

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD MITCHELL A/K/A DONALD  
E. MITCHELL, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53345

**FILED**

NOV 05 2009

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

ORDER OF AFFIRMANCE AND DIRECTIONS FOR CORRECTION OF  
JUDGMENT OF CONVICTION

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; Jackie Glass, Judge.

On December 26, 2006, the district court convicted appellant, pursuant to a bench trial, of one count of second-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole. This court affirmed the judgment of conviction and sentence on appeal. Mitchell v. State, 124 Nev. \_\_\_, 192 P.3d 721 (2008). The remittitur issued on December 2, 2008.

On December 2, 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 March 3, 2009, the district court denied appellant's petition. This appeal followed.

In his petition, 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 there was a reasonable probability of a different outcome in the proceedings. 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 in violation of his constitutional rights his trial counsel were ineffective for failing: (1) to effectively advocate his innocence, (2) to provide the same representation a "rich man" would receive, (3) to effectively communicate, (4) to interview witnesses, (5) to perform further preparation regarding the psychiatric testimony, and (6) to cross-examine witnesses. Appellant further claimed trial counsel undermined the confidence in the outcome, committed unprofessional errors, and lacked effort and preparation. Appellant failed to set forth any specific facts in support of these claims, and thus, the district court did not err in denying the claims. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Second, it appears that appellant claimed that trial counsel was ineffective for failing to investigate and present evidence to support appellant's assertion that the victim shot at him first. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel questioned witnesses regarding the shots

fired and their ability to actually see the shooting. Trial counsel further questioned law enforcement witnesses regarding the collection of evidence and gunshot residue found on one of the victim's hands. Trial counsel suggested during closing arguments that the State failed to prove that the victim had not fired first in this case. Appellant failed to demonstrate that a more thorough investigation would have resulted in the discovery of any evidence regarding this point, and thus, he failed to demonstrate that there was a reasonable probability of a different outcome in the proceedings. Therefore, we conclude that the district court did not err in denying this claim.

Third, it appears that appellant claimed that trial counsel were ineffective for failing to offer jury instructions—in particular a voluntary manslaughter jury instruction. Appellant failed to demonstrate that the performance was deficient or that he was prejudiced. This case involved a bench trial—instructions to the jury were necessarily not required under these circumstances. In addition to arguing self-defense, trial counsel argued that the conduct should be considered voluntary manslaughter. The district court determined that the State had met its burden of proof that appellant had committed second-degree murder with the use of a deadly weapon. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel taken any other actions in this respect. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel should have challenged the deadly weapon. Appellant failed to demonstrate that the performance was deficient or that he was prejudiced. A firearm is a deadly weapon per se. See NRS 193.165(1) (providing for a deadly weapon

enhancement when an offender uses a firearm in the commission of a crime). The finder of fact, the district court, determined that a firearm had been used in the commission of the offense. Thus, the deadly weapon enhancement was applicable in the instant case. Blakely v. Washington, 542 U.S. 296 (2004) (stating that precedent makes it clear that the statutory maximum that may be imposed is the maximum sentence a judge may impose solely on the basis of the facts reflected in the finding of guilt after a trial or admitted to by the defendant). Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel challenged the deadly weapon. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to file a motion to suppress the confession. Appellant appeared to allege that the confession was involuntary. Appellant failed to demonstrate that the performance was deficient or that he was prejudiced. Appellant provided no facts supporting his allegation that the confession was involuntary, and thus, he failed to demonstrate a motion to suppress would have been successful or 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.<sup>1</sup>

Next, appellant claimed that there was a conflict of interest because the district court judge and an attorney from the prosecution team

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<sup>1</sup>To the extent that appellant raised the underlying claim independently of his claim of ineffective assistance of counsel, the claim was waived as it could have been raised on direct appeal, and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b).

once worked for the same firm. This claim was waived as it could have been raised on direct appeal, and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b). Moreover, as a separate and independent ground to deny relief, the claim was without factual support. In responding to the petition below, the State represented that the commonality was with the defense team, not the prosecution team. At the time of trial, there was no existing conflict between the district court judge and either team based on the district court judge's past employment. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that this court erred in stating in the opinion for his direct appeal that he had carried a weapon into the pool party, pulled out the weapon and shot the victim. This claim is not properly raised in the instant petition as it should have been raised in the prior appellate proceedings, and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b). Moreover, as a separate and independent ground to deny relief, the claim was patently without merit. The evidence presented at trial established that appellant carried a firearm into the location where a pool party was occurring. Appellant, himself, testified to this fact. The evidence at trial further established that appellant pulled out the weapon and shot the victim. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that he was denied the right to counsel because trial counsel was not allowed to make a summation of the trial. This claim was waived as it should have been raised on direct appeal, and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b). Moreover, as a separate and independent ground to

deny relief, the claim was without merit as it was belied by the record on appeal. Appellant's trial counsel made a closing argument. Therefore, we conclude that the district court did not err in denying this claim.

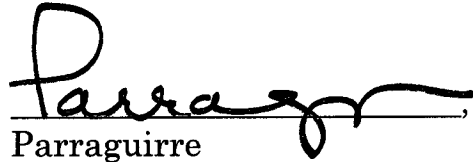
Next, appellant claimed that the State was not entitled to have him examined by their own psychiatric expert and that there was insufficient evidence. These claims were considered and rejected on direct appeal. The doctrine of the law of the case prevents further litigation of these claims. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Therefore, we conclude that the district court did not err in denying these claims.

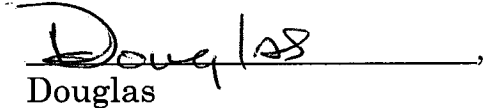
Next, appellant appeared to challenge his conviction because it was "caused by negligent medical treatment because been impeach misconduct by prosecutor to attempt manifestly abused its discretion 'prior bad acts' gang wars credibility." This claim was too vaguely set forth for proper review, and this pleading defect provides sufficient reason to deny the claim.

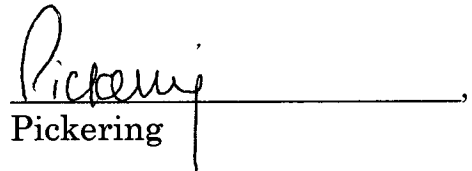
Finally, we note that there is a clerical error in the judgment of conviction. The determination at the conclusion of the bench trial was that appellant had committed the offense of second-degree murder with the use of a deadly weapon. While the judgment of conviction sets forth a sentence for the primary offense, the judgment of conviction fails to set forth an equal and consecutive term for the use of a deadly weapon. 1995 Nev. Stat., ch. 455, § 1, at 1431 (NRS 193.165). We direct the district court to correct this clerical error in an amended judgment of conviction.

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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED with directions to the district court to correct the clerical error in the judgment of conviction.

  
Parraguirre, J.

  
Douglas, J.

  
Pickering, J.

cc: Hon. Jackie Glass, District Judge  
Donald Mitchell  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk