of the underlying claim, appellant cannot demonstrate that his appellate counsel was deficient or that he was prejudiced. Therefore, the district court did not err in denying this claim.

Habitual Criminal

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court erred in allowing the filing of the notice of intent to seek treatment as a habitual criminal after the jury's verdict. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant's appellate counsel raised this issue in the briefs, but withdrew it during oral argument. Notice of intent to seek treatment as a habitual criminal may be filed following the "completion of the trial on the substantive offense. Such an amendment is discretionary providing it can be done without prejudice to the substantial rights of the defendant." Hollander v. State, 82 Nev. 345, 353, 418 P.2d 802, 806 (1966). As appellant had four previous felony convictions, he failed to demonstrate that he was not eligible for treatment as a habitual criminal. See NRS 207.010.

Appellant further failed to demonstrate that his substantial rights were prejudiced by the filing of the notice after the jury's verdict. Prior to sentencing, appellant claimed that he was not aware that the State could seek treatment as a habitual criminal and, if he had known of that possibility, he would not have chosen to represent himself. Because the canvass for self-representation did not cover possible sentencing as a habitual criminal, the district court conducted a hearing to question counsel who represented appellant prior to the canvass about what appellant was informed of concerning possible treatment as a habitual criminal. At the hearing, appellant's former trial counsel testified that he had explained to appellant that appellant could be sentenced as a habitual criminal, that he faced a possible term of life in prison, and that preliminary negotiations with the State had been conducted concerning treatment as a habitual criminal. The district court concluded that

appellant was informed of the possible sentences he faced as a habitual criminal and, therefore, he made a knowing and intelligent waiver of his right to counsel. As such, appellant failed to demonstrate that his substantial rights were violated by the filing of the notice of intent seek treatment as a habitual criminal after the jury's verdict was returned. See Hymon v. State, 121 Nev. 200, 214-15, 111 P.3d 1092, 1102-03 (2005) (stating a waiver of counsel was knowing, voluntary, and intelligent, even though the canvass failed to specifically inform the defendant about the potential sentencing as a habitual criminal, because the record indicated that the defendant was aware of the consequences faced by being sentenced as a habitual criminal). Thus, appellant failed to demonstrate a reasonable probability that the outcome of his direct appeal would have been different had his appellate counsel not withdrawn this issue during oral argument. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court was without jurisdiction to allow an amended information to be filed charging him as a habitual criminal. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. A review of the record reveals that the State did not file an amended information, but rather a notice of intent to seek treatment as a habitual criminal. NRS 173.095(2) provides that the prosecuting attorney may file a notice of criminal habituality after an indictment charging the primary offense is found. As appellant had four previous felony convictions, appellant failed to demonstrate that the filing of notice of the State's intent to seek treatment as a habitual criminal was improper and failed to demonstrate

that the district court was without jurisdiction to allow the filing of the notice. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his appellate counsel was ineffective for failing to argue that the jury should have decided the issue of criminal habituality. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. This court has held that a defendant is not entitled to a jury determination of criminal habituality. See O'Neill v. State, 123 Nev. 9, 16, 153 P.3d 38, 43 (2007); see also Howard v. State, 83 Nev. 53, 57, 422 P.2d 548, 550 (1967) (holding that the Nevada Constitution does not require that status as a habitual criminal be determined by a jury). Therefore, the district court did not err in denying this claim.

Missing Testimony

Seventh, appellant claimed that his appellate counsel was ineffective for failing to seek a missing portion of the trial transcript. Appellant claimed that a portion of the cross-examination of Officer Dolan was missing from the trial transcript. Appellant failed to demonstrate that he was prejudiced. It does not appear from the record that there are any portions of Officer Dolan's testimony missing from the transcript. Further, appellant failed to demonstrate how the alleged missing testimony would have altered the outcome of his direct appeal. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). As such, appellant failed to demonstrate a reasonable probability of success on appeal had his appellate counsel sought a missing portion of the trial transcript. Therefore, the district court did not err in denying this claim.

