


IN THE SUPREME COURT OF THE STATE OF NEVADA

MANUEL TARANGO, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53234

FILED

FEB 04 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  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.¹ Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Ineffective assistance of trial counsel

In his petition filed on October 17, 2008, appellant raised six claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel, 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). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

First, appellant claimed that his trial counsel was ineffective for failing to obtain evidence to demonstrate juror misconduct and State intimidation of jurors and that NRS 50.065(2) unconstitutionally precludes inquiry into the state of the juror's mind. This claim lacks merit for three reasons. First, trial counsel was not deficient because these issues were already litigated before the district court. Second, appellant failed to demonstrate that he was prejudiced because this court already considered and rejected the underlying claims regarding juror misconduct and alleged State intimidation in the appeal from the denial of a motion for a new trial. Tarango v. State, Docket No. 46680 (Order of Affirmance, September 25, 2007). Finally, the exclusion of testimony relating to a juror's mental processes under NRS 50.065(2) is proper. Barker v. State, 95 Nev. 309, 311-12, 594 P.2d 719, 720-21 (1979). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to argue that the State did not present sufficient identification evidence. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel vigorously cross-examined the witness who identified appellant and argued that the witness was not believable. Appellant failed to demonstrate a reasonable probability that the outcome of trial would have been different had counsel made further arguments concerning the identification testimony. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to argue that the surveillance video was of poor quality. Appellant failed to demonstrate that his trial counsel's performance was

deficient or that he was prejudiced. Nothing in the record indicated that the surveillance video was of poor quality. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Appellant failed to demonstrate a reasonable probability that the outcome would have been different had his trial counsel argued the video quality was poor. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to argue that the State's DNA testing was inaccurate, that the State failed to disclose its DNA testing method prior to trial, and for failing to request the extract the State used to conduct the DNA test. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel repeatedly made arguments that the State's DNA testing was inaccurate. In addition, the record belied appellant's claim that the State's DNA testing method was not disclosed. Hargrove, 100 Nev. at 503, 686 P.2d at 225. Further, as the defense had an independent lab conduct a separate DNA test on the bandana and appellant was recorded admitting culpability in the robbery, appellant failed to demonstrate a reasonable probability that the outcome of trial would have been different had his counsel made further arguments about the State's DNA test or requested the extract. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to argue that the State committed misconduct in closing argument by denigrating the defense theory of the case, pleading to the passions of the jury, attacking defense counsel personally, improperly commenting on the reasonable doubt standard, and vouching for witnesses. Appellant failed to demonstrate that his trial counsel's

performance was deficient or that he was prejudiced. Nothing in the record indicated that the State performed any of the alleged actions. Further, the State is permitted reasonable latitude to argue concerning the credibility of witnesses. Rowland v State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). Appellant failed to demonstrate a reasonable probability that the outcome of trial would have been different had his counsel argued that the State committed misconduct during closing argument. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to challenge the constitutionality of the reasonable doubt instruction. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. This court has repeatedly upheld the statutory reasonable doubt instruction, which was given in this case, against similar constitutional challenges. See, e.g., Chambers v. State, 113 Nev. 974, 982-83, 944 P.2d 805, 810 (1997); Milton v. State, 111 Nev. 1487, 1492, 908 P.2d 684, 687 (1995). Therefore, the district court did not err in denying this claim.

Ineffective assistance of appellate counsel

Next, appellant claimed 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). Rather, 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 his appellate counsel was ineffective for failing to argue that the district court erred by allowing an out-of-court statement from his sister to be admitted as a prior inconsistent statement. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant's sister testified at trial, was subject to cross-examination concerning the statement, and the statement was inconsistent with her testimony. Thus, the prior inconsistent statement was properly admitted. See NRS 51.035(2)(a). Appellant failed to demonstrate that the underlying claim had a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying this claim.

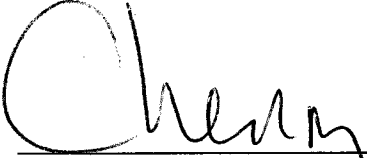
Second, appellant claimed that his appellate counsel was ineffective for failing to argue there was juror misconduct and/or the State intimidated a juror. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Counsel raised these issues on appeal from the denial of the motion for a new trial and this court already rejected those claims. Tarango v. State, Docket No. 46680 (Order of Affirmance, September 25, 2007). Therefore, the district court did not err in denying this claim.

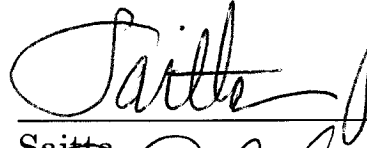
Third, appellant claimed that his appellate counsel was ineffective for failing to argue that NRS 50.065(2) was unconstitutional, the DNA testing was inaccurate, the State failed to disclose its DNA testing method prior to trial, and the State committed misconduct. Appellant also claimed that all of the above errors cumulatively amounted to ineffective assistance of counsel. Appellant failed to demonstrate that


he was prejudiced. As discussed previously, appellant failed to demonstrate that he was prejudiced for any of these claims and failed to demonstrate prejudice such that the alleged errors cumulatively amounted to ineffective assistance of counsel. Therefore, the district court did not err in denying this claim.

Having considered appellant's contentions and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Manuel Tarango, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk