


IN THE SUPREME COURT OF THE STATE OF NEVADA

CARLOS NOGUERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56829

FILED

MAY 09 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  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; Kathy A. Hardcastle, Judge.

In his petition filed on April 23, 2010, 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 Strickland). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

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).

First, appellant claimed that his trial counsel was ineffective for failing to seek an independent psychological examination of the victim. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that there was a compelling need for an evaluation because the sexual assault accusations were corroborated by the victim's pregnancy and appellant's statements. Abbott v. State, 122 Nev. 715, 724, 138 P.3d 462, 468 (2006). Further, appellant failed to demonstrate that the victim's mental or emotional state affected her ability to tell the truth. Id. Appellant failed to demonstrate a reasonable probability of a different outcome had counsel sought an independent psychological examination of the victim. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to argue that the district court was biased because it believed appellant was guilty. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant asserted that the district court's statements concerning the denial of proposed jury instructions demonstrated bias. However, adverse rulings "during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification." In re Petition to Recall Dunleavy, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). Further, when placed in context, the challenged statements did not demonstrate that the district court had a deep-seated antagonism against appellant. Liteky v. United States, 510 U.S. 540, 555 (1994). Appellant failed to demonstrate a reasonable probability of a different outcome had his counsel argued the district court was biased against appellant. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to object to prosecutorial misconduct during closing arguments and to erroneous jury instructions. Appellant failed to demonstrate that he was prejudiced because the underlying claims were considered and rejected on direct appeal.² Noguera v. State, Docket No. 48609 (Order of Affirmance, July 7, 2009). Therefore, the district court did not err in denying these claims.

Fourth, appellant claimed that his trial counsel was ineffective for failing to assert that his sentence was cruel and unusual punishment and violated equal protection principles. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. On direct appeal, appellant asserted that his sentence was cruel and unusual and this court rejected that challenge. Noguera v. State, Docket No. 48609 (Order of Affirmance, July 7, 2009). In addition, appellant failed to demonstrate his sentence violated his equal protection rights because his claim was not based on a fundamental right and the sentence was rationally related to a legitimate governmental interest. See Gaines v. State, 116 Nev. 359, 371-72, 998 P.2d 166, 173-74 (2000). Therefore, the district court did not err in denying these claims.

²Appellant acknowledged that this court rejected his challenges to the jury instructions on direct appeal, but asserts that this court only reviewed the challenges to instructions 5, 8, 9, and 11 under a plain error standard. Given the facts of the case and this court's conclusions on direct appeal, we conclude appellant failed to demonstrate a reasonable probability of a different outcome had trial counsel objected to the use of those instructions.

Fifth, appellant claimed that his trial counsel was ineffective for failing to argue that the mandatory sentence for the crime of sexual assault on a minor under 14 violated judicial discretion principles. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The mandatory sentence imposed in this case was proper because "it is within the Legislature's power to completely remove any judicial discretion to determine a criminal penalty by creating mandatory sentencing schemes." Mendoza-Lobos v. State, 125 Nev. ___, ___, 218 P.3d 501, 505 (2009); see also Anderson v. State, 92 Nev. 21, 23-4, 544 P.2d 1200, 1202 (1976). 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 his sentence was cruel and unusual punishment and violated equal protection principles. Appellant failed to demonstrate that his counsel's performance was deficient or that he was

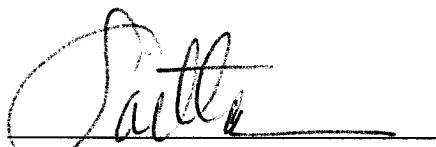
prejudiced. As discussed previously, appellant argued his sentence was cruel and unusual on direct appeal and he failed to demonstrate that his sentence violated equal protection. Therefore, the district court did not err in denying these claims.

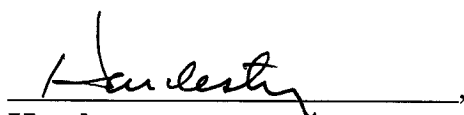
Second, appellant claimed his appellate counsel was ineffective for failing to argue that the State committed prosecutorial misconduct during closing arguments. Appellant failed to demonstrate that his counsel's performance was deficient because counsel raised the underlying argument on direct appeal. Therefore, the district court did not err in denying this claim.

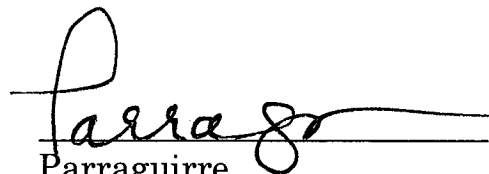
Finally, appellant claimed that he is entitled to relief due to cumulative error. This claim was raised on direct appeal and rejected by this court. Noguera v. State, Docket No. 48609 (Order of Affirmance, July 7, 2009). The doctrine of law of the case prevents further litigation of the underlying claim and cannot be avoided by a more detailed and precisely focused argument. Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). 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.


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Kathy A. Hardcastle, District Judge
Carlos Noguera
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk