IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ROBERT PERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53617

FILED

APR 08 2010

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's post-conviction petition for writ of habeas corpus and motion to modify his sentence. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Claims decided based on an evidentiary hearing

Appellant argues that the district court erred in denying several claims of ineffective assistance of counsel. To prove a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness and (2) prejudice in that there was a reasonable probability that, but for counsel's deficiency, the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). Both components of the inquiry must be shown. Id. at 697. Further, appellant must establish the facts underlying his claims by a preponderance of the evidence, Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004), and, because the issue of ineffective assistance of counsel presents a mixed question of law and fact, the "purely factual

findings" of the district court "are entitled to deference," Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant claims that trial counsel was ineffective for not presenting a personality profile to the sentencing court. Appellant fails to establish deficiency or prejudice. Appellant provides no evidence that an objectively reasonable attorney in trial counsel's place would have presented a personality profile to the court. Appellant's reliance on the sentencing court's suggestion for a psychological evaluation as proof of deficiency is misplaced, as the record shows that the purpose of the request was to assist the department of corrections in classifying appellant. Further, appellant fails to demonstrate a reasonable probability that he would have received a more favorable sentence had the court been provided the psychological evaluation at sentencing. Rather, the district court found that the psychological evidence presented at the evidentiary hearing was not new information and that the sentence was based on appellant's past failure at probation, the violent nature of the crime, appellant's history of escalating crimes, and recorded jailhouse phone calls during which appellant sought to influence witnesses in the case. We therefore conclude that the district court did not err in denying this claim.[1]

Second, appellant claims that trial counsel was ineffective pursuant to Cuyler v. Sullivan, 446 U.S. 335 (1980), because trial counsel's

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[1]Appellant also argues that this contributes to cumulative error below such that he is entitled to a new sentencing hearing. This argument was not raised below, and we decline to address it here in the first instance. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means, 120 Nev. at 1012-13, 103 P.3d at 33.

conflict of interest prevented appellant from going to trial despite having a viable defense. Appellant fails to demonstrate that "an actual conflict of interest adversely affected his lawyer's performance." Id. at 350. The district court found trial counsel to be credible when he testified that, even if one of the victims had not been a former client, he would have given appellant the same advice to plead guilty. The district court's finding is supported by substantial evidence as the record reflects that appellant admitted to participating in the robbery and at least one of his co-defendants was prepared to testify against him. We therefore conclude that the district court did not err in denying this claim.

Claims decided without an evidentiary hearing

Appellant argues that the district court erred in not granting him an evidentiary hearing on claims of ineffective assistance of trial and appellate counsel. To warrant an evidentiary hearing, a petition must raise claims that are supported by specific factual allegations not belied by the record and, if true, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Appellant claims that trial counsel was ineffective for failing to move to suppress the victims' identification of him because they were tainted by improper pretrial photographic lineups.[2] Because appellant

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[2]Appellant also alleges that the victims' descriptions of the gunmen are inconsistent with one another, with the appellant's appearance, and with their own testimony at a co-defendant's trial held 11 months after appellant was sentenced. A review of the record does not reveal any material inconsistencies in the descriptions, and trial counsel's performance is to be assessed at the time of that performance. See Strickland, 466 U.S. at 689. Appellant therefore also fails to demonstrate ineffective assistance on this point.

failed to set forth any specific facts in support of this claim, we conclude that the district court did not err in denying this claim without an evidentiary hearing.

Appellant claims that appellate counsel was ineffective in not raising a double jeopardy argument where his multiple robbery convictions constituted only a single use of force.[3] To prove a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that his counsel's performance was deficient and resulted in prejudice in that the omitted issue would have had a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellant fails to establish that he would be entitled to relief. Appellant neither argues nor cites to controlling authority indicating that an objectively reasonable appellate attorney would have raised this claim on appeal. Rather, the long-standing rule in Nevada is that "the stealing of the property of different persons at the same time and place and by the same act may be prosecuted . . . as several distinct offenses." State v. Lambert, 9 Nev. 321, 324 (1874); cf. Galvan v. State, 98 Nev. 550, 555, 655 P.2d 155, 157 (1982); see also Klein v. State, 105 Nev. 880, 784 P.2d 970 (1989) (implicitly recognizing multiple robbery convictions for a single incident). For this same reason, appellant would not have been able to establish that the argument would have had a reasonable probability of

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[3]Appellant claims for the first time in his opening brief that trial counsel was also ineffective for not raising this claim. As the claim was not raised below, we decline to address it here in the first instance. See Davis, 107 Nev. at 606, 817 P.2d at 1173.

success on appeal. We therefore conclude that the district court did not err in denying this claim without an evidentiary hearing.[4]

Appellant also argues that he was deprived of a fair sentencing hearing because the judge considered impalpable and highly suspect information about appellant contained in a co-defendant's letters to the court. This claim is outside the scope of claims permissible in a post-conviction petition for writ of habeas corpus challenging a judgment of conviction based on a guilty plea. See NRS 34.810(1)(a). Accordingly, the district court did not err in denying this claim.[5]

Motion to modify sentence

Appellant urges this court to expand its holding in Passanisi v. State, 108 Nev. 318, 831 P.2d 1371 (1992), to allow a district court to modify a sentence that was based on materially untrue assumptions about a defendant's role in the crime and about his prior criminal history in relation to that of his co-defendants. We decline appellant's invitation. First, appellant fails to demonstrate that the district court relied on materially untrue assumptions about appellant's role in the crime. See State v. District Court, 100 Nev. 90, 102, 677 P.2d 1044, 1052 (1984) ("On

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[4]To the extent that appellant raises this claim independently from his ineffective assistance of counsel claim, this claim is outside the scope of a post-conviction petition for writ of habeas corpus. See NRS 34.810(1)(a).

[5]To the extent appellant argues that the prosecutor also presented the sentencing court with impalpable and highly suspect information and that the cumulative impact of this claim and the lack of a psychological evaluation warrant a new sentencing hearing, neither argument was raised below, and we therefore decline to consider them now. See Davis, 107 Nev. at 606, 817 P.2d at 1173.

appeal, every presumption is in favor of the propriety of the trial court's action in the absence of a showing of error."). Rather, the district court stated that it understood appellant was being directed by one of his co-defendants. Second, the record reflects that appellant was sentenced, as was appropriate, based on his own personal history and degree of culpability. See Martinez v. State, 114 Nev. 735, 737, 961 P.2d 143, 145 (1998). We therefore conclude that the district court did not err in denying this claim. See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Janet J. Berry, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk