

IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY J. HOYT,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35246

FILED

JAN 02 2002

JANNETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. B. [Signature]*
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 September 3, 1996, the district court convicted appellant, pursuant to a jury trial, of burglary while in possession of a firearm, first-degree kidnapping with the use of a deadly weapon, robbery with the use of a deadly weapon, and child abuse and neglect with the use of a deadly weapon. The district court sentenced appellant to serve two terms of life in the Nevada State Prison with the possibility of parole after five years; three prison terms of twenty-six to one hundred and twenty months; and two terms of one year in the Clark County Detention Center, all terms to run consecutively. This court dismissed appellant's direct appeal, but instructed the district court to vacate the deadly weapon enhancement imposed pursuant to the conviction for child abuse.¹ The remittitur issued on December 11, 1998.

On August 20, 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

¹Hoyt v. State, Docket No. 29144 (Order Dismissing Appeal, September 4, 1998).

02-00053

represent appellant or to conduct an evidentiary hearing. On November 17, 1999, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised the following claims that could have been asserted in his direct appeal: (1) that appellant's confession upon his arrest was coerced; (2) that the State lost or destroyed allegedly exculpatory evidence; (3) that the prosecutor committed misconduct; (4) that the district court erred in admitting unduly prejudicial evidence; and (5) that the district court issued an improper jury instruction on reasonable doubt. Appellant waived these claims by failing to raise them in his direct appeal.² Therefore, we conclude that the district court did not err in denying these claims.

Appellant next raised the following claims previously presented in his direct appeal: (1) that the district court erred by refusing to order additional testimony from the victim; (2) that the district court was biased; (3) that the district court erred in disallowing testimony regarding the victim's character and alleged prior bad act; (4) that appellant was improperly convicted of both kidnapping and robbery; (5) that the district court issued an improper jury instruction on kidnapping; and (6) that the victim's pretrial identification of appellant was unduly suggestive. This court rejected these claims in appellant's direct appeal. The doctrine of the law of the case prevents further litigation of these issues,³ and appellant cannot avoid this doctrine "by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."⁴

Appellant next raised numerous claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel

²See NRS 34.810(1)(b); Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) (issues that could have been raised on direct appeal from a judgment of conviction based on a guilty plea are waived), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

³See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

⁴Id. at 316, 535 P.2d at 799.

sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.⁵ The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁶

First, appellant contended that his counsel failed to conduct necessary pre-trial investigation of appellant's alibi defense. Specifically, appellant argued that his counsel failed to interview witnesses and failed to investigate items of exculpatory evidence allegedly establishing appellant's presence at a 7-Eleven store during the time that the instant crimes were committed. The record belies appellant's assertion that such investigation would have yielded exculpatory evidence.⁷ A thorough review of the record reveals that appellant could not have been at the 7-Eleven until well after 4:00 a.m., the time when the instant crimes occurred. Thus, we conclude that counsel's decision not to conduct appellant's suggested pretrial investigation did not fall below an objective standard of reasonableness.⁸

Next, appellant presented a litany of alleged instances of ineffective assistance of counsel at trial including, but not limited to a claim that defense counsel was "reduced to senseless babbling," and that he: (1) failed to conduct an "intensive" cross-examination of the State's witnesses regarding the State's failure to preserve items of allegedly exculpatory tangible evidence; (2) failed to object to allegedly leading and compound questions; (3) failed to object to alleged instances of prosecutorial misconduct; (4) failed to object to a "prejudicial improper

⁵See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁶Strickland, 466 U.S. at 697.

⁷Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

⁸Strickland, 466 U.S. at 691 (providing that counsel must make a reasonable investigation in preparation for trial or a reasonable decision not to investigate).

prior bad act statement;" (5) failed to object to admission of an allegedly prejudicial 911 tape; (6) failed to object to an allegedly improper jury instruction regarding reasonable doubt; (7) failed to be sufficiently knowledgeable regarding Nevada statutes and case law; and (8) failed to properly respond to the State's hearsay objection.

Appellant's defense attorney, Mr. Robert Glennen, admitted in a sworn declaration filed with the district court on appellant's behalf that he had made several errors in his representation of appellant. Even assuming, however, that some of counsel's actions fell below an objective standard of reasonableness, we conclude that none of these alleged deficiencies were so severe as to render the jury's verdict unreliable.⁹

Finally, appellant contended that his appellate counsel failed "to investigate and identify and present each of the trial errors on appeal."¹⁰ Appellate counsel does not have a constitutional duty to raise every non-frivolous issue on appeal, even when the appellant requests that a particular issue be raised.¹¹ To the contrary, this court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹² Appellant's counsel on appeal raised ten issues and succeeded in having one deadly weapon enhancement vacated by this court. Moreover, appellant has failed to specify any appellate issue with a reasonable probability of success.¹³ We therefore conclude that the district

⁹See Hargrove, 100 Nev. at 502, 686 P.2d at 225 (holding that bare and naked claims unsupported by any specific factual allegations will not entitle defendant to relief).

¹⁰To the extent that appellant complained of appellate counsel's ignorance of procedural rules regarding the filing of direct appeals, we conclude that appellant suffered no prejudice. This court decided appellant's direct appeal on the merits.

¹¹See Jones v. Barnes, 463 U.S. 745 (1983).


¹²See Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

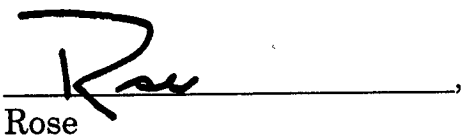
¹³See Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (providing, in pertinent part, that the Strickland test applies to claims of ineffective assistance of appellate counsel, and that "[t]o establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal.").


court did not err in rejecting appellant's claim of ineffective assistance of appellate counsel.

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.¹⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Shearing

 J.
Rose

 J.
Becker

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General/Carson City
Clark County District Attorney
Tommy J. Hoyt
Clark County Clerk

¹⁴See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).