

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY DEWAYNE BRASS,

No. 35449

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

**DEC 12 2001**

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

ORDER OF AFFIRMANCE

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

On August 23, 1996, the district court convicted appellant Anthony Dewayne Brass, pursuant to a jury verdict, of two counts of burglary while in possession of a firearm, two counts of conspiracy to commit robbery, and two counts of robbery with the use of a deadly weapon. The district court sentenced Brass to serve numerous terms totaling twenty-four to sixty years in prison. Brass appealed the judgment of conviction, arguing that the district court erred in denying his motion to suppress physical evidence and his confession. This court rejected those claims and dismissed the appeal.<sup>1</sup> The remittitur issued on September 23, 1998.

On September 3, 1999, Brass filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Brass or to conduct an evidentiary hearing. On December 10, 1999, the district court denied the petition. This appeal followed.

In his petition, Brass claimed that trial counsel provided ineffective assistance by failing to conduct an adequate pretrial investigation. Specifically, Brass alleged that trial counsel failed to interview certain named individuals who would have provided an alibi for

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<sup>1</sup>Brass v. State, Docket No. 29131 (Order Dismissing Appeal, September 4, 1998).

Brass and that trial counsel failed to interview the victims. We conclude that these contentions lack merit.

Although the petition does provide specific factual allegations regarding the names and addresses of the alibi witnesses and alleges that counsel failed to interview them, these allegations, even if true, would not entitle Brass to relief. Brass would not be entitled to relief because he cannot demonstrate that but for counsel's failure to interview the alleged alibi witnesses there is a reasonable probability that the verdict would have been different.<sup>2</sup> The State presented overwhelming evidence that Brass was guilty of the charged offenses, including videotapes of the two incidents and a confession by Brass. Under the circumstances, we conclude that even if counsel had interviewed the alleged alibi witnesses and presented testimony from them, there is no reasonable probability that the verdict would have been different and, therefore, Brass cannot demonstrate prejudice as a result of trial counsel's allegedly deficient performance.

We further conclude that trial counsel's alleged failure to interview the victims does not constitute ineffective assistance of counsel. Trial counsel thoroughly and effectively cross-examined the victims, and Brass failed to specify how counsel's performance would have been effected had he interviewed the victims prior to trial. Because Brass failed to allege prejudice as a result of counsel's alleged failure to interview the victims, we conclude that this claim of ineffective assistance lacks merit.

Brass also claimed that appellate counsel provided ineffective assistance by failing to raise the following issues on appeal: (1) the State presented insufficient evidence to support the jury's verdict; and (2) the victims' in-court identifications of Brass were the result of inherently suggestive and impermissible pretrial identification procedures.<sup>3</sup> We conclude that these claims also lack merit.

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<sup>2</sup>See Strickland v. Washington, 466 U.S. 668, 694 (1984) (explaining prejudice prong of ineffective assistance test).

<sup>3</sup>To the extent that Brass also raised these claims independently of the ineffective assistance claims, we conclude that they were waived. See NRS 34.810(1)(b). We have addressed the merits of the underlying claims only to the extent necessary to resolve the ineffective assistance claims. See Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

Appellate counsel is not required to raise every nonfrivolous issue. Thus, "[t]o establish prejudice based on the deficient assistance of appellate counsel, a petitioner must show that the omitted issue would have a reasonable probability of success on appeal."<sup>4</sup>

Having reviewed the appellate issues raised by Brass, we conclude that they would not have had a reasonable probability of success on appeal. First, after viewing the evidence in the light most favorable to the State, we conclude that there was clearly sufficient evidence from which a rational trier of fact could have found the essential elements of the charged offenses beyond a reasonable doubt.<sup>5</sup> Second, after reviewing the record and the allegations in the petition, we conclude that the mere fact that the victims were unable to identify Brass in a pretrial photographic lineup did not render their in-court identifications inadmissible.<sup>6</sup> Because these claims would not have had a reasonable probability of success on appeal, we conclude that Brass cannot demonstrate prejudice as a result of appellate counsel's failure to raise them.<sup>7</sup>

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<sup>4</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>5</sup>See Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

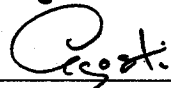
<sup>6</sup>See Browning v. State, 104 Nev. 269, 274, 757 P.2d 351, 354 (1988). We note that the results of a physical lineup some time after the photographic lineup were not admitted at trial based on a defense motion in limine. The jury was not informed that there was a physical lineup. Moreover, defense counsel extensively cross-examined the victims regarding the basis for their in-court identifications and their inability to identify Brass in the photographic lineup.


<sup>7</sup>To the extent that Brass also alleged that appellate counsel should have challenged the voluntariness of his confession, we conclude that claim lacks merit. The district court considered the voluntariness of the confession prior to trial and found the interviewing officer's testimony regarding the circumstances surrounding the confession to be credible. Given the evidence presented to the district court and the deference that this court would have given the district court's determination that the confession was voluntary, we conclude that a challenge to the voluntariness of Brass' confession would not have had 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.<sup>8</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Young

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Leavitt

cc: Hon. Sally L. Loehrer, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Anthony Dewayne Brass  
Clark County Clerk

<sup>8</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).