

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID EUGENE ABARA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 54381

**FILED**

JUN 09 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 David Eugene Abara's first, timely post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. Abara raises four issues on appeal.

First, Abara argues that the district court erred in denying his claim that his appellate counsel was ineffective for failing to argue that some of the information presented at the sentencing regarding Abara's criminal record was inaccurate. We disagree. At sentencing, the district court was presented with evidence that Abara had a 17-year criminal history that included 18 total convictions, 12 of which were felonies. Given the significant length of Abara's criminal history and number of convictions, even excluding from consideration the few that he challenges, Abara failed to demonstrate prejudice based on counsel's failure to challenge the convictions. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984) (providing that petitioner must demonstrate prejudice from counsel's errors). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, Abara argues that the district court erred in denying his claim that appellate counsel was ineffective for failing to argue that two jury instructions impermissibly reduced the burden of proof. We conclude that this issue lacks merit. The district court's instruction that the identity of the person alleged to have committed the crime is not an element of the charged crimes was a correct statement of the law. See NRS 205.463(1), NRS 205.060(1); see also State v. Fouquette, 67 Nev. 505, 531, 221 P.2d 404, 418 (1950) (providing that the identity of the perpetrator is not an element of the corpus delicti). Regarding the identity theft instruction, while it is clumsily worded, it defines the necessary elements of the crime and the omission of concluding language did not render it infirm. See NRS 205.463(1). Further, considering the evidence of guilt that we held sufficient to sustain his convictions on direct appeal, see Abara v. State, Docket No. 48395 (Order of Affirmance, April 4, 2007), Abara failed to demonstrate that this issue enjoyed a reasonable probability of success on appeal. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Third, Abara argues that the district court erred in denying his claim that his appellate counsel was ineffective for failing to argue that his waiver of the right to counsel was involuntary because it was coerced by the district court's denial of substitute conflict-free counsel. We disagree. In his direct appeal, we held that the record demonstrated that Abara knowingly, voluntarily, and intelligently waived his right to counsel. See Abara, Docket No. 48395 (Order of Affirmance, April 4, 2007). Therefore, Abara did not demonstrate that his counsel was

ineffective in this regard, and the district court did not err in denying this claim without conducting an evidentiary hearing.

Fourth, Abara argues that the district court erred in denying his claim that his sentence was supported only by impalpable or highly suspect evidence and that his sentence is unreasonably disproportionate to the crimes he committed. This claim could have been raised on direct appeal and Abara failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b)(2). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Having considered Abara's contentions and concluding that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.  
Cherry

Saitta, J.  
Saitta

Gibbons, J.  
Gibbons

cc: Hon. Steven R. Kosach, District Judge  
Karla K. Butko  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk