

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES R. BURKE,

No. 35853

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

**FEB 11 2002**

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

ORDER OF AFFIRMANCE

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

On April 19, 1996, the district court convicted Burke, pursuant to a jury verdict, of one count of burglary, two counts of robbery with the use of a deadly weapon, one count of possession of a firearm by an ex-felon, and one count of possession of a short-barreled shotgun. The district court sentenced Burke to serve the following consecutive prison sentences: 48 to 120 months for burglary; 72 to 180 months for each robbery, each sentence enhanced by an equal and consecutive sentence; 28 to 72 months for possession of a firearm by an ex-felon; and 19 to 48 months for possession of a short-barreled shotgun. This court affirmed Burke's judgment of conviction and sentence.<sup>1</sup> The remittitur issued on February 9, 1999.

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<sup>1</sup>Burke v. State, Docket No. 28855 (Order Dismissing Appeal, January 14, 1999).

On January 11, 2000, Burke filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court declined to appoint counsel to represent Burke or to conduct an evidentiary hearing. On March 24, 2000, the district court denied Burke's petition. This appeal followed.

In his petition, Burke argues that his trial and appellate counsel provided constitutionally ineffective assistance. Claims of ineffective assistance of counsel are evaluated under the two-part test set forth in Strickland v. Washington.<sup>2</sup> Under Strickland, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.<sup>3</sup> To establish prejudice based on trial counsel's deficient performance, a petitioner must show that but for counsel's errors there is a reasonable probability that the verdict would have been different.<sup>4</sup> To establish prejudice based on appellate counsel's deficient performance, a petitioner must show that the omitted issues would have had a reasonable probability of success on appeal.<sup>5</sup> A petitioner is entitled to an evidentiary hearing only if he supports his claims with specific factual allegations that if true would entitle him to relief.<sup>6</sup> A petitioner is not entitled to such a hearing if the factual allegations are belied or repelled by the record.<sup>7</sup>

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<sup>2</sup>466 U.S. 668 (1984).

<sup>3</sup>Id. at 687.

<sup>4</sup>Id. at 694.

<sup>5</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

<sup>6</sup>Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

<sup>7</sup>Id. at 507, 686 P.2d at 225.

Burke first argues that trial counsel was ineffective for failing to challenge “anticipated direct and circumstantial evidence.” Burke neither specifies the evidence that counsel should have challenged nor explains the basis for the challenge. This broad claim falls short of alleging that counsel’s performance fell below an objective standard of reasonableness. Therefore, we conclude that the district court properly denied relief on this ground.

Burke next argues that trial counsel was ineffective for failing to utilize the court-appointed investigator. Specifically, Burke claims that some fingerprints on the crime vehicle were not his, the eyeglasses found in the vehicle did not belong to him, and counsel failed to investigate the vehicle’s owner and his associates. Even assuming that counsel failed to utilize the investigator in this regard, we conclude that Burke cannot establish prejudice. First, Burke does not explain how further investigation would have impacted his defense. Moreover, as we noted in our order affirming Burke’s conviction, the State presented overwhelming evidence of guilt. The three robbery victims identified Burke as the perpetrator; a crime scene analyst lifted a print matching Burke’s palm from the crime vehicle; and several people testified that twice on the day of the robbery, they saw Burke in the apartment complex where the crime vehicle had been abandoned. Because this claim does not raise a reasonable probability that the jury’s verdict would have been different if counsel had utilized the investigator, we conclude that the district court properly denied relief on this ground.

Burke argues that trial counsel was also ineffective because he did not challenge several in-court identifications. Counsel’s decision to not challenge the identifications cannot be objectively unreasonable if there is no basis for the challenge. Burke does not argue that the pre-trial photographic lineup was unnecessarily suggestive, and there is nothing in

the record that suggests that the pre-trial identifications were tainted.<sup>8</sup> Burke simply contends that the identifications were “inconclusive.” The record repels this assertion; the witnesses uniformly testified that they were certain that Burke was the man that committed the crime. While one witness admitted that at the time of the photographic lineup he was only sixty percent sure that Burke was the perpetrator, Burke’s trial counsel thoroughly cross-examined the witness on his perception and memory of the robbery. Moreover, the witnesses had ample opportunity to observe Burke, maintained consistent and accurate descriptions of him, and identified him within two weeks of observing him.<sup>9</sup> Because Burke offers no viable basis for excluding the identifications, we conclude that the record belies his claim. The district court properly denied relief on this ground.

Burke finally claims that he asked his appellate counsel to raise certain issues on direct appeal and that counsel provided ineffective assistance by failing to either raise the issues or explain to Burke his reasons for not raising them. Burke does not, however, identify the issues that he told counsel to raise. As noted above, a petitioner claiming that he received ineffective assistance of appellate counsel must demonstrate error and prejudice. Because Burke does not specify the issues that counsel should have raised, he fails to state a claim that would entitle him to relief.

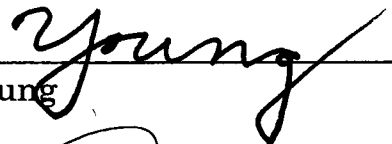
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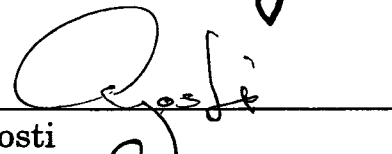
<sup>8</sup>See Wright v. State, 106 Nev. 647, 799 P.2d 548 (1990) (holding that a pre-trial identification violates due process and must be excluded if the identification procedure was unnecessarily suggestive and likely led to a mistaken identification).

<sup>9</sup>See Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (concluding that “reliability is the linchpin in determining the admissibility of identification testimony” and listing relevant factors).

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>10</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>11</sup>

 J.  
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Young

 J.  
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Agosti

 J.  
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Leavitt

cc: Hon. Sally L. Loehrer, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
James R. Burke  
Clark County Clerk

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<sup>10</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>11</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.