Speedy Trial

Eighth, appellant claimed that his appellate counsel was ineffective for failing to argue that the State violated his speedy trial

rights. Appellant argued that his right to a speedy trial was violated because he was in custody in California on a separate charge for a year prior to his transfer to Nevada, which caused his trial on the instant offense to be more than one year after the arrest. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Pursuant to the Interstate Agreement on Detainers, codified as NRS 178.620, a defendant that is subject to a detainer must be tried within 120 days of being transferred to the state where a complaint is pending. Appellant was transferred to Nevada from California at the end of May 2005,² and his trial was on August 15, 2005. Thus, appellant was brought to trial within the 120-day period for a speedy trial. Therefore, the district court did not err in denying this claim.

Probable Cause

Ninth, appellant claimed that his appellate counsel was ineffective for failing to argue that there was no prompt determination of probable cause following his warrantless arrest. Appellant claimed that the State of Nevada held him for approximately 25 days before his transfer to California without a probable cause determination and that, due to the transfer to California, no probable cause determination was made for 15 months. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Following appellant's arrest in Nevada, appellant was held pursuant to a detainer from California. See NRS 178.620. Appellant signed a waiver of extradition on March 16, 2004 and was transferred to the custody of the

²The record is not clear on the exact date appellant was transferred to Nevada; however a hearing in which the public defender was appointed to represent appellant was held on May 31, 2005.

State of California on March 27, 2004. A criminal complaint charging appellant with possession a firearm by an ex-felon was not filed until April 16, 2004. As such, appellant failed to demonstrate that he was improperly held by the State of Nevada prior to the transfer to California. Appellant was transferred back to Nevada in May of 2005, a preliminary hearing was held on June 22, 2005, where a determination of probable cause was made. As appellant was in custody pursuant to charges in California at the time of the filing of the complaint and a preliminary hearing was held shortly after his return to the custody of the State of Nevada, appellant failed to demonstrate that the 15-month delay was inappropriate or that he was prejudiced. Therefore, the district court did not err in denying this claim.

Failure to introduce evidence at trial

Tenth, appellant claimed that his appellate counsel was ineffective for failing to challenge the State's discussion of a jacket at trial, when the State never produced it or admitted it into evidence. Appellant failed to demonstrate that he was prejudiced. Appellant was viewed wearing a jacket during the incident and a jacket matching that description was later found along the chase route. During trial, Officer Dolan stated that the jacket was collected and placed into evidence, but that somehow it had been misplaced and could not be produced at trial. Appellant does not identify a rule of evidence that would have precluded the State from discussing the jacket at trial without admitting the actual jacket into evidence. Further, the jury was informed that the jacket would not be admitted during the trial, allowing the jury members to take that fact into account when deliberating. Accordingly, appellant failed to demonstrate that arguing error on appeal in admitting testimony about the jacket without also admitting the actual jacket into evidence would

have had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

To the extent that appellant claimed that his appellate counsel was ineffective for failing to argue that the loss of the jacket amounted to destruction of exculpatory evidence, appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that the jacket itself was favorable to the defense or that there was a reasonable probability that the result of the trial would have been different had the jacket been introduced. Bennett, 119 Nev. at 599-600, 81 P.3d at 8. Appellant further failed to demonstrate that any failure by the State in disclosing prior to trial that the jacket had been lost was prejudicial to his defense. Id.; see also Strickler, 527 U.S. at 281-82. Therefore, the district court did not err in denying this claim.

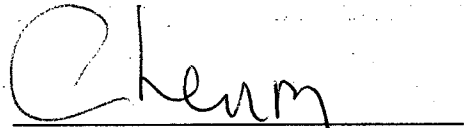
Appellant also claimed error in that the State discussed the jacket at trial, but never produced it or admitted it into evidence. Appellant could have raised this claim in his direct appeal, and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b); see also Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Therefore, the district court did not err in denying this claim.

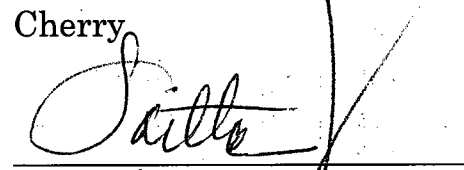
Conclusion


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.³


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Valerie Adair, District Judge
Donald Robin Barren
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

³We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, 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.