

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM EMERY FODOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58274

FILED

MAR 30 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
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; Jerome T. Tao, Judge.

In his petition, filed on January 12, 2011, appellant first claimed that he received ineffective assistance of trial counsel. To prove ineffective assistance of trial 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.

First, appellant claimed that trial counsel was ineffective for failing to utilize exculpatory evidence, including various reports

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).

demonstrating discrepancies in the type of wire, the amount of wire, and the condition of the wire found in appellant's possession. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Counsel thoroughly cross-examined each of the State's witnesses, highlighting the discrepancies in the length of wire reported, and establishing that none of the witnesses could definitively testify to the exact length of the wire recovered, nor could they absolutely verify that the wire in appellant's possession had belonged to the City of Las Vegas. Given this testimony, appellant failed to establish how the result of the trial would have been different if counsel had introduced additional contradictory evidence regarding the quantity and condition of the wire. Accordingly, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to object to the fact that the State only presented testimony regarding the replacement value of the wire, and failed to present testimony regarding the fair market value of the wire. Appellant further claimed that counsel should have utilized expert testimony to establish that it was very common for copper wire to be "shorted out" and of no value. Appellant failed to demonstrate that he was prejudiced. At trial, the State presented testimony establishing that the cost to the City of Las Vegas to replace the wire was \$1,800. The State also established that the salvage price for scrap copper was up to \$4.00 per pound. While estimates regarding the exact amount of wire varied, most witnesses testified that the wire was at least 600 feet long, and photographs presented at trial documented that a significant amount of wire was recovered—so much that the police department was unable to store the wire in their evidence vault. Therefore, even if a standard market existed for copper utility wire,

appellant failed to establish any reasonable probability that the fair market value of the copper wire was less than the \$250 required to sustain a conviction for possession of stolen property. See NRS 205.275(2)(b); Cleveland v. State, 85 Nev. 635, 637, 461 P.2d 408, 409 (1969) (noting that the appropriate measure of “the value of property taken is the fair market value of the property at the time and place it was stolen if there be such a standard market”); cf. Bryant v. State, 114 Nev. 626, 630, 959 P.2d 964, 966 (1998) (concluding that because the purchase price of stolen items was only \$335, it was conceivable that fair market value of items was below the \$250 felony threshold). Accordingly, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to present the testimony of a witness who would have testified that appellant had previously worked for him as an electrician, indicating that he possessed the alleged burglary tools for a legitimate purpose. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Even if appellant had possessed the tools for a legitimate purpose at one point in time, this proposed testimony failed to establish any legitimate reason as to why appellant had the tools in his possession when he was found inside of an air conditioning unit on the Rite-Aid roof without the knowledge or permission of Rite-Aid. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to object to various convictions used by the State to support the small habitual criminal enhancement, and failing to object when the district court failed to make an adjudication of guilt on the underlying offenses. Appellant failed to demonstrate that counsel was deficient or

that he was prejudiced. Despite appellant's contentions, the district court did not rely on a "list" of ten convictions; it relied upon the eight certified judgments of conviction submitted by the State. Trial counsel objected to one of these convictions on the basis that the name did not exactly match appellant's, and was overruled. These convictions were more than ample to support a finding of habitual criminality pursuant to NRS 207.010(1)(a). Further, the judgment of conviction entered by the district court appropriately announced a finding of guilt of the underlying offenses. Accordingly, the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to move for a directed verdict when he requested it at the close of trial. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Given this court's conclusion on direct appeal that appellant's conviction was supported by sufficient evidence, Fodor v. State, Docket No. 52869 (Order of Affirmance, March 11, 2010), appellant failed to demonstrate any reasonable probability that a motion for a directed verdict would have been successful. Counsel was not required to make a futile motion. See Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Accordingly, the district court did not err in denying this claim.

In addition to his claims of ineffective assistance of trial counsel, appellant also 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 appellate counsel was ineffective for failing to argue that a police detective allowed the wire to be disposed of, knowing that it had evidentiary value, in violation of his due process rights. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Counsel argued extensively in the fast track statement that the State's failure to preserve the wire resulted in a due process violation. Appellant did not demonstrate any reasonable probability of a different outcome had counsel included additional argument. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel was ineffective for failing to argue that the State did not prove the fair market value of the copper wire. Appellant failed to demonstrate that he was prejudiced. As explained above, appellant failed to show any reasonable probability that the value of the wire was less than \$250. Accordingly, the district court did not err in denying this claim.

Third, appellant claimed that appellate counsel was ineffective for failing to respond to the State's assertion in its fast track response that the fact that copper wire was often sold to recycling centers for \$4.00 a pound showed that appellant possessed the wire for his own gain. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Counsel had already argued in appellant's fast track statement that the State had provided insufficient evidence to sustain a

conviction. The above statement was not impermissible argument by the State, and counsel was not required to make futile objections or arguments. Donovan, 94 Nev. at 675, 584 P.2d at 711. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that appellate counsel was ineffective for failing to respond to a statement in the State's fast track response that appellant had told the police that a man named Tim had taken the wire from the location at Durell and Decatur. Appellant claimed that this statement was stricken from the record as hearsay, and was inappropriately relied upon by the State on appeal. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Despite appellant's contentions, the district court did not strike this entire statement from the record—it only struck the part of the statement that referred specifically to the location at Durell and Decatur. The portion of the statement indicating that "Tim" had taken the wire was properly admitted. Given the other testimony in the record specifically referring to the Durell and Decatur location, appellant failed to demonstrate how the result of the appeal would have been different had counsel filed a reply highlighting this relatively minor error. Accordingly, the district court did not err in denying this claim.

Fifth, appellant claimed that appellate counsel was ineffective for failing to argue that the district court abused its discretion when it wrongfully decided appellant's pretrial motion pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and his pretrial petition for a writ of habeas corpus. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Contrary to appellant's claims, appellate counsel thoroughly briefed the Brady issue on direct appeal. Further, given this

court's conclusion on appeal that appellant's conviction was supported by sufficient evidence, appellant failed to demonstrate any reasonable probability of a different result had counsel included an argument that the district court erred in denying appellant's pretrial petition for a writ of habeas corpus challenging the sufficiency of the evidence. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that appellate counsel failed to provide specific analysis for his claim related to the sufficiency of the evidence. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Notably, appellant failed to allege any specific facts or arguments that counsel should have added to its analysis of the sufficiency of the evidence. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Accordingly, the district court did not err in denying this claim.

Seventh, appellant claimed that appellate counsel was ineffective for failing to argue that the sentencing judge failed to make an appropriate adjudication of guilt. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. As explained above, the judgment of conviction contained a proper adjudication of guilt. Accordingly, the district court did not err in denying this claim.

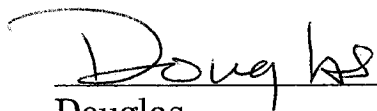
Eighth, appellant claimed that appellate counsel was ineffective for failing to argue that the physical burglary tools were not provided to the defense until the eve of trial, and that a booking photo admitted of appellant at trial was overly prejudicial. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Appellant provided no specific facts demonstrating how the actual physical burglary tools were necessary to his preparation for trial, or that the State

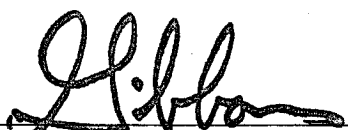
had denied any requests by trial counsel to inspect the tools. See id. Similarly, appellant failed to allege any specific facts demonstrating how the booking photograph of him was more prejudicial than probative. Id. Counsel was not required to make futile or meritless arguments. See Ford, 105 Nev. at 853, 784 P.2d at 95; Donovan, 94 Nev. at 675, 584 P.2d at 711. Accordingly, the district court did not err in denying this claim.

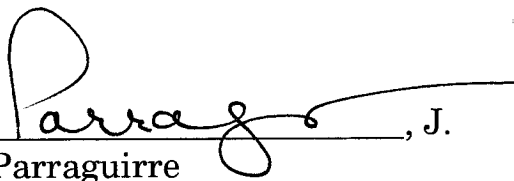
Finally, appellant claimed that (1) the district court violated appellant's due process rights when it adjudicated appellant a small habitual criminal pursuant to NRS 207.010(1)(a), (2) appellant is wrongfully in custody due to multiple instances of prosecutorial misconduct, (3) appellant's conviction and sentence are invalid under state and federal due process and equal protection guarantees, and (4) the district court wrongfully decided appellant's pretrial petitions and motions. 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). Appellant raised no facts to show either good cause or prejudice. Accordingly, the district court did not err in denying these claims.²

²To the extent appellant attempted to re-argue the merits of his Brady claim relating to the release of the copper wire evidence, this court already considered and rejected this claim on direct appeal. Fodor v. State, Docket No. 52869 (Order of Affirmance, March 11, 2010). Accordingly, this claim is also 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).

For the reasons stated above, we
ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Jerome T. Tao, District Judge
William Emery Fodor
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk