

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRED D. GEORGE, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52791

FILED

AUG 24 2009

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

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; Valerie Adair, Judge.

On January 31, 2005, the district court convicted appellant, pursuant to a jury verdict, of one count of burglary while in possession of a firearm and one count of robbery with the use of a deadly weapon. The district court sentenced appellant to serve three consecutive terms of life in the Nevada State Prison with the possibility of parole. On August 5, 2008, the district court entered an amended judgment of conviction clarifying that the sentences were imposed pursuant to NRS 207.010 and/or NRS 207.012. This court affirmed the judgment of conviction and amended judgment of conviction in part but reversed and remanded to vacate the term for the deadly weapon enhancement. George v. State, Docket Nos. 44338, 45815 (Order Affirming in Part, Reversing in Part and Remanding, May 9, 2007). The remittitur issued on June 5, 2007. On July 12, 2007, the district court entered a second amended judgment of

conviction vacating the sentence for the deadly weapon enhancement. No appeal was taken from the second amended judgment of conviction.

On May 15, 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 November 4, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed: (1) a flawed procedure was used to adjudicate appellant a habitual criminal, (2) the district court erred in not providing him with additional peremptory challenges, and (3) the photographic line-up was suggestive. These claims were considered and rejected on direct appeal. The doctrine of the law of the case prevents further litigation of these issues 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 these claims.

Next, appellant claimed: (1) the amended judgment of conviction was flawed because the district court mistakenly indicates that appellant was sentenced to a category B felony, (2) the district court erred in not giving appellant a copy of his discovery and arrest report, (3) the amended judgment of conviction was flawed because it referred to both NRS 207.010 and NRS 207.012, (4) the district court erred in admitting a gun from an unrelated case, and (5) the transcripts were altered from the original text. These claims could have been raised on direct appeal or an appeal from the July 12, 2007 amended judgment of conviction. Thus, the claims were waived, and appellant failed to demonstrate good cause for his

failure to raise the claims on direct appeal or in an appeal from the July 12, 2007 amended judgment of conviction. NRS 34.810(1)(b). Therefore, we conclude that the district court did not err in denying these claims.

Next, appellant claimed that he received ineffective assistance of trial counsel. 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 components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697.

First, appellant claimed that his trial counsel was ineffective for failing to provide him with discovery. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel provided appellant with discovery. Appellant failed to provide any specific facts regarding the discovery or any specific argument as to the potential effect on the jury's verdict. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for withholding information that was used against appellant at trial. Appellant claimed that he was not informed that his fingerprint was found at the crime scene until one week before trial. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that

being informed about the fingerprint earlier than one before trial would have had a reasonable probability of altering the jury's verdict. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for "agreeing" with the prosecution and failing to adequately challenge the victim's testimony. Specifically, appellant claimed that his trial counsel should have pursued the victim's lack of description of a scar on the suspect's head to the police after the robbery. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The record on appeal does not support appellant's assertion that trial counsel "agreed" with the State. Trial counsel conducted a thorough cross-examination of the victim. Trial counsel noted the victim's discrepancy in describing the scar during closing arguments. Appellant failed to demonstrate that there was a reasonable probability of a different verdict had trial counsel raised additional challenges to this testimony. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for: (1) failing to adequately consult with appellant and prepare for trial, which prevented appellant from being able to adequately defend himself; (2) failing to investigate; and (3) failing to locate and interview corroborating witnesses, which were allegedly identified in a letter to trial counsel. These claims relate to appellant's assertion that he had an alibi for the time of the crime: he was in a government building, where he had an appointment and where he was required to sign a log. Appellant asserted that trial counsel had asked for a continuance to locate alibi witnesses, but no such witnesses were presented at trial.

The district court summarily denied these claims without conducting an evidentiary hearing and without a specific analysis of the facts relating to these claims.¹ Based upon our review of the record on appeal, we cannot affirm the denial of these claims at this time. A petitioner is entitled to an evidentiary hearing on claims supported by specific facts not belied by the record on appeal, which if true, would entitle the petitioner to relief. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Appellant's claims relating to a potential alibi are supported by factual allegations and are not belied by the record on appeal. Further, appellant asserts that he informed trial counsel of witnesses to corroborate his alibi claim. Because an evidentiary hearing was not conducted, it is not clear whether the claims relating to the alibi defense were brought to trial counsel's attention, and if so, whether trial counsel investigated the alibi defense and what conclusions were reached regarding an alibi defense. An alibi defense may be critical in a case where identification of the perpetrator is at issue in the case.² Notably, at trial, counsel did not make an opening statement and presented no witnesses for the defense. Therefore, we reverse the order of the district

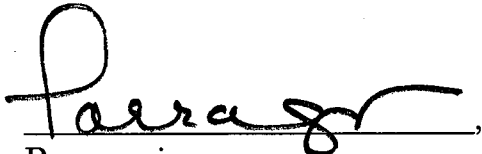
¹The district court's finding states only that appellant "received effective assistance of counsel."

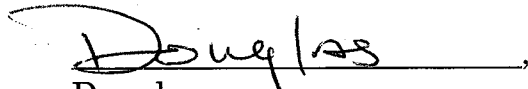
²Although a fingerprint matching appellant was found at the crime scene, a cash-loan business, the testimony at trial indicated that it was not scientifically possible to determine the age of print.

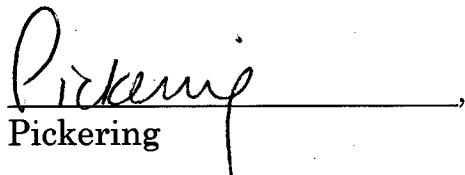
court denying these claims, and we remand this matter for an evidentiary hearing on the claims identified above.³

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.⁴


Parraguirre, J.


Douglas, J.


Pickering, J.

³On remand, the district court should consider whether the appointment of counsel would assist in the post-conviction proceedings on remand, particularly in the development of facts relating to an alibi that may fall outside the record and which may not be accessible to an incarcerated person. NRS 34.750(1).

⁴This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Hon. Valerie Adair, District Judge
Fred D. George Jr.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk