

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE ALBERNI,

No. 34949

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

NOV 08 2001

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Bloom*  
CHIEF 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 a writ of habeas corpus.

On July 26, 1996, the district court convicted appellant, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole. This court dismissed appellant's direct appeal.<sup>1</sup> The remittitur issued on October 14, 1998.

On March 8, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a "motion to strike" the State's opposition. 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 September 9, 1999, the district court denied appellant's petition. This appeal followed.

In his petition, appellant first contended that he was denied the right to a fair trial on the following six grounds: (1) the district court erred in admitting prior bad act evidence, (2) the district court improperly permitted the State to present "evidence of a weapon which was not the weapon used in the crime" with which appellant was charged, (3) the district court did not permit defense counsel to properly cross-examine the

<sup>1</sup>Alberni v. State, Docket No. 29066 (Order Dismissing Appeal, July 28, 1998).

State's witnesses, (4) the jury was not properly instructed on elements pertaining to involuntary manslaughter, (5) the district court conducted the proceedings in a manner which reflected partiality toward the State, and (6) the district court impermissibly restricted "the scope of (defense) counsel's theory of defense." Our review of the record on appeal reveals that the district court did not err in denying these claims.

The first and second of these claims were, among other challenges, the subject of appellant's direct appeal. Appellant argued on direct appeal that the district court erred in denying his motion for a mistrial after the State elicited prior bad act evidence from several witnesses in violation of NRS 48.045(2). He also contended that the district court erred in admitting into evidence a photograph of appellant holding a handgun because the weapon depicted in the photograph was not the same as that used to kill the victim of the instant offense. As stated above, this court dismissed appellant's direct appeal. The doctrine of the law of the case prevents relitigation of these issues.<sup>2</sup> Moreover, claims that the district court entertained an actual bias or that there were other conditions that rendered the proceedings unfair must be pursued on direct appeal or they will be considered waived in subsequent proceedings.<sup>3</sup> Thus, appellant waived the remaining claims by failing to present them in his direct appeal.<sup>4</sup>

Second, appellant contended that he was denied the effective assistance of counsel as a result of certain rulings on the part of the district court. Specifically, appellant complained that the district court improperly admitted, over objections of defense counsel, "evidence of prior

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<sup>2</sup>See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

<sup>3</sup>See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

<sup>4</sup>See NRS 34.810(1)(b)(2) (providing that the district court shall dismiss a petition for a writ of habeas corpus if the court determines that the grounds raised in the petition could have been raised in a direct appeal or a prior post-conviction proceeding, unless the court finds cause for the failure to raise the grounds in the prior proceeding and actual prejudice). We note that appellant presented no reason for his failure to raise these claims on direct appeal.

bad acts, hearsay testimony, (an) inaccurate demonstration of the crime scene, (and) prejudicial photos." Appellant's claims are without merit.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.<sup>5</sup> Appellant failed to establish either prong of the Strickland test. He did not complain about his attorney's handling of his case and that he was prejudiced by his attorney's objectively unreasonable performance; rather, he argued that the district court prevented his attorney from rendering effective assistance. The actions of the district court are beyond the scope of a claim of ineffective assistance of counsel.

Third, appellant contended that his counsel was ineffective for several reasons. Specifically, appellant complained that his attorney failed to conduct "essential pretrial investigation," failed to file "essential pretrial requests for Brady materials," "neglected to file essential pretrial motions to suppress evidence," failed to "quash the charging instrument," and acted as counsel when he knew there was a conflict of interest. Appellant did not support these claims with specific factual allegations, which if true, would entitle him to the relief requested.<sup>6</sup> He did not indicate the witnesses or information counsel would have discovered had counsel conducted a more thorough investigation. He likewise failed to specify what Brady material may have been available, what evidence should have been suppressed, and the basis for the motion to quash. Thus, we conclude that appellant failed to demonstrate that he received ineffective assistance of counsel.

Finally, appellant contended that the trial court precluded him from presenting the testimony of gun-expert David Dwen. To the extent that this claim differs from appellant's earlier claim that the district court impermissibly restricted "the scope of defense's expert

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<sup>5</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

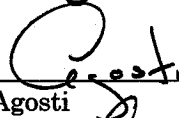
<sup>6</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).


witnesses" already discussed above, it is belied by the record.<sup>7</sup> David Dwen did in fact testify on behalf of appellant.

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.<sup>8</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Young

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Leavitt

cc: Hon. Ronald D. Parraguirre, District Judge  
Attorney General  
Clark County District Attorney  
Jose Albern  
Clark County Clerk

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<sup>7</sup>See *id.* at 503, 686 P.2d at 225.

<sup>8</sup>See *Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).