IN THE SUPREME COURT OF THE STATE OF NEVADA

GENARO C. MARTINO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35913

FILED

SEP 16 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 December 6, 1995, the district court convicted appellant, pursuant to a jury verdict, of one count of murder and three counts of forgery.[1] The district court sentenced appellant to serve a term of life in the Nevada State Prison without the possibility of parole for the murder conviction and three concurrent terms of eight years for the forgery convictions to be served consecutively to the term of murder. This court dismissed appellant's appeal from his judgment of conviction.[2]

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[1]Although only one judgement of conviction was entered, appellant had two jury trials regarding his convictions. At his first trial, appellant was convicted of the three forgery counts and the jury was hung on the murder count. At the second trial, appellant was convicted of murder.

[2]Martino v. State, Docket No. 28299 (Order Dismissing Appeal, January 22, 1998).

02-16089

On January 4, 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, the district court appointed counsel to represent appellant. Counsel filed a supplement to appellant's petition. The State opposed the supplement.[3] Pursuant to NRS 34.770, the district court conducted an evidentiary hearing. On March 17, 2000, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised eight claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.[4] The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.[5]

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[3]Attached to the State's opposition was an affidavit from appellant's trial counsel refuting the claims in appellant's petition. We conclude that this expansion of the record is a violation of appellant's statutory rights pursuant to Mann v. State, 118 Nev. ___, 46 P.3d 1228 (2002). However, appellant was represented by post-conviction counsel at the evidentiary hearing and counsel waived any statutory violation regarding the expansion of the record.

[4]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[5]See Strickland, 466 U.S. at 697.

First, appellant claimed that his trial counsel was ineffective for failing to raise in appellant's pre-trial petition for a writ of habeas corpus that the justice court judge and the prosecutor produced insufficient evidence at the preliminary hearing to bind appellant over for murder. We conclude that the district court did not err in denying this claim. At the preliminary hearing, an eyewitness to the murder testified that he was in the motel room and witnessed appellant kill the victim by strangulation. Moreover, at trial appellant was ultimately convicted of murder. Thus, appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Second, appellant claimed that his counsel was ineffective for failing to file an appeal or file a motion for a rehearing after the pre-trial petition for a writ of habeas corpus was denied. We conclude that the district court did not err in denying this claim. The denial of a pre-trial petition for a writ of habeas corpus is not independently appealable.[6] Moreover, appellant was not prejudiced by counsel's failure to file a motion for a rehearing regarding the pre-trial petition. Thus, appellant failed to demonstrate that counsel was ineffective in this regard.

Third, appellant claimed that his trial counsel was ineffective for failing to subpeona 17 witnesses for his second trial who had previously testified at appellant's first trial. Appellant also claimed that his counsel was ineffective for failing to subpeona Gary Godfrey for his

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[6]See Gary v. Sheriff, 96 Nev. 78, 605 P.2d 212 (1980); see also Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990).

first and second trial. We conclude that the district court did not err in denying these claims. Appellant failed to demonstrate what these witnesses would have testified to and/or how their testimony would have changed the results of the trials.[7] Thus, counsel was not ineffective in this regard.

Fourth, appellant claimed that his counsel was ineffective for failing to request a Petrocelli[8] hearing regarding the offenses of fraudulent use of a credit card. At appellant's first trial, evidence was presented that appellant used the victim's credit cards after she was reported missing and alleged to be dead. Appellant claimed that his counsel should have requested a Petrocelli hearing regarding this prior bad act evidence before it was admitted at his trial. We conclude that the district court did not err in denying this claim. This court has held that before prior bad act evidence can be admitted at a trial, the district court must conduct a hearing to determine that (1) the incident was relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.[9] However, the failure to conduct a Petrocelli hearing is not always reversible error. For example, if the result of the trial would have been the same if the evidence was withheld then the

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

[8]See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[9]See Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

failure to conduct a Petrocelli hearing is harmless error.[10] Here, assuming without deciding that a Petrocelli hearing was necessary regarding the fraudulent use of the victim's credit cards, appellant was not prejudiced. The result of the trial would have been the same if the prior bad acts had not been admitted because of the persuasive evidence presented during trial. Specifically, there was an eyewitness to the murder who testified at trial. Thus, counsel was not ineffective in this regard.

Fifth, appellant claimed that his counsel was ineffective at appellant's second trial for failing to request a Petrocelli hearing regarding appellant's prior convictions of forgery. We conclude that the district court did not err in denying this claim. Even assuming, without deciding that a Petrocelli hearing was necessary, appellant was not prejudiced for the reasons discussed above. Thus, appellant was not prejudiced by counsel's failure to request such a hearing at appellant's second trial.

Sixth, appellant claimed that his trial counsel was ineffective for failing to request a jury instruction regarding community property. Appellant alleged that he and the victim were married; thus, the money taken from the victim's account after she was reported missing was also his money pursuant to the rules of community property. We conclude that the district court did not err in denying this claim. Appellant failed to

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[10]See Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998).

show how he was prejudiced by his counsel's failure to request such a jury instruction.

Seventh, appellant claimed that his counsel was ineffective for failing to object to the jury instruction on implied malice because it violated NRS 42.230. Specifically, appellant claimed that this instruction allowed the jury to rely on the presumption of malice without informing the jury that the State was required to prove the presumption beyond a reasonable doubt. We conclude that the district court did not err in denying this claim. The jury instruction regarding implied malice merely defined malice and did not direct the jury to find a presumed fact.[11] Also, the jury was instructed that the State must prove every element of the crime of murder beyond a reasonable doubt. Lastly, the jury returned a verdict of first degree murder which indicates that they believed he murdered the victim deliberately, willfully, and with pre-meditation.[12] Thus, counsel was not ineffective for failing to object to the jury instruction regarding implied malice.

Lastly, appellant raised claims that he failed to provide sufficient factual support. He claimed that trial counsel failed to appeal the denial of his pre-trial "omnibus motions", failed to investigate, failed to make trial preparations, failed to communicate with appellant, and was inadequate at trial. We conclude that the district court did not err in

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[11]See Ruland v. State, 102 Nev. 529, 728 P.2d 818 (1986); see also Doyle v. State, 112 Nev. 879, 901, 921 P.2d 901, 915 (1996).

[12]See Doyle, 112 Nev. at 902, 921 P.2d at 916; see also Scott v. State, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976).

denying these claims. Appellant failed to provide sufficient understandable facts regarding these claims that would entitle him to relief.[13]

Next, appellant claimed that his appellate counsel was ineffective for three reasons. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."[14] Appellate counsel is not required to raise every non-frivolous issue on appeal.[15] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[16] "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal."[17]

First, appellant claimed that his appellate counsel was ineffective for failing to argue on appeal that the district court's denial of his "omnibus" motions was an error of law. We conclude that the district court did not err in denying this claim. Appellant failed to demonstrate

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[13]See Hargrove, 100 Nev. 498, 686 P.2d 222.

[14]See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

[15]See Jones v. Barnes, 463 U.S. 745 (1983).

[16]See Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

[17]See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

that this issue would have had a reasonable probability of success on appeal.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that there was insufficient evidence presented at trial for the jury to find him guilty of murder. We conclude that the district court did not err in denying this claim. There was an eyewitness to the crime whose prior testimony was admitted during appellant's murder trial. Thus, appellant failed to demonstrate that his appellate counsel was ineffective in this regard.

Lastly, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court's denial of appellant's pre-trial petition for a writ of habeas corpus was error. In his pre-trial petition, appellant claimed that there was insufficient evidence to bind him over for his first trial on the forgery counts because there was no evidence that he committed the crime in Nye County. We conclude that the district court did not err in denying this claim. Only slight or marginal evidence is required to be presented at the preliminary hearing to bind a defendant over for trial.[18] At the preliminary hearing, circumstantial evidence was presented that appellant had possession of his wife's checks in Nye County with the intent to utter them.[19] Thus, appellant failed to demonstrate that a challenge to the denial of his pre-

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[18]See Sheriff v. Middleton, 112 Nev. 956, 961, 921 P.2d 282, 286 (1996).

[19]See NRS 205.110.

trial writ of habeas corpus would have had a reasonable probability of success on appeal because there was sufficient evidence presented to bind him over.[20] Appellate counsel was not ineffective in this regard.

Next, appellant raised two claims that have already been considered and denied by this court in his direct appeal. Appellant claimed (1) that district court judge and the district attorney violated Title 18 U.S.C. section 201(c)(2)(3) in obtaining, permitting, and using the testimony of the eyewitness, James Brasington, at both of appellant's trials, and (2) that there was insufficient evidence presented at trial to establish jurisdiction over one of the forgery counts. We conclude that the district court did not err in denying these claims. This court concluded in appellant's direct appeal that "Brasington's prior testimony was properly admitted into evidence" and that his claim regarding the sufficiency of the evidence in establishing jurisdiction over one of the forgery count was without merit.[21] Thus, these claims are barred by the doctrine of law of the case.[22] Appellant cannot avoid this doctrine "by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."[23]

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[20]Further, appellant substantially argued this claim on direct appeal and this court considered and rejected the claim. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

[21]See Martino v. State, Docket No. 28299, (Order Dismissing Appeal, January 22, 1998).

[22]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

[23]See id. at 316, 535 P.2d at 799.

Lastly, appellant claimed that the district court judge violated the Nevada Code of Judicial Conduct for allowing the eyewitness James Brasington to testify at appellant's first trial. We conclude that the district court did not err in denying this claim. Appellant waived this claim by failing to raise it on direct appeal.[24] Moreover, appellant failed to provide sufficient facts regarding this claim that would entitle him to relief.[25]

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.[26] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[27]

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

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[24]See NRS 34.810(1)(b).

[25]See Hargrove, 100 Nev. 498, 686 P.2d 222.

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

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

cc: Hon. John P. Davis, District Judge
Attorney General/Carson City
Nye County District Attorney/Tonopah
Genaro C. Martino
Nye County Clerk