

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT NADON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53232

FILED

JUN 09 2010

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from an order of the district court denying appellant Robert Nadon's post-conviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; William A. Maddox, Judge.

First, Nadon argues that the district court erred in denying his claim that his trial counsel was ineffective for failing to compel a grant of immunity for two defense witnesses who would have testified that Nadon was not the source of the drugs sold during the controlled buys and that he did not stand to gain from the sales. We conclude that Nadon failed to demonstrate that such a motion would have been successful. See Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996).

While the testimony was relevant, it did not directly contradict informant Rudy Gage's testimony that he exchanged money for drugs with Nadon on two occasions. See U.S. v. Straub, 538 F.3d 1147, 1161-62 (9th Cir. 2008). Further, Nadon failed to demonstrate that the testimony would have affected the outcome of the trial. See Kirksey, 112 Nev. at 990, 923 P.2d at 1109. Police detectives monitoring the transactions observed Gage and Nadon engage in passing movements and

identified Nadon's voice as bargaining with Gage. Therefore, the district court did not err in denying this claim.

Second, Nadon contends that the district court erred in denying his claim that trial and appellate counsel were ineffective for failing to object to or argue error related to the State's grant of immunity to Gage. We disagree. Nadon cites no authority demonstrating that the district court abused its discretion in granting the State's motion to grant Gage immunity. See McCabe v. State, 98 Nev. 604, 606, 655 P.2d 536, 537 (1982) (providing that a grant of immunity pursuant to NRS 178.572 is within the court's discretion). Therefore, he failed to demonstrate that an objection or argument on appeal would have been successful.

Third, Nadon argues that the district court erred in denying his claim that his trial counsel was ineffective for failing to adequately cross-examine Gage on whether he used drugs with Jamie Wise and Fern Capra on the days of the controlled buys. We disagree. Counsel elicited testimony from Gage concerning his drug use that contradicted Gage's preliminary hearing testimony and acknowledged that he had ingested drugs with Capra "[b]efore we did the 25th and 26th." While additionally evidence that Gage used drugs on the day of the controlled buys with Wise might have assisted the defense, Nadon failed to demonstrate prejudice. Gage's testimony about the transactions was corroborated by officers monitoring the transactions. Further, officers testified that Gage did not appear as if he was under the influence of drugs at the time of the transactions. Therefore, the district court did not err in denying this claim.

Fourth, Nadon argues that the district court erred in denying his claim that his trial counsel was ineffective for failing to call an

investigator to testify to Capra's and Wise's statements. As this claim was not raised in his petition below, we decline to address it on appeal. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (noting that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

Fifth, Nadon argues that the district court erred in denying his claim that his counsel was ineffective for failing to request an instruction concerning sentencing entrapment. We disagree. As he concedes in his brief on appeal, this court has not recognized sentencing entrapment as a substantive defense. Because counsel was not deficient in this regard, the district court did not err by denying this claim.

Sixth, Nadon argues that the district court erred in denying his claim that his counsel was ineffective for failing to request an addict-informer instruction for Gage. We conclude that Nadon failed to demonstrate that his counsel was deficient. While Gage had used drugs and provided some inconsistent testimony, the State had not conceded, as it had in Champion v. State, 87 Nev. 542, 490 P.2d 1056 (1971), that he was "about as unreliable an addict-informer as you can have." Id. at 543, 490 P.2d at 1057. Instead, the informant had a consistent history of aiding law enforcement in Nevada and the monitoring officers' observations were consistent with Gage's testimony. Thus, the instruction was not warranted. See King v. State, 116 Nev. 349, 355, 998 P.2d 1172, 1176 (2000) (providing that instruction was not required where the informer "not known to be or deemed unreliable"). Therefore, the district court did not err in denying this claim.

Seventh, Nadon argues that the district court erred in denying his claim that his counsel failed to object to the aiding and abetting instructions because they were confusing in that Nadon was not charged as an aider and abettor as was his codefendant, but the instructions did not indicate that they only related to the codefendant. And, according to Nadon, he was not provided adequate notice that the State was seeking a conviction against him on an aiding and abetting theory. We disagree. The information, which was read to the jury as part of the instructions, indicated that the State had charged Nadon as a principal and Nadon's codefendant under an aiding and abetting theory. Thus, as the instructions as a whole were not confusing and the State did not pursue a theory against Nadon for which he was not properly on notice, Nadon did not demonstrate that his counsel was deficient for failing to object to the instruction. Therefore, the district court did not err in denying this claim.

Eighth, Nadon argues that the district court erred in denying his claim that his counsel was ineffective at the sentencing hearing because counsel failed to discuss substantial assistance with Nadon or argue that his sentence was disparate to the other codefendants. We conclude that Nadon failed to demonstrate prejudice. Regardless of whether counsel discussed substantial assistance, Nadon indicated that he was already aware of the possibility of offering it as both he and his wife approached the police seeking to offer substantial assistance. The police were not required to extend Nadon the opportunity to render substantial assistance. See Parrish v. State, 116 Nev. 982, 990, 12 P.3d 953, 957 (2000). Regarding the sentencing disparity argument, there is no legal requirement that codefendants receive identical punishment. Nobles v. Warden, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990). As Wise had entered a

plea agreement to only one of the transactions and Beltran had only been convicted of his conduct related to the second transaction, Nadon and his codefendants were not similarly situated. See Gaines v. State, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000) (“The Equal Protection Clause of the Fourteenth Amendment mandates that all persons similarly situated receive like treatment under the law.”). Therefore, the district court did not err in denying this claim.

Ninth, Nadon argues that the district court erred in denying his claim that his counsel was ineffective for failing to seek a mistrial based on Gage’s alleged perjury during the preliminary hearing.¹ Nadon failed to demonstrate that a motion for a mistrial would have been successful. As the inconsistencies in Gage’s testimony were addressed on cross-examination and other evidence corroborated Gage’s testimony and supported Nadon’s conviction, Nadon failed to demonstrate that the prejudice resulting from the alleged perjury prevented him from receiving a fair trial. See Rudin v. State, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004). Therefore, the district court did not err in denying this claim.

Tenth, Nadon argues that the district court erred in denying his claim that his counsel was ineffective for failing to request a procuring agent instruction regarding Count III of the amended information. We agree. The testimony that Nadon merely passed Gage’s money to Beltran and then passed the drugs from Beltran to Gage suggests that he was

¹To the extent that Nadon argues that his counsel was ineffective for failing to move for a new trial based on alleged perjury, this claim was not raised in his petition below and we decline to address it for the first time on appeal. See Davis, 107 Nev. at 606, 817 P.2d at 1173.

merely a conduit for the sale. See Colon v. State, 113 Nev. 484, 490, 938 P.2d 714, 718 (1997) (“[T]he procuring agent defense in a prosecution for a sale of a controlled substance can be maintained only if the defendant was merely a conduit for the purchase and in no way benefited from the transaction” (quoting Love v. State, 111 Nev. 545, 548, 893 P.2d 376, 378 (1995))); see also Rosas v. State, 122 Nev. 1258, 1264-65, 147 P.3d 1101, 1106 (2006) (providing that a defendant is entitled to an instruction on any reasonable theory of the case where there is any evidence, however slight, supporting that theory). Further, considering the brevity of the meeting, limited evidence of the transaction conversation, lack of evidence that Nadon received any benefit from the transaction, and Gage’s statement after the transaction that he got the drugs from Beltran, there was a reasonable probability of a different result at trial had the jury been given the procuring agent instruction. Therefore, we conclude that the district court erred in denying this claim and remand this case to the district court with instructions to grant the petition on this claim.

Eleventh, Nadon argues that the district court erred in denying his claim that the cumulative effect of his counsel’s errors warrants relief. Even assuming that counsel’s deficiencies may be cumulated, see Harris by and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995) (concluding that prejudice may result from cumulative effect of multiple counsel deficiencies), any deficiencies in counsels’ performance, other than the error we have previously recognized and addressed, had no cumulative impact warranting reversal of Nadon’s convictions or sentence.

Having considered Nadon’s contentions and for the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court with instructions to grant Nadon's post-conviction petition for a writ of habeas corpus as it relates to his conviction for Count III.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: First Judicial District Court Dept. 2, District Judge
Karla K. Butko
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk