

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIYON TONY FORD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52915

**FILED**

**AUG 27 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 denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

On January 22, 2007, the district court convicted appellant, pursuant to a jury verdict, of one count of attempted murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of 96 to 240 months in the Nevada State Prison. This court affirmed the judgment of conviction on direct appeal. Ford v. State, Docket No. 48781 (Order of Affirmance, September 6, 2007). The remittitur issued on October 2, 2007.

On August 30, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant filed a supplement on September 18, 2008, and an amendment to the supplement on October 9, 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 December 4, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed his constitutional rights were denied when after his conviction was entered counsel failed to turn over all legal documents and tangible evidence despite being ordered to do so. This claim did not challenge the validity of the judgment of conviction, and thus, it was improperly raised in a post-conviction petition for a writ of habeas corpus. NRS 34.724. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed: (1) the crime scene analysts failed to gather material evidence or interfered with the crime scene—a beer bottle at the scene of the crime; (2) the district court erred in allowing the victim to identify appellant because of an impermissibly suggestive photographic line-up; (3) the deadly weapon enhancement was not applicable because the jury did not decide the issue of the deadly weapon; (4) the State improperly elicited testimony from the victim that was inconsistent with his voluntary statement and preliminary hearing testimony; (5) the State improperly expressed an opinion that appellant fabricated testimony and misstated facts relating to the beer bottle; (6) the jury did not represent a fair cross section of the community and the State improperly dismissed two African-American jurors; and (7) the district court denied appellant the right to confront and cross-examine the victim when he would not allow trial counsel to question the victim about his criminal history. Appellant waived these claims as they should have been raised on direct appeal and he failed to demonstrate good cause for his failure to do so. 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 right to counsel was violated due to a conflict of interest. Appellant claimed that trial counsel should not have been permitted to represent appellant because appellant had filed numerous motions detailing a conflict of interest and because trial counsel maintained only minimal contact with appellant. Appellant claimed that trial counsel would not file motions or allow appellant to have access to discovery and trial counsel was rude to appellant's family members.

Appellant failed to demonstrate that his right to counsel was denied by a conflict of interest. To show a Sixth Amendment violation of his right to counsel, a petitioner must demonstrate both an actual conflict and an adverse effect on his attorney's performance. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). "In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties." Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)). "[W]e presume prejudice only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely

affected his lawyer's performance." Burger v. Kemp, 483 U.S. 776, 783 (1987) (internal quotation marks and citation omitted); see also Lockhart v. Terhune, 250 F.3d 1223, 1226 (9th Cir. 2001) (noting that harmless error does not apply where an actual conflict of interest is alleged). Appellant failed to demonstrate that his trial counsel actively represented conflicting interests. Consequently, appellant failed to demonstrate that an actual conflict of interest adversely affected trial counsel's performance. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to investigate Monet Brown, appellant's wife, to aid his self defense claims. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. A petitioner asserting a claim that his counsel did not conduct a sufficient investigation bears the burden of showing that he would have benefited from a more thorough investigation. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Appellant failed to set forth specific facts in support of this claim indicating what evidence would have been uncovered with a more thorough investigation. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Notably, appellant testified at trial that he was unaware of his wife's location and had not seen her in a long time. Appellant's self defense theory was presented at trial through his testimony. Appellant failed to demonstrate that any investigation of his wife would have led to the discovery of evidence that would have had a reasonable probability of altering the outcome at trial. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to investigate his innocence. Appellant claimed that trial counsel did not investigate his claim that he had been hit in the head with a bottle of beer, that the victim reached into his waistband for a gun, that thinking his life in danger, appellant grabbed his wife's jacket, where his gun was located, and that the gun went off during appellant's and victim's struggle over appellant's gun. Appellant claimed that the woman with the victim at the time of the shooting had made a statement that she heard a bottle break before the gun shot. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel presented the self defense theory to the jury through appellant's testimony. Appellant failed to specify what further evidence or potential testimony would have been uncovered with a more thorough investigation. Appellant failed to demonstrate that there was a reasonable probability of a different result had trial counsel conducted a more thorough investigation. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to adequately investigate and prepare for direct and cross-examination. Specifically, appellant claimed that his trial counsel failed to conduct an adequate examination into the legality of the search of the apartment. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to specify what further evidence or potential testimony would have been uncovered with a more thorough investigation and more thorough preparation. Regardless of ownership of the gun, which appellant disputed at trial, appellant admitted he was involved in the shooting and

that there were only two individuals involved in the shooting—appellant and the victim. Appellant failed to demonstrate that there was a reasonable probability of a different result had trial counsel conducted a more thorough investigation. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to prepare and present a defense of a lesser included offense—battery with substantial bodily harm or assault with a deadly weapon. Appellant claimed that he had not intended to shoot the victim. Appellant failed to demonstrate that he was prejudiced. The jury found appellant guilty of attempted murder with the use of a deadly weapon and that finding indicates that the jury necessarily found the elements of attempted murder with the use of a deadly weapon had been met with proof beyond a reasonable doubt. NRS 193.330(1); NRS 200.030. On direct appeal, this court determined that there was sufficient evidence supporting the jury's verdict. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel pursued lesser offenses. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to procure the victim's criminal record for impeachment purposes. Appellant complained that the district court would not allow the presentation of this type of impeachment evidence because trial counsel had failed to have documentation of the victim's criminal record. Appellant failed to demonstrate that he was prejudiced. Appellant's trial counsel asked about the victim's prior criminal record and elicited that the victim had at least two prior felony convictions. The district court, in

response to the State's objection, stated that no further questions would be allowed and directed trial counsel to move forward in the questions. Thus, the fact the victim had at least two prior felony convictions was presented to the jury. Appellant did not indicate that further convictions were admissible but not presented by trial counsel. NRS 50.095. Under these facts, we conclude that appellant failed to demonstrate that there was a reasonable probability of a different outcome at trial had trial counsel procured documentation of the victim's criminal record. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for failing to impeach the victim with prior inconsistent statements. Specifically, appellant asserted trial counsel should have questioned the victim about a discrepancy in his description of the shooting and a discrepancy regarding the drinking of beer. Appellant failed to demonstrate that he was prejudiced. The victim's testimony regarding the gunshot was essentially consistent in that there was a struggle for the gun and the gun was under the victim's chin when he was shot. Statements regarding the drinking of beer had only minimal bearing on the victim's description of the incident. Appellant failed to demonstrate that there was a reasonable probability of a different outcome at trial had trial counsel impeached the victim with prior inconsistent statements in the aforementioned areas. Therefore, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that trial counsel was ineffective for failing to investigate the failure of crime scene analysts to gather the beer bottle into evidence. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that had trial counsel

conducted further investigation in this area that there was a reasonable probability of a different outcome at trial. 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).

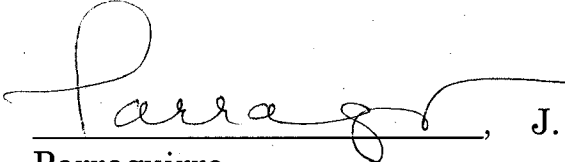
Appellant claimed that his appellate counsel was ineffective for raising only one issue and failing to raise other grounds. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant failed to specifically identify any other grounds for relief or provide any argument that any potential claims had a reasonable probability of success on appeal. Therefore, we conclude that the district court did not err in denying this claim.

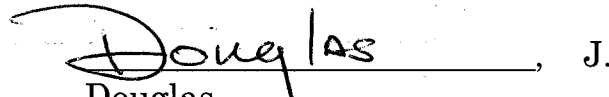
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that

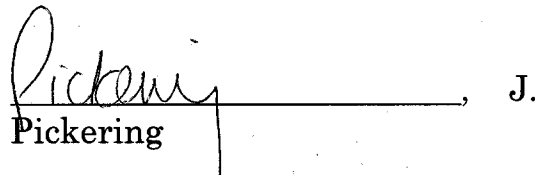


briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>1</sup>

  
Parraguirre, J.

  
Douglas, J.

  
Pickering, J.

cc: Eighth Judicial District Court Dept. 7, District Judge  
Tiyon T. Ford  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>1</sup>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.