

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN HARRIS,

No. 36512

Appellant,

vs.

FILED

DEC 10 2001

THE STATE OF NEVADA,

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

Respondent.

ORDER OF AFFIRMANCE

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

On February 13, 1997, the district court convicted appellant Melvin Harris, pursuant to a jury verdict, of three counts of attempted murder and one count of first-degree arson. The district court sentenced Harris to serve three consecutive terms of 43 to 192 months in prison on the attempted murder counts, and to serve a term of 35 to 156 months in prison on the arson count. The district court further ordered Harris to serve the sentence for the arson count concurrently with the sentence for the third attempted murder count. On appeal, this court affirmed the judgment of conviction.¹ The remittitur issued on April 6, 1999.

On March 14, 2000, Harris 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 Harris or to conduct an evidentiary hearing. On June 28, 2000, the district court denied the petition. This appeal followed.

In his petition, Harris claimed that trial counsel provided ineffective assistance. Claims of ineffective assistance of counsel are analyzed under the two-part test set forth in Strickland v. Washington.²

¹Harris v. State, Docket No. 30116 (Order Dismissing Appeal, March 11, 1999).

²466 U.S. 668 (1984); accord Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

01-20683

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, but for counsel's mistakes, there is a reasonable probability that the verdict would have been different.³ The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁴

Harris first claimed that trial counsel provided ineffective assistance by failing to assert Harris' right to a speedy trial and to object to the State's motion for a continuance. We conclude that this claim lacks merit. On direct appeal, we determined that the State demonstrated good cause for the sole delay it requested of the trial. We therefore conclude that trial counsel was not deficient in failing to object to the continuance.

Harris next claimed that trial counsel provided ineffective assistance by failing to move for a mistrial based on alleged prosecutorial misconduct during closing argument. In particular, Harris claims that the following comment by the prosecutor during rebuttal closing argument was an improper reference to his right to remain silent:

Then [defense counsel] talk[s] about police procedure, never talking with the defendant. The investigator, as he told you, he couldn't find him, he couldn't talk to the defendant. And there are a number of legal reasons why, at some point later, [sic] could not talk to the defendant.

Trial counsel objected to the comment, but did not request a mistrial.

Our review of the record indicates that Harris was not prejudiced by counsel's failure to request a mistrial. The prosecutor's comment was made in response to defense counsel's suggestion during closing argument that the investigator did not follow proper police procedure because he did not interview Harris. Because defense counsel opened the door to the prosecutor's response, it is unlikely that the district court would have declared a mistrial.⁵ Moreover, the prosecutor did not expressly comment on Harris' right to remain silent; there was only the

³Strickland, 466 U.S. at 694, 697.

⁴Id. at 697.

⁵See Milligan v. State, 101 Nev. 627, 637, 708 P.2d 289, 296 (1985) (error invited by defendant "cannot be asserted as grounds for reversal").

single, vague comment quoted above. Under the circumstances, we conclude that trial counsel was not ineffective for failing to request a mistrial because there is no reasonable probability that the district court would have granted a mistrial.

Harris also claimed that trial counsel provided ineffective assistance by failing to formulate a proper defense, interview potential witnesses, and investigate the State's witnesses. Harris failed to identify the defense that counsel should have proffered, the witnesses that counsel should have interviewed or the nature of their intended testimony, or the information that additional investigation would have revealed. As such, Harris' claim consisted of nothing more than "naked" allegations that would not entitle him to relief.⁶

In his petition, Harris also raised several claims that could have been raised on direct appeal. Specifically, Harris challenged the probable cause to support his arrest, the validity of any arrest warrant, the probable cause determination at the preliminary hearing, the use of a photographic lineup, admission of the photographic lineup into evidence, the reasonable doubt instruction, the arson instruction, the instruction setting forth the charges from the information, and the sufficiency of the evidence to support the jury's verdict.⁷ Harris waived these issues by failing to raise them on direct appeal.⁸ As such, Harris had to demonstrate both cause for his failure to present these issues on direct appeal and actual prejudice.⁹ Harris failed to demonstrate cause for his failure to raise these issues on direct appeal. Accordingly, we conclude that the district court did not err in summarily rejecting these issues.

Harris further claimed that the district court erred in giving a flight instruction and in allowing the State to offer the testimony of a

⁶See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁷Harris also alleged that several of the witnesses were or should have been impeached with prior inconsistent statements or with inconsistencies between their testimony and that of other witnesses. It appears that these allegations were primarily related to his challenges to the probable cause determination and the sufficiency of the evidence. Moreover, it appears that most, if not all, of these inconsistencies were addressed at trial.

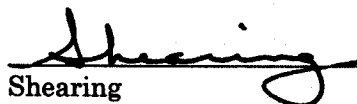
⁸NRS 34.810(1)(b).

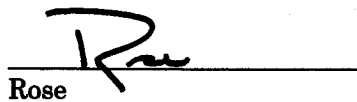
⁹Id.


witness who was not endorsed until after the trial commenced, and that he was deprived of his right to a speedy trial. These claims were raised on direct appeal. Our decision on direct appeal constitutes the law of the case.¹⁰ These issues cannot be relitigated. Accordingly, we conclude that the district court did not err in summarily rejecting 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.¹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹²

 J.
Shearing

 J.
Rose

 J.
Becker

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

¹⁰See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

¹¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹²We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted. In particular, we note that a "successive petition" must be filed in the district court in the first instance. See NRS 34.738(1) ("A petition that challenges the validity of a conviction or sentence must be filed with the clerk of the district court for the county in which the conviction occurred."); see also Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). We express no opinion as to whether Harris will be able to comply with the procedural requirements and bars set forth in NRS chapter 34.