

IN THE SUPREME COURT OF THE STATE OF NEVADA

GABRIEL GONZALEZ,
Appellant,
vs.
THE STATE OF NEVADA AND
WARDEN, NORTHERN NEVADA
CORRECTIONAL CENTER, JIM
BENEDETTI,
Respondents.

No. 55018

FILED

SEP 10 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Younger
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.¹ Sixth Judicial District Court, Pershing County; Richard Wagner, Judge.

In his petition filed on September 18, 2008, appellant claimed that his trial counsel was ineffective. 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

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).

Strickland). Both components of the inquiry must be shown, Strickland, 466 U.S. at 697.

First, appellant claimed that his trial counsel was ineffective for failing to argue that the State did not provide notice of criminal liability under an aider and abettor theory. Appellant cannot demonstrate that his trial counsel was deficient because, in the third amended information, the State charged appellant with trafficking in a controlled substance and listed NRS 195.020, which states that one who aids or abets shall be punished as a principal. Appellant failed to demonstrate prejudice because the evidence showed that he personally sold the cocaine to the police informant. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to call J. Ordaz to testify because she could have provided an alibi. Appellant failed to demonstrate that he was prejudiced. As Ordaz was in the vehicle with appellant during the drug transaction and appellant was seen by numerous police officers participating in the sale of cocaine, appellant failed to demonstrate that she could have provided an alibi for appellant. Given the evidence produced at trial, appellant failed to demonstrate a reasonable probability that the outcome of trial would have been different had Ordaz testified at his trial. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to impeach M. Williams' testimony with his criminal history. Appellant cannot demonstrate that his trial counsel's performance was deficient because counsel attempted to question the witness in this area,

but the district court precluded questioning of this nature due to the age of the conviction. See NRS 50.095(2). Therefore, the district court did not err in denying this claim.

Next appellant claimed that his appellate counsel was ineffective. To prove ineffective assistance of appellate 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 the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, appellant claimed that his appellate counsel was ineffective for failing to argue that the State should have tested the drug baggie and money for fingerprints. Appellant failed to demonstrate that he was prejudiced. During trial, police witnesses testified that the drug baggie and the money were not tested for fingerprints because those surfaces rarely reveal fingerprints. Considering that the police informant and appellant's codefendant both testified that appellant sold the cocaine and the purchase money was found next to appellant in the car's door, appellant failed to demonstrate that the underlying claim had a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the State did not provide notice of criminal liability under an aider and abettor theory. As discussed previously, the State charged appellant as an aider and abettor in the third amended information. Accordingly, appellant failed to demonstrate that the underlying issue had a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that the State knowingly used perjured testimony to convict him. Appellant failed to demonstrate that his appellate counsel's performance was deficient. Nothing in the record supports appellant's claim that the State knew two witnesses committed perjury. Appellant's bare and naked claims are insufficient to demonstrate that he is entitled to relief for this claim. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that he was innocent and for raising only frivolous arguments. Appellant failed to demonstrate that he was prejudiced. A review of the record reveals sufficient evidence to establish appellant's guilt beyond a reasonable doubt, Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998), thus he failed to demonstrate that a claim of innocence would have had a reasonable likelihood of success on appeal. Further, he failed to demonstrate that he was prejudiced by his appellate counsel's failure to raise any additional claims. Therefore, the district court did not err in denying this claim.

Having considered appellant's contentions and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Richard Wagner, District Judge
Gabriel Gonzalez
Attorney General/Carson City
Pershing County District Attorney
Pershing County Clerk