

IN THE SUPREME COURT OF THE STATE OF NEVADA

GONZALO ABELO-GONZALES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60449

GONZALO ALBELO-GONZALES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61278

FILED

DEC 12 2012

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

These are proper person appeals from district court orders denying post-conviction petitions for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Stefany Miley, Judge. We elect to consolidate these appeals for disposition. See NRAP 3(b).²

¹These appeals have been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the records are sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²In light of our decision to consolidate these appeals, appellant's proper person motion to consolidate is moot.

Docket No. 60449

In his petition filed on June 16, 2011, appellant claimed his trial counsel was ineffective. 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, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

First, appellant claimed his trial counsel was ineffective for failing to challenge the testimony of two of the State's witnesses that appellant asserts provided misleading testimony. Appellant failed to demonstrate his counsel's performance was deficient or that he was prejudiced. Counsel cross-examined the two witnesses and attempted to highlight inconsistencies between their testimony at trial and their previous statements. Appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel conducted further cross-examination as appellant confessed to committing the crime. Therefore, the district court did not err in denying this claim.

Second, appellant claimed his trial counsel was ineffective for failing to investigate his 1997 conviction and demonstrate that the State could not use that conviction for impeachment purposes. Appellant failed to demonstrate that his counsel's performance was deficient or that he was

prejudiced. Prior to trial, counsel filed a motion in limine arguing that the 1997 conviction was too old to be used for impeachment purposes. The district court properly denied that motion pursuant to NRS 50.095(2)(b) as the evidence presented demonstrated that less than 10 years had elapsed since appellant expired probation for that conviction. Further, appellant failed to provide any evidence that counsel would have discovered had counsel performed additional investigation regarding the 1997 conviction. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, the district court did not err in denying this claim.

Third, appellant claimed his trial counsel was ineffective for failing to discuss the petit larceny charge with him. Appellant asserts he had no notice that counsel would argue he should be found guilty of petit larceny rather than burglary. Based upon this court's review of the record on appeal, we conclude that the district court erred in failing to conduct an evidentiary hearing on this claim. Appellant is entitled to an evidentiary hearing if he raised claims that, if true, would entitle him to relief and if his claims were not belied by the record. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). This court held in Jones v. State, 110 Nev. 730, 738-39, 877 P.2d 1052, 1057 (1994) that the concession of a client's guilt without the client's consent can constitute ineffective assistance of counsel. There is no evidence in the record that appellant consented to the strategy to concede guilt to petit larceny. Without an evidentiary hearing on the underlying factual allegations supporting this claim, this court is unable to affirm the decision of the district court denying this claim. Therefore, we reverse the district court's decision to deny this claim and remand for an evidentiary hearing on whether trial counsel and appellant discussed the strategy to concede appellant's guilt

for petit larceny and counsel obtained appellant's consent to pursue this strategy.³

Fourth, appellant claimed his trial counsel was ineffective for failing to provide him written notice of the State's intent to seek habitual criminal adjudication. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant acknowledged that counsel discussed with him the State's intent to seek habitual criminal adjudication and appellant failed to demonstrate reasonably competent counsel would have provided written notice of the State's intent as well. Appellant failed to demonstrate a reasonable probability that there would have been a different outcome at trial or the sentencing hearing had counsel provided him with written notice of the State's intentions regarding habitual criminal adjudication. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed his trial counsel was ineffective for failing to object to use of his prior convictions for purposes of habitual criminal adjudication. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At the sentencing hearing, counsel vigorously argued that appellant's prior convictions were so far in the past that the district court should conclude adjudication as a habitual criminal was not appropriate. Because the habitual criminal statute makes no special allowance for remoteness of the prior convictions such that these are merely considerations within the

³The district court may exercise its discretion to appoint post-conviction counsel pursuant to NRS 34.750(1), given the complicated factual and legal issue presented.

discretion of the district court, Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992), counsel could do no more than he did. To the extent that appellant asserted that counsel should have challenged his prior convictions as constitutionally infirm, appellant put forth only bare and naked claims that his prior convictions were not appropriate for consideration. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed his trial counsel was ineffective for failing to object when the district court did not find habitual criminal adjudication was just and proper, failing to object to statements the State made during closing arguments, failing to argue that the jury, rather than the district court, should consider habitual criminal adjudication, and failing to argue that the jury did not represent a fair cross-section of the population. Appellant failed to demonstrate prejudice as the underlying claims were considered and rejected on direct appeal. Albelo-Gonzales v. State, Docket No. 56384 (Order of Affirmance, February 9, 2011). Therefore, the district court did not err in denying these claims.

Next, appellant claimed the State improperly attempted to use his 1997 conviction for impeachment and the State committed prosecutorial misconduct in allowing witnesses to provide misleading testimony. These claims could have been raised in appellant's direct appeal, and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b). Therefore, the district court did not err in denying these claims.

Next, appellant claimed that the district court erred in denying a motion in limine regarding his 1997 conviction without conducting a balancing analysis, the jury rather than the district court

should determine habitual criminal adjudication, his sentence constitutes cruel and unusual punishment, and there was insufficient evidence of his guilt. These claims were considered and rejected on direct appeal. Albelo-Gonzales v. State, Docket No. 56384 (Order of Affirmance, February 9, 2011). The doctrine of law of the case prevents further litigation of these issues and “cannot be avoided by a more detailed and precisely focused argument.” Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, the district court did not err in denying these claims.

Docket No. 61278


Appellant filed a second post-conviction petition for a writ of habeas corpus on November 21, 2011. Appellant’s petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition. See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant’s petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.810(1)(b); NRS 34.810(3).

The district court should not have reached the merits of appellant’s claims in his second petition as they were procedurally barred. See State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (“Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory.”), but we affirm because the district court reached the right result in denying the petition. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).


Appellant asserted that he had good cause to excuse the procedural bars because he asked his appellate counsel to raise claims of ineffective assistance of trial counsel on direct appeal, but his appellate

counsel declined to raise those claims. Appellant failed to demonstrate good cause for a second successive petition because appellate counsel properly declined to raise claims of ineffective assistance of counsel on direct appeal as claims of that nature should be raised in post-conviction proceedings and generally are not appropriate for review on direct appeal. See Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). Moreover, appellant raised claims of ineffective assistance of trial counsel in his first petition. Therefore, appellant's petition is procedurally barred and without good cause. Accordingly, we

ORDER the judgments 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.⁴


Saitta _____, J.


Pickering _____, J.


Hardesty _____, J.

⁴We have considered all proper person documents filed or received in these matters. 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.

cc: Hon. Stefany Miley, District Judge
Gonzalo Albelo-Gonzales
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk