

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN BISHOP,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 36375

FILED

OCT 22 2002

ORDER OF AFFIRMANCE

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

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 February 8, 1996, the district court convicted appellant, pursuant to a jury verdict, of two counts of obtaining money under false pretenses. The district court sentenced appellant to serve a term of five years in the Nevada State Prison and pay \$2,600 in restitution for count I, and to serve a concurrent term of six years and pay \$1,800 in restitution for count II. This court dismissed appellant's direct appeal.<sup>1</sup>

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<sup>1</sup>Bishop v. State, Docket No. 28269 (Order Dismissing Appeal, March 24, 1999).

On April 20, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus<sup>2</sup> in the district court. The State opposed the petition arguing, among other things, that appellant's petition should be dismissed because appellant had been deemed an absconder from parole since September, 1998, and appellant's petition was not in the proper form pursuant to NRS 34.735. On July 27, 2000, pursuant to NRS 34.750 and 34.770, the district court conducted an evidentiary hearing on the petition. On August 10, 2000, the district court denied appellant's petition as meritless. This appeal followed.

In his petition, appellant first raised multiple claims of ineffective assistance of trial counsel. Under Strickland v. Washington, a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction must demonstrate that counsel's performance fell

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<sup>2</sup>Appellant filed documents labeled "Motion for Expansion of the Record of Petitioners 'P C R' filing," and "Petitioners 'P C R' Motion Petitioners Motion New Trial Motion for Habeas Corpus." Because appellant challenged his judgment of conviction, we conclude that the district court did not err in construing these filings as a post-conviction petition for a writ of habeas corpus. See NRS 34.724(2)(b) (stating that a post-conviction petition for a writ of habeas corpus "[c]omprehends and takes the place of all other common law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them").

below an objective standard of reasonableness and that but for counsel's errors, the result of the proceeding would have been different.<sup>3</sup> There is a presumption that counsel provided effective assistance unless petitioner demonstrates "strong and convincing proof to the contrary."<sup>4</sup> Further, this court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.<sup>5</sup>

First, many of appellant's claims of ineffective assistance of trial counsel were not sufficiently supported with specific or intelligible factual allegations. Appellant claimed that his counsel's investigation of the facts was inadequate because counsel failed: (1) to subpoena records from the bank and Tom's Sunset Casino, (2) to interview and subpoena witnesses, (3) to investigate the facts of the "California matters," (4) to discover and tell appellant that Tom Sodar was out of business, and (5) to obtain a videotape of a July 30, 1994 meeting between Michael Seifer and appellant. Appellant failed to provide sufficient facts demonstrating what

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<sup>3</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Riley v. State, 110 Nev. at 646, 878 P.2d at 277-78 (1994).

<sup>4</sup>Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991) (quoting Len v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981)).

<sup>5</sup>Strickland, 466 U.S. at 697.

evidence would have been revealed had counsel taken such action or that such evidence would have changed the result at trial. Thus, we conclude that the district court did not err in denying these claims.<sup>6</sup>

Second, appellant contended that his counsel was ineffective for failing to prevent appellant's two cases from being consolidated. This court considered and rejected appellant's challenge to the consolidation of his two cases in appellant's direct appeal. The doctrine of the law of the case prevents further relitigation of this matter.<sup>7</sup> The district court did not err in denying this claim.

Third, appellant contended that his counsel was ineffective for failing to communicate with him. Appellant's petition and the record indicate, however, that trial counsel had substantial communication with appellant on multiple occasions. Moreover, appellant failed to demonstrate that any additional communication with counsel would have changed the result at trial. Thus, we conclude that the district court did not err in denying this claim.

Fourth, appellant contended that his counsel was ineffective for failing to prepare and present a defense at trial. Counsel did present a

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

<sup>7</sup>See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

defense at trial, i.e., that the victims had misunderstood appellant's proposal as an offer to sell a vehicle rather than an offer to place a bid on a vehicle at an auction. In presenting this defense at trial, counsel elicited testimony from the victims indicating that appellant had mentioned an auction to them and that they did not understand how an auction worked. Thus, the district court did not err in denying this claim.

Fifth, appellant contended that his counsel was ineffective for (1) representing appellant while counsel was attempting to rent real property from appellant's brother, thus, allegedly creating a conflict of interest, and (2) advising appellant not to speak with the Department of Parole and Probation. Appellant failed to provide sufficient facts demonstrating that counsel's conduct was unreasonable or that he suffered any prejudice from counsel's actions. Thus, we conclude that the district court did not err in denying these claims.

Sixth, appellant contended that his counsel was ineffective at sentencing. The record indicates that at sentencing, appellant's counsel zealously argued that appellant (1) should not be given a prison sentence, (2) was ready, willing, and able to make restitution to the victims, (3) had skills that were valuable to the community, (4) had the support of the community as evidenced by the presence of appellant's family and friends in court, (5) had a minimal criminal history, and (6) would not be a repeat

offender. Thus, we conclude that appellant failed to demonstrate that his counsel was ineffective in this regard.

Seventh, appellant contended that his counsel was ineffective for failing to move to have the charges dismissed, and to have the verdict set aside. Appellant failed to provide facts demonstrating a viable basis for having the charges dismissed or having the verdict set aside. Thus, appellant failed to demonstrate that his counsel was ineffective for these reasons.

Next, appellant raised several claims of ineffective assistance of appellate counsel.<sup>8</sup> “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).” Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>9</sup> This court has held that appellate counsel will be most effective when every

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<sup>8</sup>To the extent that appellant raises any of the same issues underlying his claim that his appellate counsel was ineffective as independent constitutional violations, they are waived. *Franklin v. State*, 110 Nev. 750, 877 P.2d 1058 (1994) overruled in part on other grounds by *Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). We nevertheless address appellant’s claims in connection with his contention that appellate counsel rendered ineffective assistance.

<sup>9</sup>*Jones v. Barnes*, 463 U.S. 745 (1983).

conceivable issue is not raised on appeal.<sup>10</sup> “To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal.”<sup>11</sup>

First, appellant claimed that his appellate counsel was ineffective for failing to raise many of the same issues underlying his ineffective assistance of trial counsel claims as independent constitutional violations in his direct appeal. As noted above, there is no discernable merit to these underlying issues, and they would not have had a reasonable probability of success on direct appeal. Therefore, counsel was not ineffective in failing to raise these issues on direct appeal.

Second, appellant claimed that his appellate counsel was ineffective for (1) failing to investigate whether the State withheld inculpatory statements or exculpatory evidence prior to or during trial, (2) failing to investigate whether perjury charges should be brought against a State’s witness, (3) “orchestrating a contrived scheme” to keep appellant’s files from him until March 15, 2000, (4) preventing appellant from filing a petition for reconsideration within the statutory period, (5) failing to

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<sup>10</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

<sup>11</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

provide appellant with an affidavit so that appellant could move for an extension of time. Appellant failed to provide sufficiently specific or intelligible factual allegations demonstrating a viable basis for any of these claims. Further, appellant failed to demonstrate that he suffered any prejudice. Thus, the district court did not err in denying these claims.

Finally, appellant claimed that the State violated his Fourth, Fifth, and Fourteenth Amendment rights by (1) failing to comply with the trial court's order to provide the defense with all new or additional evidence, (2) failing to provide the defense with a copy of the videotape that had been in the State's possession, (3) allowing a witness to testify to the events which were captured on the videotape, (4) knowingly allowing a witness to commit perjury on the stand, (5) allowing a witness to withhold documents from the defense and to "pull such from briefcase or pockets in front of jury," (6) withholding from the defense the bank records from California Federal Bank regarding Linda King, (7) withholding a cashier from Tom's Sunset Casino from the defense, and (8) allowing Detective Newman to withhold evidence from the defense as to witnesses and to




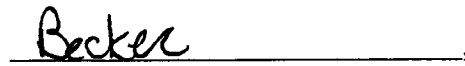
alter police reports, complaints and notes. Appellant waived these claims by failing to raise them in his direct appeal.<sup>12</sup>

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>13</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>14</sup>

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Leavitt

  
\_\_\_\_\_, J.  
Becker

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<sup>12</sup>See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

<sup>13</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>14</sup>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. Lee A. Gates, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Sean Bishop  
Clark County Clerk