

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMAJA ELVIS FUNDERBURK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55826

FILED

NOV 08 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 November 27, 2007, post-conviction petition for a writ of habeas corpus and a supplemental petition filed on December 29, 2009.¹ Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

In his petition, appellant claimed that he received ineffective assistance of trial 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

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 a BB gun was not a deadly weapon. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced because a BB gun met the statutory definition of a deadly weapon. NRS 193.165(6)(c); NRS 202.290. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to file a notice of appeal. Appellant failed to demonstrate that he was prejudiced. Appellant filed a proper person notice of appeal on March 28, 2007, and this court considered and rejected the claims raised on direct appeal. Funderburk v. State, 125 Nev. ___, 212 P.3d 337 (2009). Therefore, the district court did not err in denying this claim.

Next, appellant claimed that he received ineffective assistance of appellate counsel. 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). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

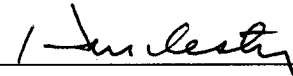
First, appellant claimed that his appellate counsel was ineffective for failing to argue that a BB gun was not a deadly weapon. As discussed previously, appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced because a BB gun met the statutory definition of a deadly weapon. NRS 193.165(6)(c); NRS 202.290. Therefore, the district court did not err in denying this claim.

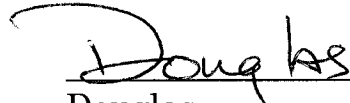
Second, appellant claimed that his appellate counsel was ineffective for failing to notify him of the denial of his direct appeal. Appellant failed to demonstrate prejudice because he failed to demonstrate a reasonable likelihood of a different outcome. Therefore, the district court did not err in denying this claim.

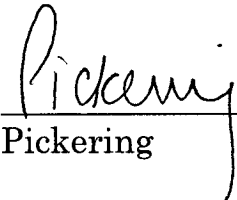
Next, appellant claimed: (1) that the district court erred by imposing the deadly weapon enhancement; (2) the district court abused its discretion by sentencing him to serve consecutive terms rather than concurrent terms; (3) his due process rights had been violated because the laws reproduced in the Nevada Revised Statutes did not contain an enacting clause as required by the Nevada Constitution; (4) this court erroneously interpreted NRS 193.165 to require a consecutive sentence; (5) NRS 193.165 is ambiguous regarding the proper charging procedure; and (6) the statutes for kidnapping, murder, robbery, and sexual assault are unconstitutionally vague. These claims are waived as appellant failed to raise them on direct appeal and failed to demonstrate good cause for his failure to do so. See NRS 34.810(1)(b).² We therefore conclude that the

²To the extent appellant argued that NRS 34.810(1)(b) did not apply because he was not challenging the validity of the judgment of conviction
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district court did not err in denying appellant's petition,³ and we
ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Stefany Miley, District Judge
Eighth District Court Clerk
Samaja Elvis Funderburk
Attorney General/Carson City
Clark County District Attorney

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but rather the constitutionality of the laws and the district court's jurisdiction, his argument was without merit. Appellant's claims challenged the validity of the judgment of conviction and did not implicate the jurisdiction of the courts. Nev. Const. art. 6, § 6; NRS 171.010. Thus, the procedural bars did apply in this case. NRS 34.720(1); NRS 34.724(1). Appellant also did not demonstrate a fundamental miscarriage of justice as his arguments fell short of demonstrating actual innocence. Calderon v. Thompson, 523 U.S. 538, 559 (1998); Schlup v. Delo, 513 U.S. 298, 327 (1995); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

³We further conclude that the district court did not err in denying his request for a writ of mandamus or declaratory judgment. NRS 34.170.