

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS KEITH WRIGHT,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35307

FILED

NOV 20 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

THOMAS KEITH WRIGHT,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35567

ORDER OF AFFIRMANCE

Docket No. 35307 is a proper person appeal from a district court order denying appellant's petition for a writ of mandamus. Docket No. 35567 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. We elect to consolidate these cases for disposition.¹

On February 27, 1997, the district court convicted appellant, pursuant to a jury verdict, of burglary while in possession of a deadly weapon (Count I) and grand larceny (Count II). The district court adjudicated appellant a habitual criminal and sentenced him to serve in the Nevada State Prison a term of life with the possibility of parole for Count I, and to serve a consecutive term of ninety-six (96) to two hundred-forty (240) months for Count II. This court dismissed appellant's appeal from his judgment of conviction.² Remittitur issued June 23, 1999.

¹See NRAP 3(b).

²Wright v. State, Docket No. 30198 (Order Dismissing Appeal, May 28, 1999).

01-19476

On September 15, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the habeas petition. On November 3, 1999, appellant filed a petition for writ of mandamus in the district court. The State did not oppose appellant's mandamus petition. 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 December 10, 1999, the district court denied appellant's petition for writ of mandamus. On December 16, 1999, the district court denied appellant's petition for writ of habeas corpus. These appeals followed.³

We first consider appellant's petition for writ of habeas corpus. In his habeas petition, appellant first contended that he received ineffective assistance of appellate counsel. Specifically, appellant alleged that his attorney failed to provide this court with an adequate record to determine appellant's claim, raised on direct appeal, that the district court erroneously adjudicated him a habitual criminal because it failed to make the actual judgment that appellant deserved to be declared a habitual criminal.⁴ In fact, counsel for appellant failed to provide this court with the sentencing transcript for review. As a result, this court was unable to determine the merits of appellant's claim on direct appeal.

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.⁵ "Deficient" assistance of counsel is representation that falls below an objective standard of reasonableness.⁶ To establish prejudice based on the deficient

³In his December 14, 1999 notice of appeal, appellant stated that he appealed from "the District Court's Order denying Post-conviction Petition, entered in this action on the 30th day of November, 1999." After reviewing the documents on file with this court, including the minute entries for November 30, 1999, this court concludes that the December 14, 1999 notice of appeal is an appeal from the order of the district court denying appellant's proper person petition for a writ of mandamus.

⁴See Clark v. State, 109 Nev. 426, 851 P.2d 426 (1993).

⁵See Hill v. Lockhart, 474 U.S. 52 (1985); Strickland v. Washington, 466 U.S. 668 (1984).

⁶Strickland, 466 U.S. at 688.

assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal.⁷

Even assuming counsel's failure to provide the sentencing transcript was objectively unreasonable, appellant cannot demonstrate that he was prejudiced by counsel's deficient performance because appellant's claim is without merit. "Nevada law requires a sentencing court to exercise its discretion and weigh the appropriate factors for and against the habitual criminal statute before adjudicating a person as a habitual criminal."⁸ Although it is easier for this court to determine whether the sentencing court exercised its discretion where the sentencing court makes particularized findings and specifically addresses the nature and gravity of the prior convictions, this court has never required such explicit findings.⁹ Instead, we look to the record as a whole to determine whether the district court exercised its discretion or was operating under a misconception that habitual criminal adjudication is automatic upon proof of the prior convictions.¹⁰

At the sentencing hearing, counsel for the State asked the district court to adjudicate appellant a habitual criminal, thus implying that this determination was one within the district court's discretion. The State vigorously argued in favor of finding appellant a habitual criminal, a necessary effort only where that determination is discretionary in the district court. The district court judge acknowledged defense counsel's right to speak on appellant's behalf and asked appellant whether he wished to speak "in mitigation." Defense counsel referred to the district court's having studied the pre-sentence investigation report for purposes of weighing whether appellant should be adjudicated a habitual criminal. Moreover, the State provided the district court with a history of appellant's prior felony convictions and a packet of prior felony convictions had been admitted. Defense counsel concurred that the convictions recited

⁷Kirksey, 112 Nev. at 998, 923 P.2d at 1114 (citing Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath v. Jones, 941 F.2d 1126, 1132 (11th Cir. 1991)).

⁸Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000).

⁹Id.

¹⁰Id., 996 P.2d at 893-94.

by the State were "exactly what's in the PSI." In his habeas petition, appellant himself referred to his having seven prior felony convictions. We conclude that the record as a whole indicates that the district court understood its sentencing authority and appropriately exercised its discretion in deciding to adjudicate appellant a habitual criminal. Therefore, appellant failed to demonstrate that his counsel was ineffective for failing to provide the sentencing transcript to this court on direct appeal.

In his habeas petition, appellant next raised two issues already presented to and rejected by this court on direct appeal. Specifically, appellant again alleged (1) that the district court improperly admitted evidence of prior bad acts, and (2) that insufficient evidence existed to support his conviction for grand larceny. The doctrine of law of the case prevents relitigation of these issues.¹¹ Further, "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."¹²

Finally, appellant also raised the following new claims: (1) that he was denied due process of law because his pre-trial photo line-up and the in-court identification procedures used to identify appellant as the perpetrator were tainted and suggestive, (2) that he was illegally sentenced under the habitual criminal statute, and (3) that insufficient evidence existed to support his burglary conviction. Appellant waived these claims by failing to raise them in his direct appeal.¹³ Moreover, appellant did not attempt to demonstrate good cause and prejudice for failing to raise these claims in the earlier proceeding.¹⁴

We now turn to appellant's proper person appeal challenging the district court's denial of appellant's petition for writ of mandamus through which appellant sought production of certain transcripts,

¹¹Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

¹²Id. at 316, 535 P.2d at 799.


¹³See NRS 34.810(1)(b)(2); see also Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

¹⁴See NRS 34.810(1)(b).

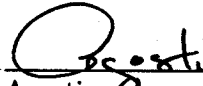
documents and trial exhibits. We have reviewed the documents on file with this court, and we conclude that the district court properly exercised its discretion in declining to issue mandamus in this matter. Petitioner did not make the threshold showing of need for the items requested. Specifically, petitioner did not show that the points he wished to raise had merit and such merit would tend to be supported by a review of these materials.¹⁵

Having reviewed the records 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.¹⁶ Accordingly, we

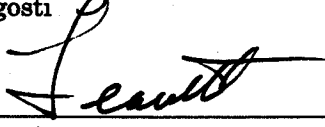
ORDER the judgments of the district court AFFIRMED.¹⁷



Young J.



Agosti J.



Leavitt J.

cc: Hon. John S. McGroarty, District Judge
Attorney General/Carson City
Clark County District Attorney
Thomas Keith Wright
Clark County Clerk

¹⁵Peterson v. Warden, 87 Nev. 134, 136, 483 P.2d 204, 205 (1971).

¹⁶See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁷We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.