IN THE SUPREME COURT OF THE STATE OF NEVADA

DARYL S. METHVIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35743

FILED

JUN 06 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On July 2, 1996, the district court convicted appellant, pursuant to a jury verdict, of one count of burglary while in possession of a firearm and four counts of robbery with the use of a deadly weapon. The district court sentenced appellant to serve a total of twelve to thirty years in the Nevada State Prison. This court dismissed appellant's direct appeal.[1]

On September 27, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to

[1]Methvin v. State, Docket No. 29072 (Order Dismissing Appeal, December 29, 1998).

conduct an evidentiary hearing. On January 20, 2000, the district court denied appellant's petition. This appeal followed.[2]

In his petition, appellant contended that he received ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they prejudiced the defense by rendering the jury's verdict unreliable.[3] To establish prejudice, the defendant must show that but for counsel's mistakes, there is a reasonable probability that the result of the proceeding would have been different.[4] The tactical decisions of defense counsel are "virtually unchallengeable absent extraordinary circumstances."[5] The court need not consider both prongs of the

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[2]On January 5, 2000, appellant filed a "notice of intent to invoke U.S. constitution for the limited purposes of exhaustion." The district court denied the motion on January 28, 2000. To the extent that appellant seeks to appeal that decision in his petition, it is unappealable. See Castillo v. State, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990) ("the right to appeal is statutory; where no statutory authority to appeal is granted, no right to appeal exists").

[3]Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

[4]Strickland, 466 U.S. at 694.

[5]Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691) (abrogation on other grounds recognized by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000)).

Strickland test if the appellant makes an insufficient showing on either prong.[6]

Appellant raised eight claims that his counsel rendered ineffective assistance at the preliminary hearing.[7] Specifically, appellant claimed that counsel representing him at the preliminary hearing was ineffective for failing to: (1) visit appellant and/or notify him that counsel had been appointed prior to the preliminary hearing; (2) move to vacate and reset the preliminary hearing date; (3) "distinguish the petitioner from the perpetrator;" (4) move for release of the Las Vegas Metropolitan Police Department [LVMPD] dispatch recording of the suspect description; (5) call certain LVMPD officers as witnesses; (6) move to suppress physical evidence; (7) call an eyewitness identification expert; and (8) move to suppress the show-up identification of appellant by one of the witnesses.[8] These claims are without merit. The State called as witnesses the four victims who all positively identified appellant as the man who robbed them. Based on the fact that the State produced more than enough evidence to establish probable cause for the purpose of binding appellant

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[6]Strickland, 466 U.S. at 697.

[7]Appellant was represented at the preliminary hearing by a public defender. He subsequently retained private counsel.

[8]Appellant also claimed that both his counsel at the preliminary hearing and at trial were ineffective for failing to move to suppress the booking photograph of appellant. This court has already determined on direct appeal that the admission of appellant's booking photograph did not prejudice the defense, and the doctrine of the law of the case prevents further litigation on this issue. See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 798-99 (1975).

over for trial,[9] appellant has failed to show that the defense was prejudiced.[10] Therefore, appellant failed to demonstrate that counsel was ineffective in this regard.

Next, appellant raised nine claims that his trial counsel rendered ineffective assistance. First, appellant claimed that counsel was ineffective for failing to "exhibit evidence." Specifically, appellant claimed that counsel failed to introduce evidence that would have: (1) supported appellant's alibi; and (2) undermined the eyewitness testimony. Appellant argued that he could not have committed the robbery because he was somewhere else and because at the time of the robbery his hair could not have been as long as that of the perpetrator. Appellant also argued that because he had been to the establishment on previous occasions the victims were confused.[11] Appellant did not establish how the admission of any additional evidence would have changed the outcome of the trial.[12] Counsel called appellant's alibi witness, and the jury heard testimony that appellant was with him at the time of the robbery. The witness also testified that the appellant had shaved off all of his head and facial hair

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[9]See Sheriff v. Middleton, 112 Nev. 956, 961, 921 P.2d 282, 285-86 (1996) (quoting Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (citations omitted)) ("probable cause to bind a defendant over for trial 'may be based on 'slight,' even 'marginal' evidence because it does not involve a determination of guilt or innocence of an accused'").

[10]See Strickland, 466 U.S. at 694.

[11]The establishment robbed was a pet clinic. Appellant maintained that he accompanied his mother and her dogs to the clinic six times from 1989 to 1993.

[12]See Strickland, 466 U.S. at 694.

approximately one month prior to the date of the robbery. However, contrary to appellant's assertions, the record does not reflect that any of the witnesses testified that the robber had "long hair" or a "ponytail."[13] Moreover, appellant was arrested two days after the robbery and all four eyewitnesses identified appellant from his booking photograph and testified that it accurately represented appellant's appearance at the time of the robbery. Appellant did not provide any specific factual allegations which would support his contention that even if he had been to the establishment in the past, that any of the victims had seen him there or if they had how that would undermine their identification of him as the man who robbed them.[14] Therefore, appellant failed to demonstrate that counsel was ineffective in this regard.

Second, appellant contended that his trial counsel was ineffective for failing to call certain witnesses. Specifically, appellant argued that counsel should have called: (1) the person arrested at the

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[13]There is some variation in the way that the police described the suspect in the original police report and the way the witnesses described him at trial. The perpetrator wore a bandana tied around his head, covering the top of his head and his forehead. The suspect description in the police report describes the length of the suspect's hair as "short" and the hair style as "ponytail;" the narrative states that his "hair was shaved on the side and a red ponytail." The arrest report states that the suspect was described by the witnesses as having "short shaved hair." One witness did testify at trial that the man who robbed them had "red long hair or longer in the back." However, the rest of the witnesses testified that his hair was "really close to the side," "very, very short," "almost clean shaven," and "very short, close to the head."

[14]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

same time as appellant;[15] (2) certain LVMPD officers; and (3) an eyewitness identification expert. Apparently, appellant theorized that because "someone else" was arrested with him, this somehow cast doubt upon the validity of appellant's arrest. Appellant's assertions that the testimony of this person and of other officers at the scene "would have contributed to the eventual vindication" of appellant are insufficient to establish specifically what these people would have testified to if called, and how that testimony would have supported his defense.[16] Appellant did not state precisely what an eyewitness identification expert would have testified to, only that counsel should have called one "specializing in discrediting eyewitness testimony."[17] Accordingly, appellant did not show that failure to call these witnesses fell below an objective standard of reasonableness or that the defense was prejudiced.[18] Therefore, appellant failed to demonstrate that counsel was ineffective in this regard.

Third, appellant contended that his trial counsel was ineffective for failing to file a motion for the release of the LVMPD

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[15]The robbery occurred on September 12, 1995. An officer responded, interviewed the four victims, and broadcast a description of the perpetrator over the police radio. On September 14, 1995, several officers, including the officer who had responded to the robbery, responded to a "drug call" in the same neighborhood. When the officer arrived at the location, there were two men present, one of whom, appellant, he recognized as matching the description of the person who committed the robbery two days earlier.

[16]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[17]See id.

[18]See Strickland, 466 U.S. at 687-88; Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

dispatch recording of the suspect description. Appellant argued that the recording of the suspect description would have allowed the defense to "reveal any fabrications of testimony" on the part of the arresting officer regarding the victims' description of the robber. Apparently, appellant theorized that the victims did not tell the police that the perpetrator had "short red hair," and that the arresting officer invented this piece of information after the fact so the witness description would correspond to appellant's appearance at the time of his arrest. However, all of the victims testified at trial that the robber had short, red, reddish brown, or sandy brown hair, and "scruffy" red facial hair. Accordingly, appellant did not show that failure to move for the release of dispatch recording of the suspect description fell below an objective standard of reasonableness, and that the defense was prejudiced.[19] Therefore, appellant failed to demonstrate that counsel was ineffective in this regard.

Fourth, appellant contended that his trial counsel was ineffective for failing to file a motion for the release of the LVMPD dispatch recording of the "drug call" which eventually led to appellant's arrest. Appellant argued that the recording of the "drug call" would have identified the caller who then could have been called as a witness which "would have contributed to the eventual vindication" of the appellant. As discussed, this assertion does not provide sufficient specificity as to what this person would have testified to, and how that testimony would have supported the defense.[20] Accordingly, appellant did not demonstrate that failure to move for the release of the LVMPD dispatch recording of the

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[19]See id.

[20]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

"drug call" fell below an objective standard of reasonableness, and that the defense was prejudiced.[21] Therefore, appellant failed to demonstrate that counsel was ineffective in this regard.

Fifth, appellant contended that his trial counsel was ineffective for failing to move to suppress certain evidence. Specifically, appellant argued that counsel should have moved to suppress: (1) physical evidence seized at the time of appellant's arrest; (2) the testimony of the arresting officer; and (3) the show-up identification of appellant by one of the victims. Appellant has not shown that any of the motions he contended should have been filed were "meritorious and that there was a reasonable likelihood that the exclusion of the evidence would have changed the result of [the] trial."[22] Therefore, appellant failed to demonstrate that counsel was ineffective in this regard.

Sixth, appellant contended that his trial counsel was ineffective for failing to procure video tape footage of the location at which appellant was arrested. Appellant argued that such a video tape would have shown the distance between the appellant and the eyewitness at the one-on-one show-up identification, and "the line of sight" between the house from which the "drug call" was apparently made and the house at which appellant was arrested. However, appellant did not demonstrate how this information would have supported his defense.[23] Therefore, appellant failed to demonstrate that counsel was ineffective in this regard.

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[21]Strickland, 466 U.S. at 687-88; Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

[22]See Kirksey, 112 Nev. at 990, 923 P.2d at 1109.

[23]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Seventh, appellant contended that his trial counsel was ineffective for failing to: (1) order transcripts of his prior conviction proceedings to be used at sentencing; and (2) move to suppress appellant's use of aliases and fictitious social security numbers introduced at the time of sentencing. Appellant maintained that this resulted in a harsher sentence than he would have otherwise received. However, based on the evidence and appellant's record as a prior felon, appellant failed to show that his sentence would have been different if the district court had access to the transcripts of his prior conviction proceedings, or that the district court relied on "impalpable or highly suspect evidence" which resulted in prejudice.[24] Therefore, appellant failed to demonstrate that counsel was ineffective in this regard.

Eighth, appellant contended that his trial counsel was ineffective for failing to employ appellant's defense strategy. Specifically, appellant argued that counsel should have: (1) "exhibit[ed] the petitioner's statement;" (2) introduced appellant's maps; and (3) employed appellant's analysis. All four victims positively identified appellant as the man who robbed them, and when appellant was arrested he had in his possession a gun and clothing matching the description of those possessed by the perpetrator. Appellant has not shown that, in light of the overwhelming evidence against him, the jury's verdict would have been different had

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[24]See Strickland, 466 U.S. at 687-88; Silks v. State, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976).

counsel employed different trial strategies.[25] Therefore, appellant failed to demonstrate that counsel was ineffective in this regard.

Ninth, appellant claimed that his trial counsel was ineffective for failing to file a petition for a writ of habeas corpus and/or a motion for a new preliminary hearing based on the ineffective assistance of appellant's counsel at the preliminary hearing. As discussed, appellant failed to establish that counsel rendered ineffective assistance at the preliminary hearing. Therefore, counsel was not ineffective in this regard.

Tenth, appellant contended his trial counsel was ineffective because he "abused heroin." Appellant's contention that his other claims demonstrate a general ineffectiveness attributable to heroin abuse, and that counsel "displayed disorganization" during the trial, do not amount to specific factual allegations which would support the accusation that his counsel abused heroin.[26] Therefore, appellant failed to demonstrate that counsel was ineffective in this regard.[27]

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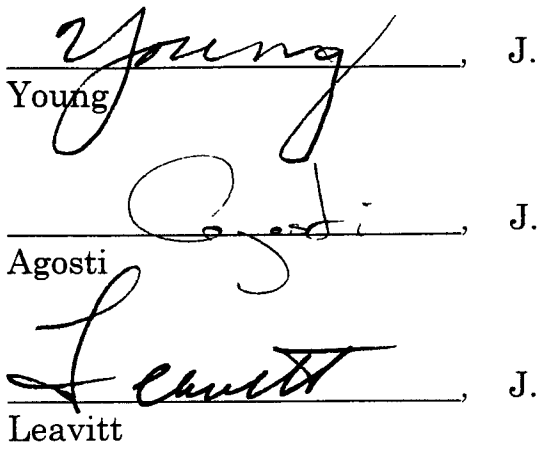
[25]See Ford v. State, 105 Nev. 850, 852, 784 P.2d 951, 952 (1989) ("overwhelming evidence of guilt is relevant to the question of whether a client had ineffective counsel") (citing Strickland, 466 U.S. at 697).

[26]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[27]Appellant also contended that his trial counsel was ineffective because he failed to procure proper courtroom attire for appellant. This court has already determined on direct appeal that appellant was not prejudiced by his attire at trial, and the doctrine of the law of the case prevents further litigation on this issue. See Hall, 91 Nev. at 316, 535 P.2d at 798-99.

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.[28] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[29]



_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. John S. McGroarty, District Judge
Attorney General/Carson City
Clark County District Attorney
Daryl S. Methvin
Clark County Clerk

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

[29]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.