

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERNANDO RODRIGUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36657

FILED

FEB 27 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Rehak*
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 August 20, 1996, the district court convicted appellant, pursuant to a jury verdict, of two counts of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve four consecutive terms of life in the Nevada State Prison without the possibility of parole. This court dismissed appellant's direct appeal.¹ Remittitur issued on July 7, 1999.

On May 5, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On the same date, appellant also requested the appointment of counsel. The

¹Rodriguez v. State, Docket No. 29730 (Order Dismissing Appeal, June 8, 1999).

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 August 16, 2000, the district court denied appellant's petition. This appeal followed.²

In his petition, appellant raised numerous 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.³ The court need not consider both prongs of the test if the petitioner makes an insufficient showing on either prong.⁴ Further, we have held that a petitioner is not entitled to relief on claims that are belied or repelled by the record or are not sufficiently supported by specific factual allegations that would, if true, entitle the petitioner to relief.⁵

²To the extent appellant appealed the denial of his proper person request for the appointment of counsel, we conclude that the district court did not abuse its discretion.

³See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁴See Strickland, 466 U.S. at 697.

⁵See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

First, appellant claimed that his trial attorneys conducted an inadequate pre-trial investigation. Specifically, appellant contended that his attorneys "were aware of the [following] facts yet failed to conduct an adequate investigation": (1) that one of the State's witnesses "was a major drug dealer," that one of the victims was a Drug Enforcement Agency informant, and that this witness thus had a motive to kill this victim and, in fact, "had a hit out on [him];" (2) that a LVMPD homicide detective's memo circulated asking members of the LVMPD narcotics section whether this victim was an informant and whether another named individual had threatened his life; (3) that bloody shoe prints near a body did not match appellant's shoe size; (4) "that sixteen pairs of shoes collected from suspects in this case were never tested for possible matches against the bloody shoe impressions found at the crime scene"; (5) that a palm print near one body was never properly tested against other possible suspects; (6) that long blond hairs were found in one victim's left hand which could not have come from appellant whose hair was short and black; and (7) that one particular possible suspect was never finger printed. Appellant concluded that this evidence "indicated that someone other than the [appellant] committed the murders."

Our review of the record on appeal reveals that the district court did not err in denying appellant relief on these claims. First, appellant failed to articulate how his counsels' pre-trial investigation was deficient in as much as he admitted that they were "aware" of the

foregoing facts.⁶ Moreover, we find appellant's claim belied by the record. Trial counsels' defense theory, first introduced in their opening statement, was that appellant did not, indeed could not have committed the instant crimes and that he was the victim of a rush to judgment on the part of law enforcement officials. Defense counsel thereafter elicited all of the above information on direct examination of their own witnesses and cross-examination of State witnesses. Appellant's attorneys then contended in their closing arguments that the above facts raised a reasonable doubt as to appellant's guilt. Again, appellant failed to indicate what additional facts and evidence his attorneys could have adduced with a more thorough investigation. Thus, we conclude that appellant's trial counsel did not conduct an inadequate pre-trial investigation and, therefore, that their performance was not ineffective in this regard.

Next, appellant claimed that he received ineffective assistance of counsel at trial. Specifically, appellant contended that his attorneys (1) "failed to seek perjury charges against [the State's eye witness];" (2) failed to request an accomplice instruction pursuant to NRS 175.291; (3) failed to object to a jury instruction that appellant alleged improperly "quantified" reasonable doubt; and (4) failed to object to the "[p]rosecutor's reference to witness intimidation . . . when [the prosecutor] was unable to demonstrate

⁶See *id.* at 502, 686 P.2d at 225; *Kirksey*, 112 Nev. at 987; 923 P.2d at 1107 (citing *Strickland*, 466 U.S. at 687).

that [appellant] was the source of the intimidation." Again, we conclude that appellant's claims are without merit.

First, appellant failed to identify allegedly perjured testimony with any specificity.⁷ Instead, appellant's perjury claim actually rested upon discrepancies in the testimony of various State witnesses, particularly the State's eyewitness, with respect to their testimony at appellant's preliminary hearing. This court has held that discrepancies between the testimony of prosecution witnesses at a preliminary hearing and their subsequent testimony at trial are relevant to the credibility of those witnesses and are properly matters for jury determination.⁸ Moreover, we note that appellant was not prejudiced by any failure to pursue perjury charges against State witnesses. Appellant's trial counsel thoroughly cross-examined these witnesses thereby eliciting admissions that their trial testimony was indeed different from their testimony at appellant's preliminary hearing. Further, the district court issued an instruction regarding witness credibility and that instructed the jurors that if they "believe that a witness has lied about any material fact in the

⁷See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

⁸See Ward v. State, 95 Nev. 431, 596 P.2d 219 (1979); see also Hutchins v. State, 110 Nev. 103, 107, 867 P.2d 1136, 1139 (1994) ([I]t is for the jury to determine what weight and credibility to give various testimony.").

case," they "may disregard the entire testimony of that witness." "There is a presumption that jurors follow jury instructions."⁹ Thus, we conclude that appellant failed to demonstrate that his counsels' performance was deficient for failing to pursue perjury charges against State's witnesses, or that he was prejudiced by this alleged omission.

Second, appellant's attorneys were not deficient for failing to request an accomplice instruction.¹⁰ First, the alleged accomplice was not charged with any offenses arising from the incident. Further, this court has held that "the granting of an [accomplice] instruction . . . is required only when an accomplice's testimony is uncorroborated."¹¹ In this case, we conclude that the State provided sufficient corroboration to admit its

⁹See Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997), clarified on denial of rehearing, 114 Nev. 221, 954 P.2d 744 (1998).

¹⁰NRS 175.291 provides, in pertinent part:

"(1) A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense.

(2) An accomplice is . . . defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

¹¹Howard v. State, 102 Nev. 572, 576, 729 P.2d 1341, 1344 (1986) (citing Buckley v. State, 95 Nev. 602, 600 P.2d 227 (1979)).

eyewitness' testimony assuming that he was an accomplice. Specifically, other witnesses testified that appellant had a motive to kill one of the victims, that appellant had in fact threatened that victim's life and several State witnesses testified that appellant subsequently confessed to the murders. Thus, we conclude that appellant's counsel was not ineffective in this regard.

Third, appellant's claim that his attorneys were ineffective for failing to object to a jury instruction that allegedly "quantified" reasonable doubt is without merit. The instruction to which appellant objected on this basis does not define or "quantify" reasonable doubt; rather, it advises the jurors to "bring to the consideration of evidence [their] everyday common sense and judgment as reasonable men and women." Thus, we conclude that appellant is not entitled to relief on this claim.

Finally, appellant's claim that his counsel improperly failed to object to the "[p]rosecutor's reference to witness intimidation" was misguided.¹² The record reveals that the purpose of questioning the defense witness regarding his alleged intimidation of State witnesses at appellant's preliminary hearing was to impeach him. Specifically, the

¹²See Wesley v. State, 112 Nev. 503, 513, 916 P.2d 793, 800 (1996) (citing Lay v. State, 110 Nev. 1189, 1193, 886 P.2d 448, 450-51 (1994)) (holding that "[u]nless substantial credible evidence is presented that a defendant is the source of witness intimidation, implying that a defendant intimidated a witness is reversible error.").

State sought to show bias on the part of this defense witness. Nowhere was it implied that appellant had intimidated State's witnesses. Thus, we conclude that appellant is not entitled to relief on this claim.

Appellant next raised claims of ineffective assistance of appellate counsel on the basis that appellate counsel failed to pursue the above claims as independent constitutional violations in appellant's direct appeal. The Strickland test applies to claims of ineffective assistance of appellate counsel.¹³ To establish prejudice based on the deficient assistance of appellate counsel, a defendant must show that the omitted issue would have a reasonable probability of success on appeal.¹⁴

Again we conclude that appellant is not entitled to relief on these claims. First, claims of ineffective assistance of counsel may not be raised on direct appeal, "unless there has already been an evidentiary hearing."¹⁵ Further, as the above discussion establishes, appellant's claims are without merit and thus without a reasonable probability of success on appeal.


¹³See Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

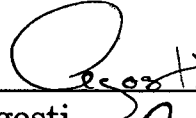
¹⁴Id.

¹⁵Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

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.¹⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Sally L. Loehrer, District Judge
Attorney General/Carson City
Clark County District Attorney
Fernando Rodriguez
Clark County Clerk

¹⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).