

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL K. RAY A/K/A CAPTAIN PAUL
RAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54495

FILED

MAY 07 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Ingeson*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for writ of habeas corpus and his "motion for withdrawal of attorney of record, request to obtain copy of defendant's file, and request to have court-appointed representation during post-conviction relief process."¹ Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

In his petition filed on April 14, 2009, appellant raised a number of claims of ineffective assistance of counsel. To prove a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate (a) that counsel's performance

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

To the extent that appellant appealed the denial of his motion for counsel, we conclude the district court did not abuse its discretion in denying the motion. See NRS 34.750(1).

was deficient in that it fell below an objective standard of reasonableness and (b) 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); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

First, appellant claimed that trial counsel was ineffective for not calling his witnesses at trial. Appellant failed to demonstrate deficiency or prejudice. Whom to call as a witness "is a tactical decision that is 'virtually unchallengeable absent extraordinary circumstances,'" Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000)), circumstances appellant has neither alleged nor demonstrated. Moreover, appellant does not describe the witnesses' expected testimony and thus failed to demonstrate a reasonable probability of a different outcome at trial had counsel called them to testify. We therefore conclude the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective in not objecting when a juror's racist remark allegedly tainted the entire jury. Appellant failed to demonstrate deficiency or prejudice. The juror gave a frank and brief answer to the court's question, and appellant has not demonstrated either that the answer tainted the jury pool or that an objectively reasonable attorney would have raised an objection. Further, the record reflects that in a sidebar discussion, the court agreed to dismiss the juror for cause. Moreover, as the district court dismissed the juror,

appellant has failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected. Cf. Chavez v. State, 125 Nev. ___, ___, 213 P.3d 476, 489 (2009). We therefore conclude the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective in cross-examining the investigator because she did not elicit evidence that appellant's deposits exceeded his withdrawals. Appellant failed to demonstrate deficiency or prejudice. Appellant's claim is belied by the record, which shows that trial counsel elicited testimony from the witness as to the total amounts deposited and withdrawn. See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). Moreover, the jury had access to appellant's bank records, including detailed deposit and withdrawal history, and appellant does not suggest what further evidence trial counsel should have elicited. Accordingly, appellant did not demonstrate a reasonable probability of a different outcome at trial. We therefore conclude the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel never contacted him or reviewed the case with him. Appellant failed to demonstrate prejudice. We first note that the trial transcript reflects that trial counsel was familiar with the case and put forth a defense consistent with appellant's insistence of his innocence. Also, appellant did not claim that trial counsel was unprepared for trial, did not identify any portion of his case with which trial counsel was unfamiliar, and in no way suggested what additional information he would have provided to trial counsel. Accordingly, appellant did not demonstrate a reasonable probability of a different outcome at trial. We therefore conclude the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective in not preparing him for sentencing or providing him with the judgment of conviction after sentencing. Appellant failed to demonstrate deficiency or prejudice. Appellant does not state what trial counsel should have done to prepare him for sentencing. Moreover, appellant, convicted of the theft of over \$26,000, faced a sentence of up to ten years in prison, NRS 205.0835(4), but was sentenced to a suspended term of one to four years and placed on probation for five years. Further, appellant filed a timely direct appeal. Accordingly, appellant did not demonstrate a reasonable probability of a different outcome had he been better prepared for sentencing or been in possession of a copy of his judgment of conviction. We therefore conclude the district court did not err in denying these claims.

Sixth, appellant claimed that trial counsel was ineffective in entering into an agreement with the district attorney that appellant would pay the victim. Appellant failed to demonstrate deficiency. Appellant made only a bare, naked claim that failed to identify any agreement that was entered into. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. We therefore conclude the district court did not err in denying this claim.

Seventh, appellant claimed that his first attorney in district court was ineffective for failing to use or recognize the importance of a conversation that appellant had taped and that the attorney failed to give a clear and thorough briefing to trial counsel when she assumed appellant's representation. Appellant failed to demonstrate deficiency or prejudice. Appellant failed to provide any factual support for these bare, naked claims. See id. at 502, 686 P.2d at 225. Moreover, as appellant does not disclose the contents of the conversation or any information

surrounding the handover of his case, he has failed to demonstrate a reasonable probability of a different outcome at trial. We therefore conclude the district court did not err in denying these claims.

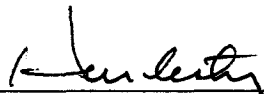
Appellant next claimed that the prosecutor engaged in misconduct; false charges were levied against him; the investigation by the state Securities Enforcement division violated his rights; the State violated appellant's rights pursuant to Brady v. Maryland, 373 U.S. 83 (1963), by not introducing appellant's documentary evidence at trial; a perjury investigation should be initiated against the Securities Enforcement investigator(s) and the victim; and the district court should have held an evidentiary hearing for appellant's probation revocation. These claims should have been raised on direct appeal, and appellant failed to demonstrate good cause or prejudice for failing to raise them. See NRS 34.810(1)(b). Further, to the extent that appellant sought to avoid the procedural bar because he claimed actual innocence, he did not demonstrate that it was more likely than not that no reasonable juror would have convicted him in light of new evidence. See Calderon v. Thompson, 523 U.S. 538, 559 (1998); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). We therefore conclude the district court did not err in denying these claims.

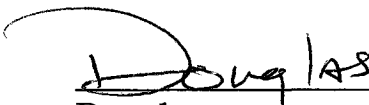
Finally, appellant claimed the district court imposed a "random amount of restitution" and erred in allowing the jury to deliberate into the wee hours of the morning. As these claims were


decided on the merits on appeal,² they are barred by the doctrine of law of the case. See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). We therefore conclude the district court did not err in denying these claims.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Valorie Vega, District Judge
Paul K. Ray
Attorney General/Las Vegas
Eighth District Court Clerk

²Ray v. State, Docket Nos. 46577, 47078 (Order Affirming in Part, Reversing in Part and Remanding, January 29, 2008).