

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTIAN ANDERSON WEBB,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59711

FILED

JUL 25 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 dismissing a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

In his petition filed on August 10, 2011, appellant claimed that he received ineffective assistance of trial counsel. 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.

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).

First, appellant claimed that trial counsel was ineffective for failing to file a motion to dismiss the charges against him because the justice court did not have jurisdiction to conduct a preliminary hearing on his felony charges. Appellant failed to show that counsel's performance was deficient or that he was prejudiced. The justice court has jurisdiction to conduct a preliminary hearing on felony charges and bind a defendant over for trial in the district court. See NRS 171.196 (providing for a preliminary examination in the justice court); NRS 171.206 (providing that the magistrate shall bind a defendant over to the district court if there is probable cause to believe that an offense has been committed and the defendant has committed it). Thus, a motion to dismiss on this basis would have been futile, and counsel cannot be deemed ineffective for failing to file a futile motion.² 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.

Second, appellant claimed that trial counsel was ineffective for failing to object to incomplete jury instructions and for failing to ensure that the instructions informed the jury that they had to find him guilty of all of the elements of the offenses. Appellant failed to show that counsel's performance was deficient or that he was prejudiced. Appellant claimed that the instructions were incomplete because they did not include definitions of the terms "willfully," "unlawfully," and "feloniously."

²Appellant also appeared to contend that the justice court and the district court lacked jurisdiction because an indictment or information was not filed within 48 hours of his arrest. This argument is without merit, as the record shows that the State filed an information within 15 days of his preliminary hearing, pursuant to NRS 173.035(3).

However, although “willfully” and “feloniously” were included in the description of the charges in the information, they were not elements of any of the charged offenses. See NRS 193.165; NRS 199.480; NRS 200.380; NRS 205.220; NRS 205.228; see also Quiriconi v. State, 95 Nev. 195, 196, 591 P.2d 1133, 1134 (1979) (holding that such surplus language in a charging document does not obligate the State to prove it). Further, appellant failed to demonstrate that definitions were needed for the above terms, as there was no indication that they had special meaning. See Dawes v. State, 110 Nev. 1141, 1146, 881 P.2d 670, 673 (1994) (“Words used in an instruction in their ordinary sense and which are commonly understood require no further defining instructions.”). The record belies appellant’s claim that the jury was not instructed that they had to find him guilty of all of the elements of the charged offenses. We therefore conclude that the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to investigate and rebut expert testimony that appellant’s fingerprint was found on the stolen car. Appellant failed to show that counsel’s performance was deficient or that he was prejudiced. While appellant contended that counsel should have investigated the weather at the time of the offense to determine whether the fingerprint would have been viable, he failed to explain what further investigation would have revealed. In addition, in light of his own admission to the police that he had been in the car on the night that it was stolen, he failed to demonstrate a reasonable probability of a different outcome at trial. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to object to Detective Melgarejo’s testimony about a possible

suspect, Aidon Fergosa, and for failing to investigate and call Fergosa as a witness at trial. Appellant failed to show that counsel's performance was deficient or that he was prejudiced. Detective Melgarejo testified that Fergosa had initially been a suspect in the robbery and had written a purported confession, but Detective Melgarejo ruled him out as a suspect based on the victim's description of the two robbers, the codefendant's admission that he and appellant had committed the robbery, and appellant's admission that he was present at the robbery but that the codefendant was the one who committed the offense. In light of appellant's own statements to the police, appellant failed to demonstrate a reasonable probability of a different outcome had counsel objected to testimony about Fergosa or called Fergosa as a witness. We therefore conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to ensure that bench conferences and the district court's oral rendition of the jury instructions were recorded and transcribed, which precluded meaningful appellate review. We conclude that appellant failed to demonstrate that he was prejudiced, as he has not identified any issue that this court was unable to meaningfully review due to the failure to record bench conferences. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that "bare" or "naked" claims are insufficient to grant relief). Further, the written jury instructions were included in the record and available for our review on appeal, and appellant did not demonstrate that the failure to make a record of the oral instructions undermined the reliability of the outcome of the trial or impeded this court's appellate review. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that counsel was ineffective for failing to be present with appellant when the judgment of conviction was signed. Appellant asserted that, because the written sentence in the judgment of conviction differed from the sentence pronounced orally by the district court at the sentencing hearing, he had a right to be present when the district court signed the judgment of conviction and modified his sentence. Appellant failed to show that counsel's performance was deficient or that he was prejudiced. There is no requirement that counsel or appellant be present when a judgment of conviction is signed. Further, appellant conceded in his petition that he "has no argument with [the] sentence imposed." Indeed, the sentence contained in his written judgment is more favorable to him than the sentence pronounced orally by the district court.³ Thus, the district court did not err in denying this claim.

Seventh, appellant claimed that counsel was ineffective because he did not argue for seven additional days of credit that appellant felt he earned between the oral pronouncement of sentence and the filing of the judgment of conviction. Appellant failed to demonstrate deficiency or prejudice, as he did not demonstrate that he was denied credit from the date of oral pronouncement. We therefore conclude that the district court did not err in denying this claim.

³While the district court orally imposed a prison term of 10 years to life plus a consecutive term of 1 to 4 years for a deadly weapon enhancement on count 2, the judgment of conviction states that the sentence for count 2 is 8 to 20 years plus a consecutive term of 1 to 4 years.

Appellant next 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).

First, appellant claimed that appellate counsel was ineffective for failing to federalize the insufficiency-of-the-evidence issue on direct appeal in order to preserve it for federal habeas review. Appellant failed to demonstrate prejudice because he failed to show that he would have received a more favorable standard of review on appeal had counsel federalized his claims. See Browning v. State, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004). We decline to opine as to what claims the federal courts may or may not review, as that determination is within the province of the federal courts. Therefore, the district court did not err in denying this claim.

Second, appellant appeared to claim that appellate counsel was ineffective for failing to argue that trial counsel was ineffective. Claims of ineffective assistance of counsel should be raised in post-conviction proceedings in the district court in the first instance and are generally not appropriate for review on direct appeal. Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534-35 (2001). Appellant did not

demonstrate a reasonable probability of success had counsel raised these ineffective-assistance claims on direct appeal. Thus, the district court did not err in denying this claim.

Third, appellant claimed that appellate counsel was ineffective for failing to raise the following claims: the jury instructions were incomplete; bench conferences and the oral rendition of the jury instructions were not recorded and transcribed; appellant and trial counsel were not present when the judgment of conviction was signed; and appellant should have received seven days of additional credit. For the reasons discussed previously, appellant failed to demonstrate that counsel was deficient or that appellant was prejudiced. Thus, the district court did not err in denying this claim.

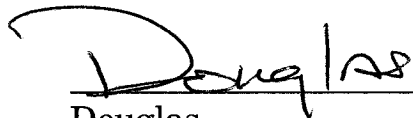
Appellant also claimed that his conviction and sentence should be reversed due to the cumulative deficiencies of counsel. Because appellant failed to make any meritorious claims of ineffective assistance of counsel, the district court did not err in denying this claim.

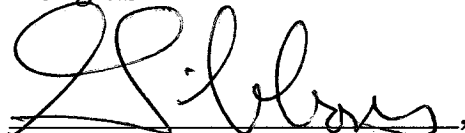
Appellant also raised several claims that could have been raised on direct appeal, and were therefore procedurally barred absent a demonstration of cause and actual prejudice. See NRS 34.810(1)(b). Specifically, appellant claimed that the State elicited false testimony from Detective Melgarejo and failed to disclose material evidence. To the extent that appellant's blanket reference to having received ineffective assistance of appellate counsel could be construed as an argument for good cause, he did not demonstrate prejudice because he failed to state any facts that would have demonstrated a reasonable probability of success for these claims on appeal. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. We


therefore conclude that the district court did not err in denying these claims.

Finally, appellant claimed that the evidence at trial was insufficient to support his convictions. However, the issue of sufficiency of the evidence was raised and rejected on direct appeal, and the doctrine of the law of the case prevents further litigation of this issue. See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Thus, the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Valerie Adair, District Judge
Christian Anderson Webb
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk