

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD THOMAS JOHNSTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59632

FILED

SEP 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

On May 23, 2006, appellant was convicted, pursuant to a jury verdict, of 6 counts of sexual assault on a minor under the age of 14, 3 counts of attempted sexual assault on a minor under the age of 14, and 6 counts of lewdness with a child under the age of 14. This court dismissed appellant's subsequent late of notice of appeal from the judgment of conviction. Johnston v. State, Docket No. 47616 (Order Dismissing Appeal, August 10, 2006). With the assistance of counsel, appellant filed a post-conviction petition for a writ of habeas corpus, raising a claim that he was deprived of a direct appeal. The district court determined that appellant was deprived of a direct appeal and directed counsel to pursue the remedy set forth in Lozada v. State, 110 Nev. 349, 871 P.2d 944

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

(1994).² In a petition filed pursuant to Lozada, appellant's counsel litigated both direct appeal claims and post-conviction claims. This court affirmed the judgment of conviction and affirmed the district court's denial of appellant's post-conviction claims. Johnston v. State, Docket No. 52830 (Order of Affirmance, June 23, 2010). The remittitur issued on July 19, 2010.

On June 28, 2011, appellant filed a proper person post-conviction petition for a writ of habeas corpus. In his petition, appellant raised direct appeal claims, claims challenging whether he received the effective assistance of trial counsel, and claims challenging whether he received the effective assistance of Lozada counsel. The district court determined that the petition was time-barred, with the exception of the claims challenging the effective assistance of his Lozada counsel.

The district court incorrectly determined that the petition was procedurally time-barred. A petition is timely filed pursuant to NRS 34.726(1) when it is filed within one year from issuance of the remittitur on direct appeal. Because the Lozada appeal took the place of the direct appeal, the proper date to use for timeliness purposes is the remittitur date from the Lozada appeal—July 19, 2010. Because appellant's petition was filed within one year from the remittitur date of the Lozada appeal, the petition was timely filed.

Ineffective assistance of trial counsel

Nevertheless, appellant faced a different procedural bar—NRS 34.810(1)(b). NRS 34.810(1)(b)(2) provides that the district court shall

²Appellant's pursuit of the remedy predated this court's adoption of the remedy set forth in NRAP 4(c).

dismiss a petition, challenging a conviction arising from a jury trial, where the grounds could have been raised on direct appeal or in a prior post-conviction petition, unless the petitioner can demonstrate good cause for failure to present the claim earlier and actual prejudice. Appellant's claims of ineffective assistance of trial counsel could have been raised in the prior post-conviction proceedings.³ Appellant claimed that he had good cause for his failure to raise the claims earlier because he was not aware that his counsel in the prior proceedings had raised any post-conviction claims and thought the prior proceedings were limited to his direct appeal claims. This assertion is not supported by the record as his counsel in the prior proceedings raised these claims in the supplement/Lozada petition, litigated them in the district court, and argued that the district court erred in denying his ineffective-assistance-of-trial-counsel claims. The record does not support appellant's assertion that he was unaware that his counsel was litigating both direct appeal claims and ineffective-assistance-of-trial-counsel claims.⁴ The ineffective-assistance-of-trial-counsel claims identified in the instant petition were reasonably available to be raised in the prior proceedings. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Thus, we conclude that appellant did not demonstrate good cause for his failure to raise these claims earlier.

³Notably, appellant raised claims challenging the effective assistance of trial in the prior post-conviction proceedings and this court reviewed those claims on appeal. Johnston v. State, Docket No. 52830 (Order of Affirmance, June 23, 2010).

⁴The record shows that appellant was present during the proceedings in the lower court.

Even assuming that appellant could demonstrate good cause for his failure to raise his ineffective-assistance-of-trial-counsel claims earlier, appellant's petition was procedurally barred because he did not demonstrate actual prejudice—that any error worked to his actual and substantial disadvantage. See Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993). To prove ineffective assistance of 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 his trial counsel was ineffective for failing to seek the disqualification of Judge Stewart Bell for implied bias because he was the Clark County District Attorney at the time the criminal proceedings began. See NRS 1.230(2)(c) (providing that a judge shall not act in action or proceeding when the judge has been the "attorney or counsel for either of the parties in the particular action or proceeding before the court"). Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that Judge Bell acted as an attorney in the instant case as he made no appearances on behalf of the State and there is nothing in the

record to indicate he personally participated in the case.⁵ See Turner v. State, 114 Nev. 682, 688, 962 P.2d 1223, 1226 (1998).

Second, appellant claimed that his trial counsel was ineffective for failing to raise a statute of limitations defense because the offense was not “secret.” Appellant failed to demonstrate that his trial counsel’s performance was deficient or that he was prejudiced. The criminal complaint was filed before the victim’s twenty-first birthday. See NRS 171.095(1)(b)(1); see also Bailey v. State, 120 Nev. 406, 409, 91 P.3d 596, 598 (2004) (recognizing that NRS 171.095(1)(b)(1) does not contain any language limiting its application to offenses committed in a secret manner).

Third, appellant claimed that his trial counsel should have objected during the closing argument because the prosecutor allegedly vouched for the credibility of the victim and commented on appellant’s testimony. Appellant failed to demonstrate that his trial counsel’s performance was deficient for failing to object during the closing arguments because the prosecutor did not vouch for the credibility of the victim. Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (recognizing that the prosecutor improperly vouches for a witness when the prosecutor places the prestige of the government behind the witness). Further, appellant failed to demonstrate that the prosecutor made any improper comments about his testimony. Appellant further failed to demonstrate that there was a reasonable probability of a different outcome had he objected during closing arguments.

⁵Appellant made no argument that actual bias existed.

Fourth, appellant claimed that his trial counsel failed to investigate the background of the victim, failed to interview the victim, failed to conduct legal research, and failed to request a physical or psychological examination. Appellant failed to provide any facts in support of these claims, and thus, he failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced.⁶

Fifth, appellant claimed that his trial counsel failed to investigate whether telephone calls were unlawfully intercepted. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to specifically identify telephone calls intercepted or provide any cogent argument regarding how the calls were unlawfully intercepted. To the extent that appellant was referring to the "pretext" telephone call placed from the victim to appellant, listened to but not recorded by the police, appellant failed to demonstrate the police violated any protected right. See NRS 179.425(1); State v. Reyes, 107 Nev. 191, 808 P.2d 544 (1991). Further, as acknowledged by appellant, trial counsel did object to testimony about the phone call but the district court overruled the objection.⁷

Sixth, appellant claimed that his trial counsel failed to object to a justice of the peace pro tempore presiding over the preliminary hearing. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to

⁶Notably the trial was conducted years after the abuse.

⁷To the extent that he claimed that trial counsel should have objected to the jury hearing about the contents of the phone call because of alleged ambiguities, trial counsel did object.

demonstrate that there was any basis for challenging the justice of the peace pro tempore. See NRS 4.032.

Because appellant failed to demonstrate that his trial counsel was ineffective for the reasons discussed above, appellant failed to demonstrate actual prejudice. Therefore, we conclude that these claims were procedurally barred pursuant to NRS 34.810(1)(b).

Ineffective assistance of Lozada counsel

Appellant raised a number of claims that he received ineffective assistance from his Lozada counsel in pursuing his direct appeal claims.⁸ 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). Both components of the inquiry must be shown, Strickland, 466 U.S. at 697. 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

⁸Appellant's claims that his Lozada counsel in his Lozada appeal provided ineffective assistance of counsel could not have been raised earlier. Thus, these claims were not subject to the procedural bar set forth in NRS 34.810(1)(b)(2).

To the extent that appellant raised any of the underlying claims independently from a claim of ineffective assistance of counsel, those claims were waived as they could have been raised in his Lozada appeal and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b); NRS 34.810(3).

issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, appellant claimed that counsel should have argued that Judge Bell should have been disqualified due to implied bias, the statute of limitations had run, the prosecutor vouched for the credibility of the victim during closing arguments, telephone calls were unlawfully intercepted, and the justice of the peace pro tempore was not qualified to preside over the preliminary hearing. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced for the reasons discussed previously. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his counsel failed to argue that there was insufficient evidence because the victim testified that she resisted some of appellant's conduct, indicating to appellant that she could have resisted all of the conduct. Appellant also claimed that the victim's testimony indicated that she understood the nature of the act. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. The victim, who was eleven years old when the abuse started, testified that she did not consent to appellant's sexual activities. Resistance is not an element of sexual assault, or attempted sexual assault. See NRS 200.366. Rather, sexual assault is the sexual penetration of another person by force or against the will of the other person or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct. See id. The fact that the victim may have understood the nature of the act does not negate the evidence that the contact was against the victim's will and under

circumstances where appellant knew or should have known that the victim was incapable, mentally and physically, of resisting. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his appellate counsel failed to argue that the jury should have received a lesser-included offense instruction for statutory sexual seduction. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Trial counsel never requested such an instruction. Appellant failed to demonstrate that the district court was required to sua sponte provide such an instruction as there was no evidentiary foundation for statutory sexual seduction. See Rosas v. State, 122 Nev. 1258, 1264-65 n.9, 147 P.3d 1101, 1106 n.9 (2006); see also NRS 200.364(5). The only testimony presented at trial was that the sexual contact was without the victim's consent. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel failed to argue that the district court failed to adequately instruct the jury because he handed the jury the instructions to read. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. The record shows that the jury was read the instructions. Therefore, we conclude that the district court did not err in denying this claim.

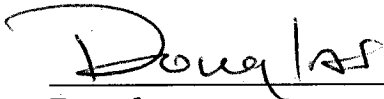
Fifth, appellant claimed that his counsel failed to argue that he was denied the right to be present on the date that the judgment of conviction was amended to include the special sentence of lifetime supervision. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced because the special sentence of lifetime supervision was legally required as a result of his


conviction of multiple sex offenses. NRS 176.0931. Therefore, we conclude that the district court did not err in denying this claim.


Sixth, appellant claimed that his counsel failed to argue that he was denied the right to confront and cross-examine the victim at the preliminary hearing because the justice of the peace limited the testimony. Appellant failed to demonstrate that counsel's performance was deficient or that there was a reasonable probability of a different outcome had counsel raised this issue on appeal. Therefore, we conclude that the district court did not err in denying this claim.

Finally, as appellant failed to demonstrate error, appellant failed to demonstrate cumulative error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁹


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

⁹We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. James M. Bixler, District Judge
Richard Thomas Johnston
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk