

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARTINEZ SMITH AYTCH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 54832

**FILED**

SEP 10 2010

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.<sup>1</sup> Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

In his petition filed on July 1, 2009, appellant raised numerous claims of ineffective assistance of counsel. To prove ineffective assistance of 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 there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. 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). Both components of the inquiry

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<sup>1</sup>This 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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

must be shown, Strickland, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings regarding ineffective assistance of counsel but review the court's application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant claimed that trial counsel was ineffective for failing to file a motion for discovery. Specifically, appellant claimed that counsel should have requested the photographs introduced at trial, his co-defendant's statement to the police, and the surveillance tape of the incident. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. From the trial transcript it appears that trial counsel had copies of the photographs and the co-defendant's statements as trial counsel used these pieces of evidence in cross-examination. Further, it does not appear that the State ever had the surveillance tape, and therefore, a motion for discovery requesting the tape would have been futile. See Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (noting that counsel cannot be deemed ineffective for failing to file futile motions). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to conduct a thorough investigation. Specifically, appellant claimed that trial counsel should have interviewed the victim regarding the property taken, should have reviewed the photographs of the stolen items, and should have investigated why the stolen property was immediately returned to the victim. Appellant failed to demonstrate that trial counsel

was deficient or that he was prejudiced. It appears from the trial record that trial counsel did review the photographs prior to trial. Further, trial counsel extensively cross-examined the officer as to why the property was returned to the victim rather than collected as evidence. Finally, appellant failed to demonstrate a different outcome at trial had trial counsel interviewed the victim regarding the value of the property. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to file motions to suppress and dismiss based on the evidence being returned to the victim and the missing surveillance tape. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate a reasonable probability of success had trial counsel filed these motions. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to object to the jury instruction on the valuation of the stolen property. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant failed to demonstrate that the jury instruction was an incorrect statement of law. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to object to or request a continuance when the State filed an amended information that added a charge inadvertently omitted from the original information. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant failed to demonstrate that his substantial rights were violated by the amendment or that a continuance was necessary because the amendment did not add additional

charges. NRS 173.095(1). Appellant unconditionally waived his preliminary hearing and was bound over on all charges in the criminal complaint. Several days later, the State filed an information that omitted the fourth count of the amended complaint. Then, on the first day of trial, the State filed an amended information to include all of the counts that appellant was bound over on in justice court. The amended information merely corrected a clerical error within the original information prepared by the State. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to challenge his co-defendant's recanted statement at arrest, failing to move to sever the trial, and failing to properly impeach his co-defendant. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant failed to allege how counsel should have challenged the arrest statement. Further, appellant failed to demonstrate that his trial should have been severed from his co-defendant's. See Rodriguez v. State, 117 Nev. 800, 808-09, 32 P.3d 773, 779 (2001) ("[S]everance should only be granted when there is a 'serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993))). Finally, trial counsel did use appellant's co-defendant's statement as impeachment evidence at trial and appellant failed to demonstrate how trial counsel could have impeached her more effectively. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for failing to investigate and review the surveillance tape. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate that a surveillance tape existed. Appellant failed to demonstrate that the bar actually recorded a surveillance tape, that the surveillance tape would have shown the portion of the bar where the victim was sitting, or that the tape would be exculpatory. Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that trial counsel was ineffective for failing to discover and present the defense that appellant purchased the stolen items from someone else. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant failed to support this claim with specific facts that, if true, would entitle him to relief. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that trial counsel was ineffective for failing to completely develop the defense that was presented. Specifically, appellant claimed that counsel should have visited the scenes of the crimes, should have interviewed the bartender and retrieved the surveillance tape, and should have been aware that there was no forensic evidence. Appellant failed to demonstrate that he was prejudiced. Appellant failed to support his claims with specific facts that, if true, would entitle him to relief. See id. Further, trial counsel used the fact that there was no forensic evidence as part of appellant's defense. Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that trial counsel was ineffective for failing to offer a proposed instruction on possession of stolen property. Appellant failed to demonstrate that he was prejudiced because appellant failed to demonstrate a reasonable probability of a different outcome at trial had trial counsel requested the instruction. The State provided overwhelming evidence that appellant committed grand larceny. Further, both possession of stolen property worth more than \$250 but less than \$2500 and grand larceny are category C felonies, and therefore, appellant failed to demonstrate a different outcome at sentencing had appellant been convicted of possession of stolen property rather than grand larceny. Therefore, the district court did not err in denying this claim.

Eleventh, appellant claimed that trial counsel was ineffective for failing to object to the district court's failure to hold an evidentiary hearing regarding a conversation by the victim that may have been overheard by some jurors. Appellant failed to demonstrate that he was prejudiced. According to the bailiff, the conversation between the victim and the other person was about her children and not about the case. Thus, appellant failed to demonstrate a reasonable probability of a different outcome had counsel objected. Therefore, the district court did not err in denying this claim.

Twelfth, appellant claimed that trial counsel was ineffective for failing to object to the prior judgments of conviction and for failing to challenge errors in the PSI. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant failed to demonstrate that any of the convictions were infirm. Further, even assuming that three out of the six convictions entered by the State were

flawed as appellant claimed, appellant still had three convictions that qualified him for large habitual criminal treatment. NRS 207.010(1)(b). Also, the alleged errors in the PSI were minor, and therefore, appellant failed to demonstrate a reasonable probability of a different outcome had trial counsel challenged those errors. Therefore, the district court did not err in denying these claims.

Thirteenth, appellant claimed that trial counsel was ineffective for failing to adequately consult with appellant and fully inform him on important issues and decisions. Specifically, appellant claimed that trial counsel should have negotiated a plea deal to possession of stolen property and drug court as he requested, should have visited appellant more prior to trial, and should have discussed pretrial motions, information learned from discovery, trial strategy and tactics, the overall defense theory, and the advantages or disadvantages of pleading guilty. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant failed to demonstrate that a plea to possession of stolen property and drug court would have been possible, especially given his prior criminal history. Further, appellant failed to demonstrate how the proceedings would have been different had counsel visited appellant more. Finally, appellant failed to demonstrate that any pretrial motions would have been successful or that further discussions regarding discovery, trial strategy and the defense theory would have created a reasonable probability of a different outcome at trial. Therefore, the district court did not err in denying these claims.

Next, appellant claimed his appellate counsel was ineffective for failing to raise the following issues on appeal: the district court erred

by not making an independent determination as to the validity of appellant's prior convictions, the district court erred by not holding an evidentiary hearing regarding jurors overhearing the victim's conversation, the district court erred by giving a flight instruction, and the district court erred by giving an incorrect instruction regarding valuation. Appellant failed to demonstrate that these issues had 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 these claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

Hardesty, J.  
Hardesty

Douglas, J.  
Douglas

Pickering, J.  
Pickering

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<sup>2</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. Donald M. Mosley, District Judge  
Martinez Smith Aytch  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk