

IN THE SUPREME COURT OF THE STATE OF NEVADA

DELL MARVIN ROBERTS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52330

**FILED**

NOV 04 2009

THACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Dell Marvin Roberts' post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On February 12, 2003, appellant was convicted, pursuant to a jury verdict, of burglary and misdemeanor petit larceny. The district court sentenced Roberts to a prison term of 4 to 10 years for burglary and a consecutive jail term of 6 months for petit larceny. This court affirmed Roberts' convictions and sentence on direct appeal. Roberts v. State, Docket No. 41076 (Order of Affirmance, August 29, 2003). The remittitur issued on September 23, 2003.

On October 15, 2003, Roberts filed a proper person post-conviction petition for a writ of habeas corpus.<sup>1</sup> The district court

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<sup>1</sup>Roberts filed an additional, untimely, proper person petition in the same case on June 1, 2005. See NRS 34.726. The claims raised in that petition were neither addressed by the district court nor raised on appeal, and therefore we do not consider them here.

appointed counsel, and a supplemental petition was filed on September 7, 2006. The State filed motions to dismiss both petitions. On March 7, 2008, the district court entered a written order dismissing all but two of Roberts' claims: (1) trial counsel was ineffective for failing to prepare him to testify at trial and (2) appellate counsel was ineffective for failing to raise a claim of prosecutorial misconduct based on Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003). On August 1, 2008, the district court held an evidentiary hearing on these two claims. On September 11, 2008, the district court entered a written order denying them. This appeal followed.

On appeal, Roberts claims that the district court erred in denying the two claims stated above. He also claims that his Sixth Amendment right to counsel was violated when the trial court denied his motion to remove counsel prior to trial. We conclude that none of Roberts' claims have merit.

#### Ineffective assistance of trial counsel

Roberts claims that his trial counsel was ineffective for failing to prepare him to testify. Specifically, he claims that trial counsel failed to inform him that he would be cross-examined about his prior felony convictions and that trial counsel's deficient preparation led him to inadvertently open the door for otherwise improper questioning by the State. Roberts' claims are without merit.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient, and that the petitioner was prejudiced by counsel's performance. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1987)). To demonstrate prejudice, the petitioner "must show a reasonable probability that, but for counsel's errors, the result of the trial

would have been different.” Id. at 988, 923 P.2d at 1107 (citing Strickland, 466 U.S. at 694). The district court’s factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Roberts failed to demonstrate that trial counsel’s performance was deficient. Roberts was canvassed by the trial court and told the court that trial counsel had consulted with him about testifying. Roberts also stated that he was aware that he would be subject to cross-examination. Moreover, prior to Roberts taking the stand, trial counsel made a record that he had (1) discussed the pros and cons of testifying with Roberts, (2) told him that his prior felony convictions would come out in cross-examination, and (3) specifically advised him not to testify. In addition, testimony elicited at the evidentiary hearing revealed that Roberts had given three different stories to trial counsel and refused to tell counsel which one he intended to present to the jury. Roberts’ refusal to cooperate with counsel and unwillingness to disclose his intended testimony limited trial counsel’s ability to further prepare Roberts to testify. The district court found that Roberts’ testimony at the evidentiary hearing regarding counsel’s failure to prepare him to testify was “incredible.” Because the district court’s findings are entitled to deference and are supported by the record, we conclude that the district court did not err in finding that Roberts’ counsel was not deficient.

Nor can Roberts demonstrate prejudice. No amount of preparation could have prevented the jury from hearing that Roberts had prior felony convictions. That result was inherent in Roberts’ decision, made against the advice of counsel, to testify at trial. See NRS 50.095. And notably, Roberts admitted at the evidentiary hearing that he did not follow the advice of trial counsel “on any subject.” Therefore, Roberts

failed to demonstrate that had counsel advised him differently, the result of trial would have been different.

Ineffective assistance of appellate counsel

Roberts claims that his appellate counsel was ineffective for failing to raise a claim, based on Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003), that the prosecutor committed misconduct by asking him to comment on the truthfulness of the State's witnesses. We conclude that Roberts' claim is without merit.

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 as well as resulting prejudice such that the omitted issue would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 987, 998, 923 P.2d at 1107, 1114.

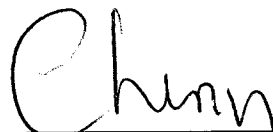
Roberts failed to demonstrate that appellate counsel's performance was deficient or that he was prejudiced. In Daniel, this court adopted "a rule prohibiting prosecutors from asking a defendant whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly challenged the truthfulness of those witnesses." 119 Nev. at 519, 78 P.3d at 904. Daniel was not decided until after this court had affirmed Roberts' convictions on direct appeal. Therefore, appellate counsel could not have raised a claim based on that case. Furthermore, the record reveals that during his direct examination Roberts repeatedly accused the State's witnesses of lying. Thus, Daniel was inapplicable and the claim suggested by Roberts would have had no likelihood of success on appeal. Accordingly, the district court did not err in denying this claim.


“Motion to Remove Attorney of Record”

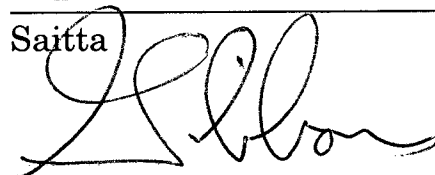
Roberts’ final claim is that the trial court erred in failing to further inquire into, or hold an evidentiary hearing on, his motion to remove his trial counsel. This claim was appropriate for direct appeal, and therefore it is procedurally barred unless Roberts can demonstrate good cause for his failure to present the claim earlier and actual prejudice. NRS 34.810(1)(b)(2). Roberts made no attempt to demonstrate good cause or prejudice. Therefore, we conclude the district court did not err in summarily dismissing this claim.

Having considered Roberts’ claims and concluded that no relief is warranted,<sup>2</sup> we

ORDER the judgment of the district court AFFIRMED.

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

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

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

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<sup>2</sup>We received appellant’s proper person motion on March 13, 2009. Because appellant is represented by counsel in this appeal and has not sought permission to file the document in proper person, we direct the clerk of this court to return to appellant, unfiled, the proper person document received in this court on March 13, 2009. Appellant shall proceed hereafter by and through counsel and shall address all concerns relating to this appeal to his counsel.

cc: Hon. Jerome Polaha, District Judge  
O'Mara Law Firm, P.C.  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk