

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENYON JOVANI LEWIS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53587

**FILED**

NOV 23 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; David Wall, Judge.

On July 19, 2007, the district court convicted appellant, pursuant to a jury verdict, of one count of conspiracy to violate the controlled substances act, two counts of trafficking in a controlled substance (category B felony), three counts of unlawful possession of a firearm, one count of high-level trafficking in a controlled substance (category A felony), and one count of possession of a short-barreled shotgun. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after serving ten years for the high-level trafficking count. The district court imposed determinate sentences for the remaining counts and ordered those to run concurrently. This court affirmed the judgment of conviction on direct appeal. Lewis v. State, Docket No. 49864 (Order of Affirmance, January 5, 2009). The remittitur issued on January 30, 2009.

On June 26, 2008, while his direct appeal was pending, 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 30, 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 his trial counsel was ineffective for failing to file a motion to suppress the evidence found in the vehicle. Appellant claimed that there was no probable cause to stop the vehicle and that the stop of his vehicle was based on a non-existent phone call to the police about a road rage incident involving a firearm. Appellant claimed that the real reason the police pulled him over was that the car was registered to a female and no female was in the car when it was pulled over.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The police officer and the detective who conducted the initial traffic stop testified that they responded to a dispatch call regarding a road rage incident involving a

firearm. The vehicle appellant was driving matched the description of the vehicle involved in the road rage incident. There was probable cause to conduct a traffic stop in the instant case. Arterburn v. State, 111 Nev. 1121, 1125, 901 P.2d 668, 670 (1995) (recognizing that in a seizure the police officer must have an articulable suspicion that the civilian has committed a crime). Further, to the extent that appellant claimed that there was some other reason to challenge the search, appellant failed to demonstrate that there was a reasonable probability that a motion to suppress would have succeeded. The testimony at trial established that an inventory search was conducted after the traffic stop; after observing narcotics in the front console area and after arresting appellant for the narcotics, the police conducted an inventory search of the vehicle, which led to the discovery of a gun under the driver's seat and more narcotics. See Diomampo v. State, 124 Nev. \_\_\_, \_\_\_, 185 P.3d 1031, 1042-43 (2008) (recognizing that a warrantless inventory search is per se reasonable and constitutional when it complies with police department policies and when it is not a ruse for rummaging to discover incriminating evidence); see also United States v. Ruckes, No. 08-30088, 2009 WL 3719209, \*4, 5 (9th Cir. November 9, 2009) (recognizing that even when a search was not permitted as a search incident to a lawful arrest, the evidence seized may still be admissible under the inevitable discovery doctrine). Counsel cannot be deemed ineffective for failing to file futile motions. Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). 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 file a motion to suppress the evidence from the search of the East Agate residence because this was not his residence.

Appellant claimed that the warrant was defective because it did not name the person who lived in the residence. Appellant claimed that he was not a friend or relation of the person who lived at the East Agate residence. Appellant acknowledged that he had no standing, but nevertheless, maintained that he had a reasonable expectation of privacy in items at that residence.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Assuming appellant's assertions distancing himself from the East Agate residence were true, appellant would have no standing to challenge the search of a residence in which he did not have a protected privacy interest. Rakas v. Illinois, 439 U.S. 128, 130-31 n.1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search."); Katz v. United States, 389 U.S. 347, 352 (1967) (recognizing that the Fourth Amendment requires an inquiry into whether the person claiming protection was entitled to assume privacy at the place under the circumstances concerned); see also State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998) (recognizing that one must have an objective and subjective expectation of privacy in the place to be searched). Appellant would not have a reasonable expectation of privacy in an acquaintance's residence. At trial, the testimony and evidence established that appellant resided at the East Agate address. The warrant was not defective for failing to name a person as the place is described. NRS 179.045. The transcript of the probable cause conversation for the telephonic warrant provided probable cause to search the East Agate residence. Keese v. State, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994) (recognizing that probable cause "requires

that law enforcement officials have trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are: seizable and will be found in the place to be searched”). 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 file a motion to dismiss the indictment because a criminal complaint had been filed first. Although appellant asserted that a criminal complaint had been filed in this case, there is no support for this assertion in the record. Notably, appellant failed to provide a citation to the justice court case number. Because appellant’s claim is a bare allegation that is not supported by the record on appeal, we conclude that appellant failed to demonstrate that his trial counsel’s performance was deficient or that he was prejudiced. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Therefore, we conclude that the district court did not err in denying this claim.<sup>1</sup>

Fourth, appellant claimed that his trial counsel was ineffective for waiving his right to a speedy trial without his consent. At the arraignment, at which appellant was present, appellant waived his right to a speedy trial, and only invoked the right to a speedy trial two weeks later. At that hearing, the matter was calendared for a status hearing (March 14, 2007) and trial (March 19, 2007). From the documents in the

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<sup>1</sup>To the extent that appellant challenged trial counsel’s performance relating to the issuance of a superceding indictment, appellant failed to provide any specific facts or arguments in support of this claim. Hargrove, 100 Nev. 498, 686 P.2d 222. Thus, we conclude that the district court did not err in denying this claim.

