

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT STEVEN YOWELL,
Appellant,
vs.
WARDEN, NORTHERN NEVADA
CORRECTIONAL CENTER,
Respondent.

No. 58251

FILED

NOV 17 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

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.¹ Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

In his petition, filed on January 21, 2011, appellant claimed that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, 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

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).

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). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697. Generally, the "[t]actical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances." Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), abrogated in part on other grounds by Harte v. State, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000). However, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. Finally, a litigant is entitled to an evidentiary hearing on all claims supported by sufficient factual allegations, which, if true, would entitle the litigant to relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Appellant first claimed that counsel was ineffective for failing to investigate and object to the photographic lineup used to identify appellant, which was later admitted at trial. The district court rejected this claim, concluding that counsel's actions were the result of trial strategy. While counsel may have had valid strategic reasons for not objecting to use of the lineup, because the district court did not hold an evidentiary hearing on this claim, the record is insufficient to determine whether counsel's actions were the result of a legitimate tactical decision. Strickland, 466 U.S. at 690-9; Hargrove, 100 Nev. at 502-503, 686 P.2d at 225. In his opening brief on direct appeal, counsel stated that he believed his actions regarding the lineup to be ineffective. At sentencing, the

district court commented that the photographic lineup “showed the greatest incompetence of practically anything I can recall in my career.” In addition, given the critical role played by the victim’s eventual eyewitness identification of appellant, without an evidentiary hearing, we are unable to conclude that there existed no reasonable probability of a different result at trial had counsel further investigated and objected to the use of the photographic lineup, or made further arguments against reliability of the lineup. Therefore, we remand this matter to the district court for an evidentiary hearing on this claim.²

Next, appellant claimed that counsel was ineffective for failing to investigate additional alibi witnesses. Appellant failed to identify with specificity any witnesses that counsel should have identified, nor did he identify any specific testimony by these witnesses that would have had a reasonable probability of affecting the jury’s verdict. See Hargrove v. State, 100 Nev. 498, 502-503, 686 P.2d 222, 225 (1984). Accordingly, the district court did not err in denying this claim.

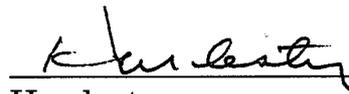
Finally, appellant claimed that the State failed to verify the crime scene to confirm jurisdiction and that no genetic evidence connected him to the victim. Appellant could have raised these claims on direct appeal and failed to do so. Therefore, appellant waived the right to raise these claims absent a demonstration of good cause and prejudice. NRS 34.810(1)(b)(2); NRS 34.810(3). Appellant raised no facts to show either good cause or prejudice. Further, to the extent these claims constituted a claim of insufficient evidence, this court concluded on direct appeal that

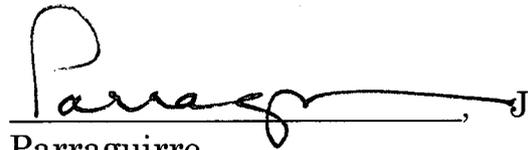
²On remand, the district court may also wish to consider whether the appointment of counsel is appropriate pursuant to NRS 34.750.

appellant's conviction was supported with sufficient evidence, indicating that these claims were barred by the doctrine of law of the case, which "cannot be avoided by a more detailed and precisely focused argument." Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Accordingly, the district court did not err in denying these claims. Therefore, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.³


_____, J.
Douglas


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Robert W. Lane, District Judge
Robert Steven Yowell
Nye County District Attorney
Attorney General/Carson City
Nye County Clerk

³We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.