IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREW L. MEEKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 34009

ANDREW L. MEEKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36652

FILED

OCT 04 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

These are proper person appeals from orders of the district court denying appellant's post-conviction petitions for writs of habeas corpus. We elect to consolidate these appeals for disposition.[1]

On April 4, 1997, the district court convicted appellant, pursuant to a jury verdict, of three counts of first degree kidnapping, five counts of use of a minor in the production of pornography, four counts of attempted statutory sexual seduction, two counts of child abuse, and two counts of attempted use of a minor in the production of pornography. The district court sentenced appellant to serve three consecutive terms of life in the Nevada State Prison with the possibility of parole and various concurrent terms. This court dismissed appellant's appeal from his judgment of conviction and sentence.[2] The remittitur issued on June 2, 1999.

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[1]See NRAP 3(b).

[2]Meeks v. State, Docket Nos. 29556, 30063 (Order Dismissing Appeal, May 5, 1999).

Docket No. 34009

On May 5, 1998, prior to this court's resolution of appellant's direct appeal, 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 February 18, 1999, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised claims of ineffective assistance of appellate counsel.[3] As the district court noted, appellant's direct appeal was pending in this court and undecided at that time. Therefore, the district court correctly rejected these claims as premature. The district court, however, also considered and rejected these claims on the merits. As discussed below, we conclude that the district court did not err.

"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)."[4] Appellate counsel is not required to raise every non-frivolous issue on appeal.[5] This court has held that appellate counsel will be most effective when every conceivable issue

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[3]To the extent that appellant raised any of the issues underlying his ineffective assistance of counsel claims as independent constitutional violations or claims of district court error, these issues could have been raised on direct appeal, and therefore, 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 address appellant's claims only to the extent that they are framed as claims that appellate counsel was ineffective for failing to raise them on direct appeal.

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

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

is not raised on appeal.[6] "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."[7]

First, appellant claimed that his appellate counsel was ineffective for failing to argue that NRS 200.350 was unconstitutional. NRS 200.350 provides that consent to kidnapping cannot be used as a defense if the victim was under the age of 18. Appellant claimed that he and other similarly situated defendants are precluded from using consent of the victim as a defense to the kidnapping of any minor even if the minor was emancipated and was considered an adult by law. Appellant further claimed that this statute prevents people from establishing residences or relationships with emancipated minors because regardless of their adult status in the eyes of the law, they are under the age of majority, 18.

"[S]tatutes are presumed to be valid, and the burden is on the challenger to make a clear showing of their unconstitutionality."[8] Appellant has failed to make a clear showing that NRS 200.350 is unconstitutional. Moreover, NRS 129.130(5)(e) states that "a decree of emancipation does not affect the status of the minor for any purpose, including the applicability of any provision of law which: . . . [i]mposes penalties or regulates conduct according to the age of any person." It is clear from this statute that the legislature did not intend to make emancipated minors adults for all purposes. Therefore, even if the victim was legally emancipated it would not have affected appellant's conviction. Appellant failed to demonstrate that this claim would have had a

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

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

[8]See Sereika v. State, 114 Nev. 142, 145, 955 P.2d 175, 177 (1998) (quoting Childs v. State, 107 Nev. 584, 587, 816 P.2d 1079, 1081 (1991)).

reasonable probability of success on appeal; thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the State, during closing arguments, changed its theory of the case when the prosecutor stated that force was not an issue in this case. Appellant claimed that he was not properly notified of this theory and was denied the right to defend himself against this new theory. The State did not alter its theory of the case during the trial. The indictment stated alternative ways that appellant could have committed the crimes, which did not include force.[9] The State never attempted to prove that force was an issue in the case during the trial. In fact, at trial, the State presented evidence that the victims willingly entered appellant's apartment. Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal; thus, appellate counsel was not ineffective in this regard.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that the trial court arbitrarily dismissed his proper person motion to suppress evidence that he filed in court the day his jury trial began. Appellant's motion was untimely and lacked merit. It sought to suppress evidence that was found during two searches of his apartment. Appellant acknowledged in his petition that he signed a consent to search form but stated that his consent was involuntary. At trial, evidence was presented that before the searches were conducted, appellant verbally consented and signed a consent to search form voluntarily. The district court properly dismissed the motion. Appellant failed to demonstrate that this claim would have had a reasonable

[9]See NRS 173.075.

probability of success on appeal; thus, appellate counsel was not ineffective in this regard.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that the judge misled the jury when he commented on the alleged emancipation of one of the victims. Specifically, the judge stated that there was no evidence presented that one of the victims was emancipated in the State of Minnesota. Evidence was presented that the victim lived independently from her parents; however, no evidence was presented that she was legally or otherwise emancipated in Nevada or in any other state.[10] Therefore, the judge's comment did not mislead the jury. Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal; thus, appellate counsel was not ineffective in this regard.

Lastly, appellant claimed that his appeal was sabotaged because the trial transcripts were illegally altered and maliciously changed to misrepresent witness testimony. Specifically, appellant claimed that statements in court regarding his motion to suppress were not in the trial transcripts. Additionally, appellant claimed that his notes of the police officers' testimony at trial regarding the searches did not match the officers' testimony. Having reviewed the transcripts, we conclude that appellant has failed to demonstrate any prejudicial errors in the transcripts before this court.

Docket No. 36652

On May 9, 2000, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to

[10]See NRS 129.140.

represent appellant or to conduct an evidentiary hearing. On July 10, 2000, the district court denied appellant's petition. This appeal followed.

In his petition, appellant reasserted several claims from his first petition.[11] Appellant claimed that his appellate counsel was ineffective for failing to raise on direct appeal: (1) the application of NRS 200.350, which appellant claimed is unconstitutional; (2) that the State used two "disjunctive theories" in proving the kidnapping charges; and (3) that the trial court abused its discretion by arbitrarily denying appellant's pre-trial proper person motion to suppress. We conclude that the district court did not err in denying these claims. Appellant raised these claims in his first post-conviction petition, and as we discussed previously, the district court correctly concluded that these claims lacked merit.

Next, appellant claimed that his trial counsel rendered ineffective assistance for failing to object to: (1) the application of NRS 200.350; (2) the State's use of two "disjunctive theories" of the case at trial; (3) the trial court's arbitrary dismissal of his pre-trial proper person motion to suppress; and (4) the use of NRS 200.310 at trial. Appellant failed to assert these grounds in his prior petition and did not demonstrate good cause and prejudice for his failure to present these claims earlier.[12] Thus, the district court properly dismissed these claims because they are procedurally barred.

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[11]To the extent that appellant again asserted claims of error independently of his claims of ineffective assistance of appellate counsel, such claims were waived, and in any event as we discussed above, the claims were without merit. See Franklin, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

[12]See NRS 34.810(2) and (3).

Appellant did raise one new claim of ineffective assistance of appellate counsel in his second petition, i.e., that his appellate counsel was ineffective for failing to argue that NRS 200.310 was unconstitutionally vague and cannot be distinguished from the offenses of pandering and contributing to the delinquency of a minor. Although this claim was not previously raised in appellant's first petition, we conclude that under the unusual circumstances of this case, there was good cause permitting consideration of this claim on the merits.[13]

Nevertheless, we also conclude that appellant's claim is without merit. The statutory definition of kidnapping set forth NRS 200.310 is not unconstitutionally vague.[14] It provides persons of ordinary intelligence fair notice of the conduct that is forbidden by the statute.[15] Moreover, the elements of the crimes of pandering[16] and contributing to the delinquency of a minor[17] are clearly distinguishable from the elements of the crime of kidnapping. Thus, appellant failed to demonstrate that

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[13]As noted, appellant's first petition was filed prior to the resolution of his direct appeal. Claims of ineffective assistance of appellate counsel do not ordinarily accrue until a direct appeal has been decided. Because appellant presented this claim in his first timely petition filed after his direct appeal was decided, we conclude there was good cause to overcome any procedural bars precluding consideration of this claim on the merits.

[14]See Sereika, 114 Nev. at 145, 955 P.2d at 177.

[15]See United States v. Harriss, 347 U.S. 612, 617 (1954).

[16]See NRS 201.300 (defining "pandering" in part as inducing, enticing, or compelling a person to become a prostitute).

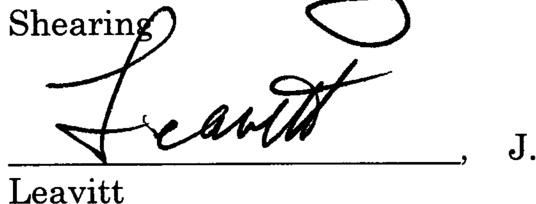
[17]See 201.110 (defining contributory neglect or delinquency in part as conduct which threatens, commands, persuades, or induces a minor to live in a manner or engage in conduct that would cause the minor to be or remain a neglected or delinquent child).

this claim would have had a reasonable probability of success on appeal. Thus, the district court did not err in denying appellant's second petition.

Having reviewed the records 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.[18] Accordingly, we

ORDER the judgments of the district court AFFIRMED.[19]

_______________, J.
Shearing



_______________, J.
Leavitt

_______________, J.
Becker

cc: Hon. Ronald D. Parraguirre, District Judge
Hon. Mark W. Gibbons, District Judge
Attorney General/Carson City
Clark County District Attorney
Andrew L. Meeks
Clark County Clerk

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

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