

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY G. AMATO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55686

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.¹ Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

In his petition filed on December 11, 2009, appellant claimed that he received ineffective assistance of trial counsel. To prove a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable. 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). The court need not address both

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).

components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697.

First, appellant claimed that his trial counsel was ineffective for failing to suppress a videotape of his interview with police. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Prior to the interview, appellant was read his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), and appellant agreed to talk with the police. The totality of the circumstances indicate that appellant's interview was voluntary. See Chambers v. State, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997). As such, appellant failed to demonstrate that a motion to suppress had a reasonable likelihood of success. Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to question Detective J. Vaccaro concerning appellant's self-defense theory. Appellant failed to demonstrate that he was prejudiced. The evidence at trial demonstrated that appellant was not confronted with the appearance of imminent danger which aroused in his mind an honest belief and fear that he was about to be killed or suffer great bodily injury. Runion v. State, 116 Nev. 1041, 1051-52, 13 P.3d 52, 59 (2000); NRS 200.120; NRS 200.200(1). Appellant failed to demonstrate a reasonable probability of a different outcome had counsel questioned Detective Vaccaro concerning self-defense. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to present a defense expert to rebut the testimony provided by the State's medical examiner. Appellant failed to demonstrate that he

was prejudiced. Appellant failed to identify any experts that would have testified in a different manner than the State's medical examiner. Accordingly, he failed to demonstrate that there was a reasonable probability of a different outcome at trial had his trial counsel sought additional expert witness testimony. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to argue appellant committed manslaughter rather than murder. Appellant cannot demonstrate that his trial counsel was deficient because counsel argued during closing argument that appellant committed manslaughter rather than first-degree murder. Therefore, appellant failed to demonstrate that the district court erred in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to object to the reasonable doubt instruction. Appellant cannot demonstrate deficiency or prejudice because the statutorily-prescribed reasonable doubt instruction was used at trial. NRS 175.211; see, e.g., Chambers, 113 Nev. at 982-83, 944 P.2d at 810; Milton v. State, 111 Nev. 1487, 1492, 908 P.2d 684, 687 (1995). Therefore, the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective. To prove a claim of 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, 112 Nev. at 998, 923 P.2d at 1114. Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). This court has held

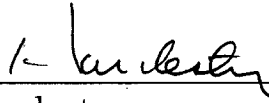
that appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

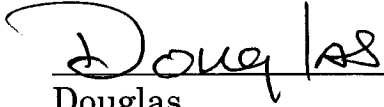
First, appellant claimed that his appellate counsel was ineffective for failing to obtain the entire trial transcript. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Portions of the trial transcript were not able to be reproduced, but this court previously held on direct appeal that appropriate procedures were followed to reconstruct the missing portions. Amato v. State, Docket No. 39515 (Order of Affirmance, June 30, 2009). Thus, the underlying claim was considered and rejected on direct appeal. Accordingly, appellant cannot demonstrate prejudice for this claim. 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 prove beyond a reasonable doubt that appellant had not acted in self-defense. Appellant failed to demonstrate that he was prejudiced. As discussed previously, the evidence at trial demonstrated that appellant was not confronted with the appearance of imminent danger which aroused in his mind an honest belief and fear that he was about to be killed or suffer great bodily injury. Runion, 116 Nev. at 1051-52, 13 P.3d at 59; NRS 200.120; NRS 200.200(1). 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.

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

ORDER the judgment of the district court AFFIRMED.²


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Elissa F. Cadish, District Judge
Gregory G. Amato
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We 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.