

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO T. MCKIBBINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51899

ANTONIO T. MCKIBBINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52340

FILED

JAN 23 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT

BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Docket No. 51899 is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Docket No. 52340 is a proper person appeal from an order of the district court denying a motion to correct an illegal sentence. We elect to consolidate these appeals for disposition. NRAP 3(b). Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

On October 6, 2005, the district court convicted appellant, pursuant to a jury verdict, of one count of robbery with the use of a deadly weapon (count 1) and one count of stop required on signal of police officer (count 2). The district court adjudicated appellant a habitual criminal on count 1 and sentenced appellant to serve a term of life in the Nevada State

Prison with the possibility of parole. The district court further imposed a consecutive term of 2 to 6 years for count 2. This court affirmed the judgment of conviction on direct appeal. McKibbins v. State, Docket No. 46098 (Order of Affirmance, March 7, 2007).

Docket No. 51899

On March 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 May 30, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of trial counsel.¹ 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 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

¹To the extent that appellant raised any of the underlying claims discussed hereinafter independently from his claims of ineffective assistance of counsel, those claims were waived as they should have been raised on direct appeal, and appellant failed to demonstrate good cause for his failure to do so. See NRS 34.810(1)(b).

components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697.

First, appellant claimed that trial counsel failed to request an alibi jury instruction. Appellant noted that Jennifer McKibbins testified that appellant was elsewhere at the time of the robbery. Appellant failed to demonstrate that he was prejudiced. The district court should give an alibi jury instruction if the defendant requests it and the evidence presented supports it. Duckett v. State, 104 Nev. 6, 9, 752 P.2d 752, 754 (1988). In the instant case, although the testimony provided by Jennifer McKibbins supported an alibi jury instruction and appellant stated that he asked counsel to request such an instruction, appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel requested and he received an alibi jury instruction. The jury was presented with the defense alibi theory that he was elsewhere at the time of the robbery. However, the victim of the robbery positively identified appellant as the perpetrator. The victim and her fiance further identified appellant as the individual caught driving the stolen vehicle and wearing her fiance's clothing, clothing that was in the vehicle when it was stolen, a couple of days after the robbery. The jury was properly instructed on the presumption of innocence, the State's burden of proof, and that it was for the jury to determine the credibility of witnesses. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to object to the jury pool as not representative of a fair cross-section of the community which resulted in his trial before an allegedly all-white

petit jury. Appellant claimed that there was underrepresentation based on race and economic status. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal as appellant failed to demonstrate a prima facie violation of the fair cross-section requirement. See Duren v. Missouri, 439 U.S. 357, 364 (1979); Evans v. State, 112 Nev. 1172, 1186-87, 926 P.2d 265, 275 (1996). Notably, appellant failed to demonstrate that any underrepresentation was due to the systematic exclusion in the jury selection process. See id. Further, we note that variations in percentages of particular communities may be constitutionally permissible in a jury venire. See Williams v. State, 121 Nev. 934, 941, 125 P.3d 627, 632 (2005). Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that he received ineffective assistance of appellate counsel. 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).

First, appellant claimed that his appellate counsel was ineffective for failing to argue that the jury panel was not comprised of a fair cross-section of the community and he was tried by an all-white jury

in violation of his right to a fair trial. For the reasons discussed earlier, appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that trial counsel failed to request an alibi jury instruction and the district court failed to sua sponte provide an alibi jury instruction. Appellant failed to demonstrate that he was prejudiced. Claims of ineffective assistance of counsel should be raised in post-conviction proceedings in the district court in the first instance and are generally not appropriate for review on direct appeal. Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). Appellant failed to demonstrate that any issues of ineffective assistance of counsel would have been appropriate for direct appeal in the instant case. Further, the district court is not required to give an alibi jury instruction sua sponte. Williams v. State, 99 Nev. 797, 798, 671 P.2d 635, 636 (1983). Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that appellant counsel failed to challenge the habitual criminal adjudication. Appellant claimed that his Sixth Amendment rights were violated because the issue of habitual criminality was not presented to a jury. Further, appellant claimed that consideration of whether he was a serious future threat, sociopath, and narcissist should have been presented to a jury. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. The district court may adjudicate a defendant a habitual criminal without submission of the issue before a jury upon presentation and proof

of the requisite number of prior convictions. O'Neill v. State, 123 Nev. 9, 16, 153 P.3d 38, 43 (2007). In the instant case, the State presented proof of three prior convictions. See NRS 207.010(1)(b). Because consideration of other factors did not serve to increase the penalty beyond the statutory maximum available based upon proof of the prior convictions, appellant failed to demonstrate that the district court erred in sentencing appellant without presentation of these other factors to a jury. This court considered and rejected appellant's claim that the district court committed misconduct at sentencing. The doctrine of the law of the case prevents further litigation of this issue and cannot be avoided by a more detailed and precisely focused argument. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed that the district court abused its discretion in refusing to allow appellant to complete his statement in allocution at sentencing. This claim was waived as it should have been raised on direct appeal, and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b). Thus, we conclude that the district court did not err in denying this claim.

Having considered the claims raised in the proceedings below and concluded that the district court did not err in denying those claims, we affirm the order of the district court denying the petition.

Docket No. 52340

On July 22, 2008, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the

motion. Appellant filed a response. On August 25, 2008, the district court denied the motion. This appeal followed.

In his motion, appellant claimed that the habitual criminal enhancement was illegal because the State failed to file notice of habitual criminality and failed to file the habitual criminal enhancement as a count in the information.

A motion to correct an illegal sentence may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence or the sentence was imposed in excess of the statutory maximum. Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). “A motion to correct an illegal sentence ‘presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.’” Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

Our review of the record on appeal reveals that the district court did not err in denying appellant’s motion. Appellant’s claim fell outside the very narrow scope of claims permissible in a motion to correct an illegal sentence as it challenged an alleged error occurring prior to sentencing. Appellant’s sentence was facially legal, and appellant failed to demonstrate that the district court was not a competent court of jurisdiction. NRS 207.010(1)(b). Moreover, as a separate and independent ground to deny relief, appellant’s claim was belied by the record. The criminal information contained notice of the State’s intention to seek habitual criminal enhancement. Therefore, we affirm the order of the district court denying the motion.

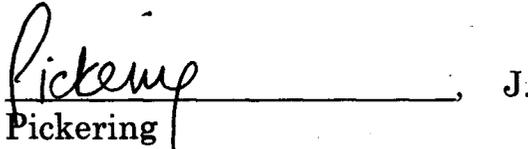
Conclusion

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

ORDER the judgments of the district court AFFIRMED.²


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Pickering

²We have reviewed the 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. We deny appellant's motion to consolidate as moot.

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