IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID RODRIGUES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52513

FILED

SEP 21 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On January 26, 2006, the district court convicted appellant, pursuant to a jury verdict, of one count of lewdness with a child under the age of fourteen years. The district court sentenced appellant to serve a term of life with the possibility of parole in the Nevada State Prison. This court affirmed the judgment of conviction and sentence on direct appeal. Rodrigues v. State, Docket No. 46745 (Order of Affirmance, March 8, 2007). The remittitur issued on April 3, 2007.

On November 30, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On January 14, 2008, the district court denied appellant's petition for failure to comply with the requirements set forth in NRS 34.730(2). This court

reversed and remanded the order of the district court on October 3, 2008, concluding that the district court should have allowed appellant to file an amended petition curing any defects in the form of the petition. Rodrigues v. State, Docket No. 51224 (Order of Reversal and Remand, October 3, 2008).

While his appeal from the denial of his November 30, 2007, petition was pending in this court, appellant filed an "amended" post-conviction petition for a writ of habeas corpus in the district court on April 29, 2008. 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 September 23, 2008, the district court dismissed the petition, concluding that the petition was time barred pursuant to NRS 34.726(1), and did not relate back to appellant's timely November 30, 2007, petition, as that petition had been denied. This appeal followed.

Because this court concluded in its October 3, 2008, order of reversal and remand that the district court should have allowed appellant the opportunity to amend his November 30, 3007, petition, we cannot affirm the district court's dismissal of appellant's April 29, 2008, attempt to amend his petition on the grounds that the amended petition was untimely filed. However, the district court also concluded that the claims in appellant's April 29, 2008, petition lacked merit. For the reasons stated below, we agree, and affirm the decision of the district court on this basis.

Ineffective assistance of counsel claims

In his petition, appellant claimed that he received 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).

First, appellant claimed that appellate counsel was ineffective for failing to argue that the district court abused its discretion in denying his motion for appointment of a new psychologist. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Beyond his blanket allegations that the psychologist appointed by the district court was "prejudiced," appellant failed to cite any specific facts demonstrating that the assigned psychologist was prejudiced. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (noting that appellant must support his claims with specific factual allegations, which if true, would entitle him to relief). Accordingly,

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[1]Appellant represented himself at trial.

appellant failed to demonstrate a reasonable probability of success on appeal had counsel raised this issue. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel was ineffective for failing to argue that the district court abused its discretion in denying his motion to produce a witness. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Beyond his assertion that the witness's testimony was "crucial," appellant provided no description of the witness's proposed testimony, nor did he indicate why this testimony might have been of importance. See id. Accordingly, appellant failed to demonstrate any reasonable probability of success on appeal had counsel raised this issue. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that appellate counsel was ineffective for failing to argue that the district court erred in denying his post trial "motion to dismiss count II and III" of the information. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. With respect to count II of the information, this charge resulted in a hung jury at trial. Pursuant to NRS 174.085(4), the State was entitled to a new trial on this charge, thus dismissal of the charge was not warranted. With respect to "count III" of the information, no such count existed, as the State's information contained only two counts. To the extent appellant argues that the district court should have construed "count III" to mean "count I," this court concluded on direct appeal that sufficient evidence existed to prove that appellant was guilty of count I

beyond a reasonable doubt. Rodrigues v. State, Docket No. 46745 (Order of Affirmance, March 8, 2007). Because sufficient evidence existed to prove that appellant was guilty of count I, the district court did not err in refusing to dismiss this count. Accordingly, appellant failed to demonstrate that counsel was deficient for refusing to raise this issue on direct appeal, or that this issue would have had any reasonable probability of success. Therefore, the district court did not err in denying this claim.

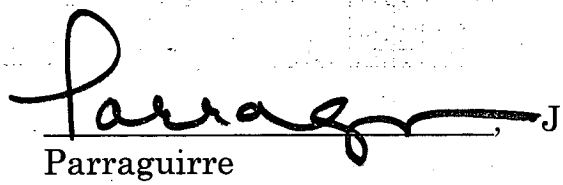
Direct appeal claims

In addition to his claims of ineffective assistance of appellate counsel, appellant claimed that he was sentenced in violation of the Sixth and Fourteenth amendments because the evaluator at the psychosexual evaluation did not conduct a "comprehensive clinical interview with the defendant." Appellant also appeared to attempt to "revive" the claims in his November 30, 2007 petition (1) that the jury's verdict was "excessive" or mistaken; (2) that because the victim admitted at trial to changing her testimony, none of her testimony should have been admissible; (3) that the victim was coached; and (4) that his sentence was excessive. 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). Appellant failed to demonstrate either good cause or prejudice. Accordingly, the district court did not err in denying these claims.

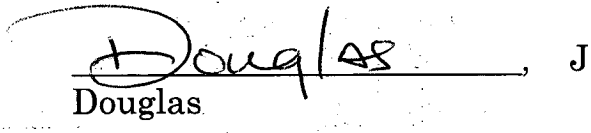
Conclusion

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

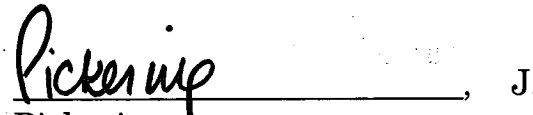
ORDER the judgment of the district court AFFIRMED.[2]



_____, J.
Parraguirre



_____, J.
Douglas



_____, J.
Pickering

[2]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.

cc: Hon. Steven P. Elliott, District Judge
David Rodrigues
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk