

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHEN DEAN COMSTOCK,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53473

**FILED**

**DEC 02 2009**

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Stephen Dean Comstock's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

On December 8, 2004, the district court convicted Comstock, pursuant to a jury verdict, of one count of possession of stolen property. The district court adjudicated Comstock as a habitual criminal and sentenced him to serve a prison term of 10 to 25 years. We affirmed the judgment of conviction on direct appeal. Comstock v. State, Docket No. 44540 (Order of Affirmance, December 23, 2005).

On August 3, 2006, Comstock filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Comstock, counsel filed a supplemental petition on a suppression issue, to which State opposed. Thereafter, the district court conducted an evidentiary hearing and denied the petition. This appeal followed.

Comstock first contends that the district court erred in denying his claim that his appellate counsel was ineffective for failing to

challenge the denial of his motion to suppress his statement to the police. He asserts that he was in custody and his statement was given absent warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). He further contends that his statement was not voluntary.

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[s] would have a reasonable probability of success on appeal." Kirksey v. State, 112 Nev. 980, 987-88, 998, 923 P.2d 1102, 1107, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751-52 (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).

Comstock fails to demonstrate that this claim would have been successful on appeal. The record does not support a conclusion that Comstock was in custody at the time he provided statements to the police. See State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998) (providing that Fifth Amendment privilege against self-incrimination provides that statements made by suspect during custodial interrogation are inadmissible unless police first provide Miranda warning). Testimony at the suppression hearing demonstrated that officers asked Comstock and another individual to accompany them to the police station. Comstock agreed and rode to the station with the officers. He was not handcuffed. At the station, officers told him that he was free to leave at any time prior to speaking with him in an interview room. Although Comstock was the target of a burglary investigation, officers began speaking to him about a

bank robbery about which Comstock had information. And Comstock was afforded a break on his request. Considering these facts, Comstock did not demonstrate that he was under formal arrest or that a restraint was placed on his freedom similar to formal arrest. See id. at 1082, 968 P.2d at 323. Further, there is no indication that these circumstances rendered his statements involuntary, requiring suppression. Therefore, we conclude that the district court did not err in denying this claim.

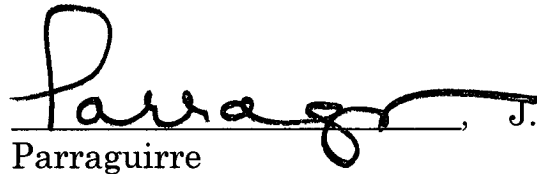
Second, Comstock argues that adjudicating him as a habitual criminal violated his due process rights under the United States Constitution. He contends that under Apprendi v. New Jersey, 530 U.S. 466 (2000), the jury, not the district court, should decide whether a defendant's habitual criminal adjudication is in the interests of justice. He contends that O'Neill v. State, 123 Nev. 9, 153 P.3d 38 (2007), cert. denied \_\_\_ U.S. \_\_\_, 128 S. Ct. 153 (2007), was wrongly decided and should be revisited.

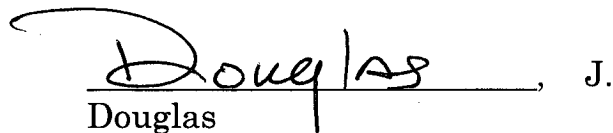
We conclude that the district court did not err in denying this claim. Comstock waived this claim by failing to raise it in his direct appeal, and he failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b)(2). Although the district court reached the merits of this claim, we affirm the order of the district court as the district court reached the correct result in denying the petition as Comstock's claim was procedurally barred. See generally Kraemer v. Kraemer, 79 Nev. 287, 291, 382 P.2d 394, 396 (1963) (holding that correct result "will not be reversed simply because it was based on the wrong reason"). Further, in O'Neill, this court concluded that Nevada's habitual criminal statute, NRS 207.010, does not violate Apprendi. 123 Nev. at 17, 153 P.3d at 43. We

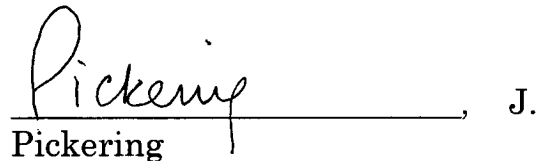
decline to revisit our holding in O'Neill, and conclude that the district court did not err in rejecting Comstock's claim.

Having reviewed Comstock's contentions and concluded that they lack merit, we

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

 J.  
Parraguirre

 J.  
Douglas

 J.  
Pickering

cc: Hon. Brent T. Adams, District Judge  
Scott W. Edwards  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>1</sup>Because Comstock is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, this court shall take no action on and shall not consider the proper person documents Comstock has submitted to this court in this matter.