

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS KEITH WRIGHT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35243

FILED

MAR 29 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On May 27, 1997, the district court convicted appellant, pursuant to a jury verdict, of attempted burglary (Count I) and attempted invasion of the home (Count II). The district court adjudicated appellant a habitual criminal on Count I and sentenced him to serve a term of life in the Nevada State Prison with the possibility of parole, to run consecutively to appellant's sentence imposed in a prior district court case. The district court held sentencing on Count II in abeyance. On March 4, 1998, the district court entered an amended judgment of conviction, eliminating credit for time served. On July 24, 1998, the district court entered a second amended judgment of conviction, dismissing Count II as redundant. This court dismissed appellant's appeal from his judgment of conviction.¹ The remittitur issued on June 15, 1999.

¹Wright v. State, Docket No. 30647 (Order Dismissing Appeal, May 18, 1999).

On August 12, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On November 22, 1999, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his appellate counsel was ineffective for failing to raise several issues in appellant's direct appeal.² To state a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense.³ "Deficient" assistance of counsel is representation that falls below an objective standard of reasonableness.⁴ To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue

²Appellant also raised these issues as constitutional violations independent of his ineffective assistance of appellate counsel claims. To the extent that these issues could have been raised on direct appeal, they are waived. Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). We nevertheless address appellant's claims in connection with his contention that appellate counsel should have raised them on direct appeal.

³See Hill v. Lockhart, 474 U.S. 52 (1985); Strickland v. Washington, 466 U.S. 668 (1984).

⁴See Strickland, 466 U.S. at 688.

would have a reasonable probability of success on appeal.⁵ The court need not consider both prongs if the defendant makes an insufficient showing on either prong.⁶

First, appellant claimed that his appellate counsel was ineffective for failing to contend on direct appeal that the evidence was insufficient to support appellant's conviction. Specifically, appellant claimed that there was insufficient evidence identifying appellant as the person who committed the offense and establishing his intent to commit to the offense. Further, appellant claimed that he should have been convicted of the lesser related offenses of trespass and/or malicious destruction of property, if convicted at all.

Our review of the record on appeal reveals that the district court did not err in rejecting these claims. Appellant's counsel on appeal challenged the sufficiency of the evidence to support the verdict, and this court concluded that sufficient evidence supported the jury's finding of guilt. The doctrine of law of the case prevents relitigation of this issue, and the doctrine "cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."⁷ Thus, appellant's efforts to further refine this claim and to circumvent application of the doctrine by construing any alleged

⁵See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath v. Jones, 941 F.2d 1126, 1132 (11th Cir. 1991)).

⁶See Strickland, 466 U.S. at 697.

⁷Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

insufficiency of the evidence as a violation of his right to due process of law are unavailing.

Appellant next contended that his appellate counsel was ineffective for failing to argue on direct appeal that the district court abused its discretion in admitting the testimony of certain State witnesses. Appellant apparently claimed that the probative value of the testimony of two State witnesses in particular, and of all of the State's identification witnesses in general, was substantially outweighed by the danger of unfair prejudice.

Appellant is not entitled to relief on this claim. With respect to the two specified State witnesses, during cross-examination, appellant's trial counsel successfully impeached one witness as biased, called into question the chain of custody of an item of tangible evidence central to the State's case, and impeached the other witness, a LVMPD officer, with omissions in his impound report and possible falsifications in his arrest report. Appellant's claim that the testimony was unduly prejudicial is without merit. The responses elicited by defense counsel assisted appellant's defense. To the extent that appellant may have contended that inconsistent testimony regarding the witnesses' identification of appellant was unduly prejudicial, we conclude that this argument is likewise without merit. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.⁸ Moreover, the determination of whether to admit evidence is within the sound discretion of the district court, and that determination

⁸See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

will not be disturbed unless manifestly wrong.⁹ The admission of the eyewitnesses' testimony was probative of whether appellant was the person who committed the attempted burglary, and appellant failed to articulate how this evidence was prejudicial beyond its being inculpatory. Thus, appellant failed to demonstrate that the district court's decision to admit the challenged testimony was manifestly wrong. Appellate counsel was not ineffective for failing to raise this issue because it did not have a reasonable probability of success on appeal.

Finally, appellant contended that his appellate counsel was ineffective for failing to argue on direct appeal that the district court improperly adjudicated appellant a habitual criminal.¹⁰ Specifically, appellant alleged that the district court failed to exercise discretion in adjudicating him a habitual criminal, and instead based its determination solely on appellant's numerous prior felony convictions. A review of the

⁹See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

¹⁰To the extent that appellant claimed that his appellate counsel's failure to raise this claim on direct appeal indicated a conflict of interest between appellant and his appellate counsel as well as a failure on the part of appellate counsel to communicate with appellant, we conclude that these claims are without merit: Appellant's claims of a conflict of interest and a failure to communicate on the part of his appellate counsel are unsupported by specific factual allegations. See Hargrove v. State, 100 Nev. 498, 686 P. 2d 222 (1984) (holding that bare and naked claims unsupported by any specific factual allegations will not entitle defendant to relief).

record as a whole does not support appellant's contention.¹¹

First, the district court stated in all three judgments of conviction that "the Court . . . certified felony convictions as acceptable to support an adjudication of habitual criminality," (emphasis added), and that "the Court adjudicated the Defendant to be an habitual criminal pursuant to the provisions of NRS 207.010(2)." NRS 207.010(2) provides, in pertinent part, that "[t]he trial judge may, at his discretion, dismiss a count under this section." Thus, the judgment of conviction supports a conclusion that the district court did not adjudicate appellant a habitual criminal solely on the basis of his prior felony convictions but properly determined that it was just and proper to impose habitual criminal status in the instant case.

Second, at appellant's sentencing hearing, the district court judge preliminarily commented that he had "to do [his] job in a calm, compassionate manner and do what's right for the State and for the defendant." Further, the district court heard arguments from both the State and defense counsel and took into consideration appellant's criminal history and a copy of the presentence report. Moreover, the district court provided appellant with the opportunity for allocution.

Thus, the record as a whole indicates that the district court was aware of its discretion regarding whether or not to adjudicate appellant a habitual criminal, and properly imposed habitual criminal

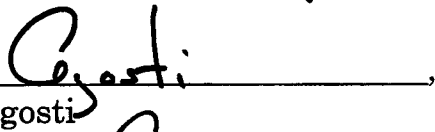
¹¹Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000) (holding that "[a]s long as the record as a whole indicates that the sentencing court was not operating under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication and that the court exercised its discretion, the sentencing court has met its obligation under Nevada law.").


status in the instant case. We therefore conclude that appellate counsel was not ineffective for failing to raise this issue because it did not have a reasonable probability of success on appeal.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹² Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹³


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Sally L. Loehrer, District Judge
Attorney General/Carson City
Clark County District Attorney
Thomas Keith Wright
Clark County Clerk

¹²See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹³We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.