

IN THE SUPREME COURT OF THE STATE OF NEVADA

BOBBY JOE FORD,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

No. 34752

FILED

MAY 16 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

Appellant Bobby Joe Ford was convicted by a jury in March of 1996 for burglary and the sexual assault of his wife, from whom he was separated from at the time. On May 28, 1998, this court, after a review of the record, dismissed Ford's direct appeal.¹

On June 11, 1999, Ford filed a post-conviction petition for writ of habeas corpus alleging sixteen grounds of error, thirteen of which were raised in Ford's direct appeal. On August 16, 1999, the district court filed its written findings of fact, conclusions of law, and order denying Ford's petition. On August 31, 1999, Ford filed a timely notice of appeal to this court.

Ford raised numerous issues of error, including the following:

(1) The trial court erroneously applied Nevada's

(2) The prosecutor improperly commented on Ford's failure to testify.

(3) The prosecutor mischaracterized the standard of reasonable doubt.

(4) The court improperly admitted prior consistent statements made by the victim and her daughter.

(5) The prosecutor engaged in misconduct by failing to provide an important witness's address prior to trial.

(6) Ford was denied his constitutional right to a fair and impartial judge.

(7) The trial court erroneously denied a request for a trespass instruction.

(8) The trial court erroneously denied a request for a battery instruction.

(9) The trial court erroneously denied a request for a jury instruction that reasonable mistake of fact as to consent is a defense to sexual assault and that force or threat of force must be proven beyond a reasonable doubt.

(10) The trial court erroneously refused to instruct the jury that the temporary protective order and the extended protective order were not effective until served.

(11) Nevada's instruction on reasonable doubt is unconstitutional.

The State argued that these arguments are barred by the law of the case because they were raised and disposed of on direct appeal.

decision is the law of the case.² In his direct appeal, Docket No. 29105, Ford raised each of the above arguments. This court dismissed that appeal, concluding that there was substantial evidence to support the conviction and that no errors by the trial court had occurred. Although Ford may arguably have refined his arguments, "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."³

Ford next argued that the prosecutor engaged in prosecutorial misconduct by holding the hand of a child witness prior to her testifying and that such conduct was the equivalent of vouching for her testimony. Ford also argued that the district court's ruling that Ford's prior convictions could be used to impeach him if he chose to testify was in error.

The State argued that these issues were waived because Ford failed to raise them on direct appeal. In addition, the State argues that the district court should not have addressed these issues in its order denying Ford's petition because they were procedurally barred.

We conclude that Ford's arguments lack merit and that these issues were waived and should not have been addressed by the district court.

NRS 34.810(1) provides, in part:

²See Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). ("The law of a first appeal is the law of the case on

The court shall dismiss a [habeas corpus] petition if the court determines that:

. . . .

(b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

. . . .

(2) Raised in a direct appeal . . . ;
or

(3) Raised in any other proceeding that the petitioner has taken to secure relief from his conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

NRS 34.810(3) provides, in part:

Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and providing specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

A court must dismiss a petition for post-conviction habeas relief if the grounds for the petition could have been raised in an earlier proceeding, "unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner."⁴

Both of these issues should have been raised on direct appeal, and therefore they are procedurally barred under NRS 34.810 from being considered in the context of a habeas corpus petition. We conclude, therefore, that the district court should not have considered these issues because

Ford argued next that he was denied effective assistance of counsel, in violation of his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution, because of the following:

(1) During trial, defense counsel did not question Nurse Adams⁵ regarding other possible sources of trauma to the victim's vaginal area.

(2) During closing, defense counsel failed to argue that the victim's statement that she feared Ford was inconsistent with the act of having Ford check on her children following the rape.

(3) Trial counsel failed to object to the prosecutor's action of holding the hand of a witness; counsel also failed to raise the issue on direct appeal.

(4) Trial counsel failed to object to the State's rebuttal summation.

(5) Trial counsel failed to appeal the district court's ruling to allow the State to impeach Ford with prior convictions if Ford chose to testify.

In addition, Ford argues that an evidentiary hearing on this issue is unnecessary because the evidence against the effective assistance of counsel claim is "ample."

The State argues that the record proves Ford received effective assistance of counsel.

We conclude that Ford received effective assistance of counsel at both the trial and appellate levels.

Nevertheless, the factual findings of a district court regarding a claim of ineffective assistance of counsel are entitled to deference on subsequent review so long as they are supported by substantial evidence and are not clearly wrong.⁷

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's errors were so severe that they rendered the jury's verdict unreliable.⁸ There is a presumption that counsel provided effective assistance unless petitioner demonstrates "'strong and convincing proof to the contrary.'"⁹ In order to eliminate the distorting effects of hindsight, courts indulge in a strong presumption that counsel's representation falls within the broad range of reasonable assistance. If the defendant shows that counsel's performance was deficient, the defendant must show that, but for the counsel's errors, the result of the trial would probably have been different.¹⁰ Furthermore, the tactical decisions of defense counsel are "virtually unchallengeable absent extraordinary circumstances."¹¹ Finally, this court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.¹²

⁷See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁸See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

The standards used to determine whether appellate counsel was effective are substantially similar to those required for trial counsel. Unless the defendant can prove that counsel did not provide "reasonably effective assistance," appellate counsel's conduct will be upheld as effective.¹³ In order to prove that appellate counsel's error was prejudicial, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal.¹⁴ While the defendant has the ultimate authority to make fundamental decisions regarding his or her case, the defendant does not have a constitutional right to "compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points."¹⁵

We conclude that none of the arguments raised by Ford support a finding that trial counsel and appellate counsel were ineffective.

With regard to the questioning of Nurse Adams, there is no indication by Ford of how he was prejudiced by counsel's failure to inquire about other possible explanations for the redness of the victim's vaginal area. Moreover, given the defense of consent advanced by appellant, there was little reason for defense counsel to obviate that defense by casting doubt over whether penetration had in fact occurred.

With regard to trial counsel's failure to examine the victim effectively, we conclude that the decision over how

tactical decision and that decisions of a tactical nature rarely support an ineffective assistance claim.¹⁶ In addition, Ford provides no colorable claim explaining the prejudicial effect of this tactical decision, and he has therefore failed to carry his heavy burden to overcome the presumption that the assistance was effective.

With regard to the issue of whether trial counsel should have objected to the prosecutor allegedly holding the hand of a witness, we conclude that trial counsel could not have successfully objected and his actions therefore cannot be considered ineffective. Additionally, the district court concluded that this issue could not form the basis of an ineffective assistance claim. Because there was no reasonable chance of success on this issue, trial counsel cannot be said to have been ineffective for failing to raise the issue.¹⁷

Ford's assertion that his trial counsel was ineffective for failing to object to comments made by the State in rebuttal summation is also unpersuasive. Because this court held on direct appeal that these comments were harmless, trial counsel's failure to object to them does not amount to a showing of ineffectiveness. In addition, Ford has offered no evidence of prejudice these comments wrought on his defense, and therefore his argument must fail.

Ford's final argument is that appellate counsel should have appealed the district court's ruling allowing the State to impeach him with prior convictions if he chose to

was not preserved for review. In addition, Ford has not offered any evidence proving that this action prejudiced the outcome of his appeal, and therefore his argument must fail.

In addition to these facts, the record generally demonstrates that Ford received effective assistance of counsel, and the trial court remarked as such. Furthermore, Ford's allegations are not supported by the record, and therefore he was not entitled to an evidentiary hearing.¹⁸ As such, the district court was under no duty to conduct such a hearing.

CONCLUSION

We conclude that the district court was correct to deny Ford's petition for a writ of habeas corpus. The bulk of Ford's arguments were barred by either the law of the case or waiver. We further conclude that Ford received effective assistance of counsel. We ORDER the judgment of the district court AFFIRMED.

Young, J.
Young

Leavitt, J.
Leavitt

Becker, J.
Becker

. . . continued

¹⁷See Duhamel, 955 F.2d at 967.

¹⁸See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (allegations that are repelled and belied by the record do not entitle a defendant to an evidentiary hearing).

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General
Clark County District Attorney
Pike & Draskovich
Clark County Clerk