

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID P. RUFFA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52268

FILED

AUG 21 2009

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant David Ruffa's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On January 11, 2006, the district court convicted appellant, pursuant to jury verdict, of one count each of first-degree kidnapping, third-degree arson, and first-degree murder. The district court sentenced appellant to two terms of life in the Nevada State Prison without the possibility of parole for the kidnapping and murder counts, and a term of 19 to 48 months for the arson count. All terms were to run concurrently. This court affirmed the judgment of conviction and sentence on direct appeal. Ruffa v. State, Docket No. 46569 (Order of Affirmance, January 24, 2008). The remittitur issued on February 19, 2008.

On May 28, 2008, appellant filed a proper person 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. The district court denied the petition on September 8, 2008. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of trial counsel, that he received ineffective assistance of appellate counsel, that his conviction was not supported by sufficient evidence, that the State withheld evidence, that the district court dismissed witnesses without allowing the defense an opportunity to cross-examine those witness, that the State relied upon character evidence to obtain a conviction, and that the district court allowed the State to submit late filings, but held the defense to a stricter standard. For the reasons stated below, we conclude that each of these claims lack merit, and affirm the decision of the district court.

Ineffective assistance of trial counsel

Appellant claimed that he received ineffective assistance of trial counsel due to counsel's failure to object to certain continuances, failure to file a direct appeal after a continuance was granted, failure to call certain witnesses, decision to present appellant's stepfather as a witness, failure to file a motion to dismiss after certain DNA evidence did not "match" appellant, and statements to appellant that he would likely be acquitted. To state a claim of ineffective assistance of trial 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 counsel's errors were so severe that they rendered the jury's verdict unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). 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. To demonstrate that counsel was ineffective, a petitioner must also support his claims with specific factual assertions, and may not

assert “naked” claims for relief. See Pellegrini v. State, 117 Nev. 860, 889, 34 P.3d 519, 538 (2001).

Claims related to continuances

First, appellant claimed that trial counsel was ineffective for failing to object when the State moved to vacate his trial date 10 days before the scheduled start date based on appellant’s failure to consent to a DNA test. Appellant failed to demonstrate that counsel’s performance was deficient or that he was prejudiced. At a hearing shortly after the State filed its motion to compel a buccal swab, counsel for appellant indicated that his client wished to have time to respond to the State’s motion. Appellant would not consent to the buccal swab. When questioned directly by the district court, appellant acknowledged that his refusal to consent and decision to file a response to the State’s motion to compel would result in the resetting of the trial date. Therefore, not objecting to the resetting of the trial date, trial counsel was acting in accordance with appellant’s wishes to contest the motion to compel a buccal swab. Further, appellant cannot now claim that he was prejudiced by a delay to which he agreed. See Broadhead v. Sheriff, 87 Nev. 219, 223, 484 P.2d 1092, 1094 (1971) (noting that “if the defendant is responsible for delaying the trial . . . he may not complain”). Accordingly, we conclude that the district court did not err in denying this claim.<sup>1</sup>

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<sup>1</sup>To the extent appellant also claimed that his speedy trial right was violated by the State’s late decision to pursue DNA testing, we note that this court concluded in appellant’s direct appeal that appellant’s right to a speedy trial was not violated. Ruffa v. State, Docket No. 46569 (Order of Affirmance, January 24, 2008). “The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.” Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting

*continued on next page . . .*

Next, appellant claimed that trial counsel was ineffective for failing to file an appeal when the State moved to vacate his trial date. Appellant claimed that he requested counsel to file an appeal, and counsel refused to do so. As indicated above, this claim is belied by the record, as it appears that appellant agreed to the delay. In addition, counsel was not ineffective for failing to file an interlocutory appeal. The right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists. Castillo v. State, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990). "The defendant may only appeal from a final judgment or verdict in a criminal case." NRS 177.015(3). Because the district court's order vacating the trial date was not an appealable order, trial counsel was not ineffective for refusing to file an interlocutory appeal. Therefore, the district court did not err in denying this claim.

Claims related to witnesses

Next, appellant claimed that trial counsel was ineffective for failing to call Cory Ann Stevens as a defense witness.<sup>2</sup> According to appellant, Stevens lived across the street from the location where the victim's body was discovered in a parked white Chevrolet Blazer. Appellant claimed that Stevens would have testified that several days

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*... continued*

Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). As this court has already determined that appellant's right to a speedy trial was not violated, this conclusion is law of the case, and cannot now be disturbed. Therefore, the district court did not err in denying this claim.

<sup>2</sup>Appellant did not identify Stevens by name in his petition. However, in his reply to the State's opposition, appellant acknowledges that the witness to which his petition referred was Stevens.

before the victim's body was discovered, she saw a man who was not the appellant exit the car. Appellant failed to demonstrate that he was prejudiced. While trial counsel did not present Stevens as a witness at trial, counsel extensively cross-examined a police detective about statements Stevens made to the police. Through the detective, counsel established that several days before the victim was last seen, Stevens saw a white Blazer parked across the street from her home. The detective also testified that Stevens had seen a man who did not match the description of appellant leaving the vehicle. Therefore, Steven's statements regarding the Blazer and a man exiting the car were presented to the jury. Given that the jury was presented with Steven's statements, appellant failed to demonstrate that there was a reasonable probability of a different result at trial had trial counsel called Stevens as a witness. Accordingly, the district court did not err in denying this claim.

Appellant also claimed that trial counsel was ineffective for failing to secure the appearance of convenience store clerks Pamela Britton and Andrea Collins. It appears that appellant believed that each of these witnesses would have testified that he did not match the description of the man who bought the gas can found in the victim's vehicle. Appellant failed to demonstrate that he was prejudiced. Although Collins was unavailable to testify, her preliminary hearing testimony was read to the jury. At the preliminary hearing, Collins testified that a white male wearing jeans bought the gas can, but she could not definitively say whether that man was or was not appellant. While Britton did not testify, appellant did not specify how her testimony would have differed from Collins' testimony. Therefore, the jury was aware that the gas station clerk could not identify appellant as the purchaser of the gas can. Appellant failed to demonstrate a reasonable

probability of a different result at trial if Britton and Collins had testified in person. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that trial counsel was ineffective for urging his mother not to testify. Appellant failed to specify what his mother would have testified to, and how this testimony would have had any effect on the jury's verdict. Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations which, if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Appellant next claimed that trial counsel was ineffective for encouraging his stepfather, Leo Kravetz, to testify and failing to object to the State's cross-examination of his stepfather. Kravetz testified that on the night the victim disappeared, appellant had visitation with his son, and appellant, his son, his mother, and Kravetz went to a pizza parlor for dinner. After returning appellant's son to his mother, Kravetz testified that appellant remained in the family's trailer for the rest of the night. However, on cross-examination, Kravetz admitted that his memory was poor, and that it was possible that appellant could have left the trailer while he was sleeping. He also admitted to multiple inconsistencies in statements he had previously made to the police. Thus, appellant claimed that trial counsel weakened his case by presenting his stepfather as a witness and should have objected to the State's cross-examination of Kravetz. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. With respect to appellant's claim that counsel should not have encouraged Kravetz to testify, while Kravetz's testimony may not have been as helpful as appellant wished, appellant failed to demonstrate that Kravetz's testimony actually hurt his case.

Accordingly, appellant did not demonstrate a reasonable probability of a different result at trial had Kravetz not testified. Regarding the State's cross-examination of Kravetz, questions regarding Kravetz's memory and ability to recall what happened the night the victim disappeared were both relevant and permissible. Counsel was not deficient for failing to make futile objections. See Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (noting that counsel cannot be deemed ineffective for failing to file futile motions). Therefore, the district court did not err in denying this claim.

Failure to file a motion to dismiss

Next, appellant claimed that trial counsel was ineffective for failing to file a motion to dismiss the charges against him when a DNA test excluded appellant as the source of DNA from under the fingernails of the victim and from a water bottle in the victim's car. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. While the DNA evidence did not implicate appellant, it also did not exonerate him, as the DNA could have been contributed by any number of people that the victim had contact with. It was entirely possible for appellant to have killed the victim without leaving DNA evidence behind. Accordingly, a motion to dismiss the charges against the defendant would have been futile. See id. Moreover, the jury was presented with this evidence. Therefore, the district court did not err in denying this claim.

Statements related to probability of acquittal

Finally, appellant claimed that counsel was ineffective for assuring him that he would be acquitted. Appellant claimed that if he had been properly advised about his chances, he "now believe[s] I would have waived my right to a trial" and entered into plea negotiations with the

State. Appellant failed to demonstrate that he was prejudiced. While appellant now asserts that he would have been open to plea negotiations, this claim is belied by appellant's own statements. Appellant admits that when the State made plea offers prior to trial, he "strenuously refused because I was totally innocent of any crime, and there was no factual forensic evidence, and certainly no reliable or truthful witnesses against me." Given appellant's own statement regarding the "strenuous" nature of his refusal to plea bargain, appellant failed to demonstrate that a different result would have been reached had counsel been less optimistic about appellant's chances at trial. Therefore, the district court did not err in denying this claim.

Ineffective assistance of appellate counsel

In addition to his claims related to trial counsel, appellant claimed that he received ineffective assistance of appellate counsel. To support a claim of ineffective assistance of appellate counsel, a petitioner must show that his counsel's performance both fell below an objective standard of reasonableness and that an omitted issue had a reasonable probability of success on appeal. Strickland, 466 U.S. at 694, 697; Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996).

Appellant appears to claim that appellate counsel was ineffective for failing to raise claims related to the multiple continuances granted to the State. Appellant failed to demonstrate that counsel's performance was deficient. Appellate counsel argued on direct appeal that the multiple continuances resulted in a violation of appellant's right to a speedy trial. This court concluded that appellant's right to a speedy trial was not violated. Ruffa v. State, Docket No. 46569 (Order of Affirmance, January 24, 2008). Accordingly, the district court did not err in denying this claim.



### Other claims that could have been raised on direct appeal

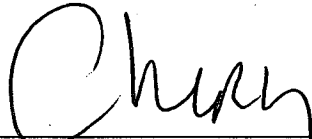
In addition to his claims of ineffective assistance of trial and appellate counsel, appellant also claimed that his conviction was not supported by sufficient evidence, that the State withheld and hid DNA evidence, that the district court dismissed witnesses without allowing the defense an opportunity to cross-examine those witness, that the State relied upon character evidence to obtain a conviction, and that the district court allowed the State to submit late filings, but held the defense to a stricter standard, and was generally biased in favor of the State. With the exception of appellant's claim that the State impermissibly withheld DNA evidence, appellant failed to raise any of these claims on direct appeal, even though he could have done so. Therefore, appellant waived the right to raise these claims absent a demonstration of good cause and prejudice. NRS 34.810(1)(b)(3); NRS 34.810(3). Appellant raised no facts to show either good cause or prejudice. Accordingly, the district court did not err in denying these claims. With respect to appellant's claim related to the State's withholding DNA evidence, this court concluded on direct appeal that appellant's due process rights were not violated by any of the State's alleged actions regarding the evidence. This conclusion is law of the case, and may not now be disturbed. See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Therefore, the district court did not err in denying this claim.

### Conclusion

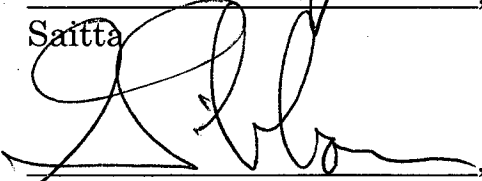
Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that

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.<sup>3</sup>

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Michelle Leavitt, District Judge  
David P. Ruffa  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>3</sup>We 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.