IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN E. HAMILTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36047

FILED

SEP 18 2000

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

ORDER DISMISSING APPEAL

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

On August 14, 1998, the district court convicted appellant, pursuant to a jury verdict, of one count of unlawful sale of a controlled substance. The district court sentenced appellant to serve a minimum term of twenty-one months to a maximum term of sixty-three months in the Nevada State Prison. This court dismissed appellant's direct appeal. Hamilton v. State, Docket No. 33017 (Order Dismissing Appeal, June 10, 1999).

On January 21, 2000, 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 conduct an evidentiary hearing. On March 31, 2000, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant raised several claims of ineffective assistance of trial 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 rendered the jury's verdict unreliable. See Strickland v. Washington, 466 U.S. 668 (1984). Moreover, judicial review of an attorney's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy. See id. at 689. For the reasons discussed below, we conclude that the district court did not err

in determining that appellant failed to demonstrate that his counsel rendered ineffective assistance of counsel.

First, appellant argued that his trial counsel was ineffective for failing to object when the district court instructed the jury that cocaine is a "class 1 drug, when it is a class two (2) drug." NRS 453.321(2), the statute under which appellant was convicted, does not treat the unlawful sale of Schedule I and II controlled substances differently; rather, NRS 453.321(2) provides that a person who unlawfully sells a controlled substance that is "classified in Schedule I or II" is guilty of a Category B felony. Further, all forms of cocaine, except for medical quality cocaine as defined by Nevada Administrative Code 453.520(2)(d), are found in Schedule I. See NAC 453.510(8). Thus, appellant's counsel was not ineffective in failing to challenge this instruction because the instruction was not erroneous.

Second, appellant argued that his counsel was ineffective for failing to object to the State's notice of an expert witness filed less than twenty-one days before trial contrary to NRS 174.234(2) and for failing to move for a continuance. NRS 174.234(3)(b) provides that a party must provide information about an expert witness "as soon as practicable after the party obtains that information." The district court may prohibit an expert witness from testifying if the "party acted in bad faith by not timely disclosing that information." NRS 174.234(3)(b). In the July 7, 1998 notice of expert witness, the State explained its reason for delay and stated that appellant's trial counsel was notified on July 2, 1998, that DNA had been detected on a piece of evidence. In denying appellant's claim of ineffective assistance of counsel, the district court concluded that "there is no evidence that the State deliberately delayed disclosure." Thus, there is no indication from the record on appeal that appellant's trial counsel was ineffective in failing to challenge the State's expert witness or move for a continuance.

Third, appellant argued that his trial counsel was ineffective for failing to call Leland Potter as a witness,

despite the fact that Potter was called as a defense witness during appellant's first trial which ended in a hung jury, and failing to call an unidentified expert witness. Appellant failed to support this claim with any specific facts about the proposed testimony of Potter or the unidentified expert witness. The decision to call a witness is a tactical decision based on many factors. "Tactical decisions are virtually unchallengeable absent extraordinary circumstances." Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691). We note that Potter possessed a record of prior criminal convictions that would have made Potter vulnerable to impeachment. See NRS 50.095. Therefore, we conclude the district court did not err in rejecting this claim.

Fourth, appellant argued that his trial counsel was ineffective for failing to object to a warrant issued by the justice court for seizure of appellant's blood for DNA testing despite the fact that appellant's case was pending in the district court at the time. The seizure of appellant's blood was proper. NRS 179.025 provides that a warrant "may be issued by a magistrate of the State of Nevada." NRS 169.095(3) provides that the term "magistrate" includes justices of the peace. Thus, appellant's counsel was not ineffective for failing to challenge the seizure of appellant's blood.

Next, appellant argued that his appellate counsel was ineffective for failing to raise a challenge to an alleged surprise witness. Appellant argued that the State improperly presented the testimony of Officer Teasley because the State failed to provide notice that Officer Teasley was to be called as a witness and because the State only presented Officer Teasley's testimony after his first trial ended in a hung jury.

The standard for ineffective assistance of appellate counsel is the same as the standard for ineffective assistance of trial counsel, that is, the "reasonably effective" test set forth in Strickland. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996). Effective counsel need not raise every non-frivolous issue on appeal. Id. at 1113-14 (citing Jones v. Barnes, 463 U.S. 745, 751-54 (1983)). Rather, counsel will often

be most effective when every conceivable issue is not raised. See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). The record on appeal belies appellant's claim that the State failed to provide notice that Officer Teasley would be called as a witness. Further, we agree with the district court's conclusion that "there is no law preventing the State from strengthening its case after a mistrial in the first trial." Therefore, we conclude that appellant's ineffective assistance of appellate counsel claim lacks merit.

Finally, appellant argued that the State and the district court committed errors based upon the preceding claims. Appellant is not entitled to relief on these claims.

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. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976). Accordingly, we

ORDER this appeal dismissed.

Young, J.

Maupin, J.

Becker, J.

cc: Hon. Steven P. Elliott, District Judge
Attorney General
Washoe County District Attorney
John E. Hamilton
Washoe County Clerk