

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT ERIC BROWN,

No. 36976

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

DEC 10 2001

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

ORDER OF AFFIRMANCE

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. Appellant was originally convicted, pursuant to a jury verdict, of one count of burglary while in possession of a deadly weapon, one count of attempted robbery with the use of a deadly weapon, one count of attempted murder with the use of a deadly weapon, and two counts of being an ex-felon in possession of a firearm.

Appellant filed a timely direct appeal, arguing that insufficient evidence was adduced at trial to support his convictions for being an ex-felon in possession of a firearm and attempted robbery. Appellant also argued that: (1) the State engaged in prosecutorial misconduct during closing argument; (2) the district court improperly allowed statements in the jury's presence regarding appellant's prior convictions; (3) the district court improperly admitted character evidence; and (4) the district court abused its discretion by denying appellant's motion to sever the counts of being an ex-felon in possession of a firearm from the remaining counts. This court affirmed the judgment of conviction.<sup>1</sup>

Appellant filed a timely proper person post-conviction petition. The district court declined to appoint counsel for appellant, but conducted a two-day evidentiary hearing. After the first day of the hearing, the district court allowed appellant to submit written arguments. After considering the evidence adduced at the hearing, the written arguments of

<sup>1</sup>Brown v. State, 114 Nev. 1118, 967 P.2d 1126 (1998).

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appellant, and the arguments of the State, the district court denied the petition. This timely appeal followed.

In the petition, appellant argued that trial counsel was ineffective for failing to conduct a thorough investigation, failing to file meaningful pretrial motions, and failing to propose or accept jury instructions. Appellant further argued that appellate counsel was ineffective and failed to represent appellant adequately on appeal, that prosecutorial misconduct deprived appellant of his right to a fair trial, and that the district court improperly instructed the jury on relevant principles of law.<sup>2</sup>

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.<sup>3</sup> Further, tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances.<sup>4</sup>

In the instant case, appellant first argued that trial counsel was ineffective for failing to interview three particular witnesses. Evidence was adduced at the hearing that the three witnesses were not included on a list of potential witnesses that appellant provided to trial counsel. Trial counsel testified that when he learned of one of the witnesses, he attempted to locate the witness, but was unsuccessful. The district court's finding that counsel's performance as to the interviewing of witnesses was not unreasonable is supported by the record.

Appellant also argued that trial counsel was ineffective for failing to put on a witness who could establish an alibi for appellant. However, trial counsel testified that he made a tactical decision not to put on the witness, because by establishing the alibi, it placed appellant at the

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<sup>2</sup>We note that appellant's claims regarding prosecutorial misconduct and the jury instructions could have been raised on direct appeal and the district court therefore correctly denied the petition as to those claims. NRS 34.810(b)(2); see also, Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (direct appeal claims not raised on direct appeal are waived in subsequent proceedings).

<sup>3</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>4</sup>See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

apartment complex where the car used in the commission of the crime was discovered. Appellant did not live at the apartment complex, nor did the owner of the car, and counsel believed that evidence that linked appellant to the car would bolster the State's case. The district court correctly concluded that trial counsel made a reasonable tactical decision.

Appellant argued that trial counsel was ineffective for failing to file a pretrial motion in limine to exclude evidence of the nature of appellant's previous convictions in connection with the counts of being an ex-felon in possession of a firearm. This court has previously determined, however, that appellant was not prejudiced by the fact that the jury was informed during the trial of appellant's previous convictions.<sup>5</sup> The district court therefore correctly concluded that appellant is unable to show prejudice as a result of trial counsel's failure to file the motion in limine.

Appellant also argued that trial counsel was ineffective for failing to request an alibi instruction and a cautionary instruction regarding appellant's previous convictions. As noted previously, however, trial counsel made a tactical decision not to pursue the alibi defense. Trial counsel also testified that he did not request a cautionary instruction because he did not want to draw further attention to the prior convictions. The district court correctly found that this was a tactical decision and did not constitute ineffective assistance of counsel.<sup>6</sup>

Appellant also argued that trial counsel was ineffective in that he failed to argue adequately appellant's theory of defense, *i.e.*, misidentification. The district court found, however, that counsel's performance was not unreasonable, and that finding is supported by the record.<sup>7</sup>

Finally, the district court found, regarding all of appellant's arguments, that in addition to failing to show that trial or appellate counsels' performance fell below an objective standard of reasonableness, appellant failed to show prejudice by counsels' performance. Specifically,

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<sup>5</sup>Brown, 114 Nev. at 1124-25, 967 P.2d at 1130-31.


<sup>6</sup>See Howard, 106 Nev. at 722, 800 P.2d at 180.

<sup>7</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal).

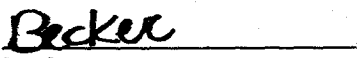
the district court found that the evidence of appellant's guilt was overwhelming, and that appellant had failed to identify any issues that had a reasonable probability of success on appeal.<sup>8</sup> We agree. We note, in particular, that appellant was positively identified by the victim and several eyewitnesses, appellant possessed a gun consistent with that used in the crime, the vehicle used by the assailant was left in the location where appellant sought to establish an alibi, and that a bullet consistent with the bullets in appellant's gun was found in the vehicle used by the assailant. Additionally, appellant was a friend of the victim's office assistant, who was present when the crime was committed, and appellant was also a friend of the owner of the vehicle used in the commission of the crime. Accordingly, we conclude that the district court correctly found that appellant's trial and appellate counsel were not ineffective and the district court properly denied appellant's petition.

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>9</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>10</sup>

  
Shering J.

  
Rose J.

  
Becker J.

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<sup>8</sup>See Strickland, 466 U.S. at 696 (a verdict or conclusion weakly supported by the record is more likely to have been affected by counsel's errors than one with overwhelming record support); Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) ("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>9</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

<sup>10</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. Sally L. Loehrer, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Robert Eric Brown  
Clark County Clerk