

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY LYNN FRANKLIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52422

FILED

DEC 11 2009

THOMAS 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; Kenneth C. Cory, Judge.

On January 9, 2007, the district court convicted appellant, pursuant to a jury trial, of trafficking in a controlled substance. Pursuant to NRS 207.010, the district court adjudicated appellant a habitual criminal. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after serving ten years. On appeal, this court affirmed the judgment of conviction and sentence. Franklin v. State, Docket No. 48848 (Order of Affirmance, December 27, 2007). The remittitur issued on January 22, 2008.

On March 5, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel to assist appellant with the post-conviction proceedings. Pursuant to NRS 34.770, the district court declined to conduct an evidentiary hearing. On October 10, 2008, the district court denied the petition. This appeal followed.

Appellant raised three claims of 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 State provided inadequate notice of the grand jury proceedings. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that this issue had a probability of success on appeal. The State provided appellant notice of the grand jury proceedings which complied with the requirements of Sheriff v. Marcum, 105 Nev. 824, 783 P.2d 1389 (1989). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the evidence found from the search of his vehicle by the Stardust Casino security officers should have been suppressed. Appellant claimed that the casino security should have been considered agents of the State, and therefore, the security officers' warrantless search of his vehicle was impermissible. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that the State knew of

or acquiesced to the search of his vehicle by the Stardust security officers, and thus, failed to demonstrate that the security officers were “agents” of the State. See United States v. Miller, 688 F.2d 652, 656 (9th Cir. 1982). As appellant failed to demonstrate that the security officers were agents of the State, he failed to demonstrate that their search of his vehicle implicated the constitutional protections against illegal search and seizure. Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971). Accordingly, appellant failed to demonstrate that an argument concerning the private party search of his vehicle had a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying this claim.

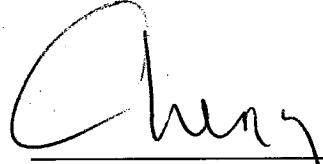
Third, appellant claimed that his appellate counsel was ineffective for failing to argue that the State failed to provide sufficient evidence of his criminal record for him to be adjudicated a habitual criminal. Appellant failed to demonstrate that his appellate counsel’s performance was deficient or that he was prejudiced. The State filed documentation for numerous previous felonies in the district court. Accordingly, appellant failed to demonstrate that arguments concerning the sufficiency of the evidence regarding his criminal history had a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying this claim.


Next, appellant claimed that the security officers lied about finding the drugs in appellant’s car. Appellant waived this claim by failing to raise it on direct appeal, and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b).


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.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Kenneth C. Cory, District Judge
Jeffrey Lynn Franklin
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Anthony M. Goldstein
Eighth District Court Clerk