record, it appears that the parties agreed to those dates. On March 12, 2007, approximately 67 days after appellant invoked his right to a speedy trial, and two days before the date calendared for the status hearing, the State indicated its readiness for trial, and trial counsel requested a continuance. Later during that hearing, trial counsel indicated readiness for trial. A continuance was then sought by trial counsel due to a motion to withdraw as counsel. The district court granted the motion and appointed new counsel, and the trial was continued until May 21, 2007. Even assuming that the decision to seek a continuance was without appellant's consent, appellant failed to demonstrate that he was prejudiced.<sup>2</sup> Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel not sought any continuances. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for coercing him to take the stand and testify. Appellant claimed that trial counsel told him he would be convicted unless he testified, but in actuality, his testimony was detrimental to his case. Appellant failed to demonstrate trial counsel's performance was deficient or that he was prejudiced. Appellant was personally canvassed about the right to testify, including that he could not be compelled to testify. Trial counsel's advice regarding defense strategy is not deficient. Appellant failed to demonstrate that there was a reasonable probability of a different result

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<sup>2</sup>We note that the appointment of new counsel necessitated continuance of the proceedings, and thus, any continuance for this reason was not deficient.

had he not testified in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to negotiate a guilty plea. Appellant noted that his codefendant was offered a guilty plea deal. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Although appellant may have desired a plea bargain, appellant was not entitled to receive a plea bargain. There is no indication in the record that the State was willing to offer any deal. Appellant failed to demonstrate that there was a reasonable probability of a different outcome in the proceedings had trial counsel sought a plea bargain. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for failing to impeach Stephanie Ward. Appellant claimed that her testimony was inconsistent. Appellant noted that she changed her testimony when she was called as a rebuttal witness. Appellant opined that she had been threatened by the State to change her testimony on rebuttal. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Ward in her rebuttal testimony admitted that she was vague or was not truthful in her prior testimony. Ward testified that her prior testimony was not accurate because of her desire to protect appellant, and there is no support in the record on appeal for appellant's assertion that the State threatened Ward. Trial counsel questioned Ward about her memory, given her new admission to taking drugs, and her motivation for changing her story. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel questioned Ward further about the

changes in her statements. 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 impeach the testimony of his codefendant, Shane Young. Appellant claimed that Young was offered probation in exchange for his agreement to provide testimony on unproven claims. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to identify what the unproven claims were or what testimony was provided to support these claims. Hargrove, 100 Nev. 498, 686 P.2d 222. The fact that the State was not to oppose probation for Young in exchange for Young's testifying against appellant was presented to the jury. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel further questioned Young about his plea agreement. Therefore, we conclude that the district court did not err in denying this claim.

Ninth, appellant claimed that his trial counsel was ineffective for insisting on going to trial despite the fact that there was no chance to win. Appellant failed to demonstrate that he was prejudiced. Absent the State offering a plea bargain, any guilty plea would have involved a guilty plea to all of the original charges. In the instant case, the district court ordered all charges to run concurrently. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had the matter not been taken to trial. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective. 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).

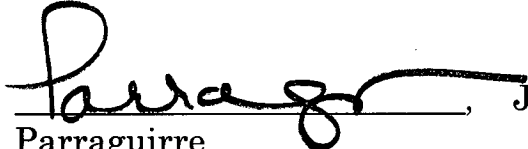
First, appellant claimed that his appellate counsel was ineffective for failing to argue: (1) there was no probable cause to stop the vehicle; (2) the seizure of evidence was unlawful where the warrant did not name a person and appellant had an expectation of privacy in his items in another's residence; (3) the grand jury indictment was invalid; (4) he was coerced into testifying at trial; (4) the State suborned perjury by allowing Ward to change her testimony; and (5) the codefendant's testimony was tainted by the State's agreement for probation. For the reasons discussed earlier in this order, appellant failed to demonstrate that there was a reasonable probability of a different outcome had appellate counsel raised any of these issues on direct appeal. Therefore, we conclude that the district court did not err in denying these claims.

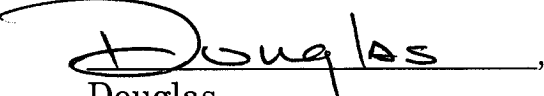
Next, appellant claimed that his appellate counsel was ineffective for failing to argue his speedy trial rights were violated. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. The continuances were pursuant to actions of the defense and appellant failed to demonstrate that there was prejudice resulting from any of the delays. See Windham v. State, 118 Nev. 226, 232, 43 P.3d 993, 997-98 (2002) (applying a four-part balancing

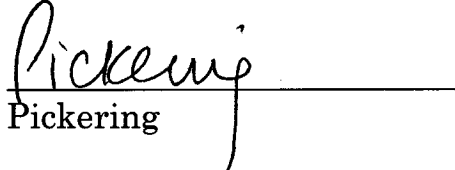
test to determine whether a Sixth Amendment violation has occurred: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant as a result of the delay). Therefore, we conclude that the district court did not err in denying 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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>3</sup>

  
Parraguirre, J.

  
Douglas, J.

  
Pickering, J.

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<sup>3</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.

cc: Hon. David Wall, District Judge  
Kenyon Jovani Lewis  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk