

IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY ARTHUR EVANS A/K/A
HENRY AUGHON EVANS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37206

FILED

AUG 22 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
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 April 21, 1997, the district court convicted appellant, pursuant to a jury verdict, of sexual assault and battery with the use of a deadly weapon. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole, plus a consecutive term of ten years. This court dismissed appellant's direct appeal.¹

On October 2, 2000, 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

¹Evans v. State, Docket No. 30083 (Order Dismissing Appeal, October 12, 1999).

conduct an evidentiary hearing. On December 12, 2000, the district court denied appellant's petition. This appeal followed.²

In his petition, appellant claimed that he did not receive adequate review of his direct appeal. The district court does not sit in review of this court.³ Accordingly, a petition for a writ of habeas corpus is not the proper means by which to raise this issue. If appellant wished to challenge this court's review of his direct appeal, he was required to file a timely petition for rehearing pursuant to NRAP 40(c).

Next, appellant claimed that the district court committed three instances of reversible error. Specifically, appellant argued that the trial court erred in: (1) admitting into evidence the victim's clothing because appellant was denied the ability to examine it for potentially exculpatory evidence; (2) instructing the jury that the uncorroborated testimony of the victim was sufficient to sustain a conviction for sexual assault; and (3) admitting appellant's prior rape conviction. This court already considered and rejected these claims on direct appeal. Therefore, further litigation on these issues is prohibited and appellant cannot avoid the doctrine of the law of the case "by a more detailed and precisely

²Pursuant to NRS 34.735, appellant was required to use a form "substantially" in accord with that contained in the statute. Appellant failed to meet this requirement or to provide most of the information required by the statutory form. However, because the district court denied appellant's petition on the merits, this court will address the issues raised by appellant.

³See Nev. Const. art. 6, § 6.

focused argument subsequently made after reflection upon the previous proceedings."⁴

Appellant also raised ten claims of ineffective assistance of trial counsel. To establish ineffective assistance of counsel, appellant must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.⁵ To show prejudice, appellant must show a reasonable probability that but for counsel's errors the result of the trial would have been different.⁶ "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."⁷ This court may consider the two test elements in any order and need not consider both prongs if an insufficient showing is made on either one.⁸

First, appellant claimed that his trial counsel was ineffective for failing to file "essential" pretrial motions, applications and petitions. Appellant contended that counsel should have filed a motion for formal discovery instead of relying on "informal discovery." According to appellant, the result was inadequate knowledge as to what "information the prosecution had in its possession," specifically, "the victim's clothing,

⁴Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

⁵Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984).

⁶Strickland, 466 U.S. at 694.

⁷Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691) abrogation on other grounds recognized by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

⁸Strickland, 466 U.S. at 697; Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

knife or flashlight." This argument is belied by the record.⁹ The police did not impound the victim's clothing, the knife or the flashlight in question. The victim kept the clothes herself at the instruction of one of the officer's at the scene, and the knife and flashlight were not admitted into evidence. Appellant also argued that counsel should have filed motion[s] to suppress, a motion to dismiss, a motion for order to interview prosecution's witness, motions for special jury instructions concerning appellant's theory of defense, and "any and all other motions, applications and/or petitions necessary to defend petitioner in this case." These claims are unsupported by any specific factual allegations which would, if true, entitle appellant to relief.¹⁰ Therefore, appellant did not show that counsel's performance fell below an objective standard of reasonableness resulting in prejudice, and trial counsel was not ineffective in this regard.

Second, appellant claimed that his trial counsel was ineffective for failing to "forcefully object" to the "systematic exclusion" of African Americans from the jury. Appellant's claim that African Americans were systematically excluded is belied by the record.¹¹ The jury originally contained two African American women, one of whom was dismissed at her own request in order to attend her grandfather's funeral. Appellant's counsel made an objection "for the record." The juror was extremely upset and appellant failed to demonstrate how forcing her to remain on the jury and miss her grandfather's funeral would have served the defense. Therefore, appellant did not show that counsel's performance

⁹See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

¹⁰See id.

¹¹See id.

fell below an objective standard of reasonableness resulting in prejudice, and trial counsel was not ineffective in this regard.

Third, appellant claimed that his trial counsel was ineffective for failing to investigate and request additional funds for the use of an investigator and expert witnesses. Specifically, appellant argued that counsel's failure to investigate the victim's background as a "prostitute and drug user," resulted in an inability to attack her credibility at trial. To the extent this claim is supported by specific factual allegations, it is belied by the record.¹² Counsel consistently attacked the victim's credibility on cross-examination, including her prior arrests for prostitution and her use of marijuana, and again during closing argument. Appellant's argument that counsel should have called expert witnesses was unaccompanied by any specifics as to which experts should have been called and what their testimony would have consisted of. Therefore, appellant did not show that counsel's performance fell below an objective standard of reasonableness resulting in prejudice, and trial counsel was not ineffective in this regard.

Fourth, appellant claimed that trial counsel was ineffective for failing to research the law. Appellant's arguments that counsel "risked [appellant's] entire defense in this case upon unproven, unfounded theories and practices" and that "[s]everal points in the course of [the] criminal proceeding reflects [counsel's] lack of legal abilities, expertise, knowledge, unpreparedness and maiden discovery" are not factual allegations of sufficient specificity to support this claim.¹³ Therefore,

¹²See id.

¹³See id.

appellant did not show that counsel's performance fell below an objective standard of reasonableness resulting in prejudice, and trial counsel was not ineffective in this regard.

Fifth, appellant claimed that his trial counsel was ineffective for failing to form a theory of defense and taking a position antagonistic and adverse to appellant's interests. Specifically, appellant argued that counsel should have established the theory that the events at issue were the result of the victim having tried to rob appellant of his wallet, then making false allegations of sexual assault to cover her own crime and explain the physical evidence. To the extent these claims are supported by specific factual allegations, they are belied by the record.¹⁴ Counsel did in fact pursue this theory throughout the trial, and the record does not reflect that counsel's position was adverse to appellant's interests. Therefore, appellant did not show that counsel's performance fell below an objective standard of reasonableness resulting in prejudice, and trial counsel was not ineffective in this regard.

Sixth, appellant claimed that his trial counsel was ineffective because he presented poor arguments during the trial and "blundered repeatedly" by conceding to the prosecution's position during closing argument. To the extent these claims are supported by specific factual allegations, they are belied by the record.¹⁵ Appellant's contention that "[t]he majority of objections and arguments made by [counsel] during [the] trial were poorly presented and immaterial to the determination of facts" lack sufficient specificity to factually support the claim that counsel's

¹⁴See id.

¹⁵See id.

arguments were poor.¹⁶ Appellant's argument that counsel blundered is not supported by the one citation to the transcript he offered.¹⁷ Review of the transcript of the defense's closing argument shows that counsel did not concede to the State's position. Therefore, appellant did not show that counsel's performance fell below an objective standard of reasonableness resulting in prejudice, and trial counsel was not ineffective in this regard.

Seventh, appellant claimed that his trial counsel was ineffective for failing to object and move for mistrial "when [the] trial court injected its self [sic] so far into the case as to reflect favoritism to the jury." These claims are unsupported by any specific factual allegations which would, if true, entitle appellant to relief.¹⁸ Appellant did not indicate in what way the district court improperly injected itself into the proceedings or committed judicial misconduct. Therefore, appellant did not show that counsel's performance fell below an objective standard of reasonableness resulting in prejudice, and trial counsel was not ineffective in this regard.

Eighth, appellant claimed that his trial counsel was ineffective for failing to move for mistrial upon the introduction of inadmissible evidence, prosecutorial misconduct in presenting inadmissible evidence and improper closing argument. Specifically, appellant argued that his prior rape conviction, the victim's clothing, knife and flashlight were

¹⁶See id.

¹⁷The citation given refers to the State's closing argument rather than that of defense counsel.

¹⁸See Hargrove, 100 Nev. 498, 686 P.2d 222.

inadmissible.¹⁹ As discussed, further litigation regarding the issue of the admissibility of appellant's prior rape conviction and the victim's clothing is barred by the doctrine of the law of the case.²⁰ As also discussed, the knife and flashlight in question were not admitted into evidence. Accordingly, appellant failed to establish prosecutorial misconduct for presenting inadmissible evidence. Appellant failed to specify in what way the prosecutor committed misconduct during closing argument.²¹ Therefore, appellant did not show that counsel's performance fell below an objective standard of reasonableness resulting in prejudice, and trial counsel was not ineffective in this regard.

Ninth, appellant claimed that his trial counsel was ineffective for failing to prepare and submit a jury instruction on the theory of defense and curative instructions. Appellant failed to specify what theory of defense and curative instructions should have been offered. Moreover, the defense theory was that appellant did not sexually assault the victim, but that there was a physical altercation between the two during which the victim sustained some physical injuries at the hand of appellant.

¹⁹Appellant also argued that the "fleeing chart" was inadmissible. Appellant first contended that trial counsel was ineffective for not moving for mistrial based on the exhibition of the "fleeing chart" during the State's closing argument, then that counsel's "attentions and efforts" were misfocused on objecting to the chart when they "should have been on impeaching the alleged victim's testimony." It is unclear to what appellant was referencing as the "fleeing chart." Nevertheless, as discussed, trial counsel did in fact consistently attack the victim's credibility.

²⁰See Hall, 91 Nev. at 316, 535 P.2d at 798.

²¹See Hargrove, 100 Nev. 498, 686 P.2d 222.

Instruction number three stated the elements of the charged offenses. Instruction number five stated that appellant was entitled to a verdict of not guilty if the jury had reasonable doubt as to his guilt. Instruction number thirteen stated that if the jury was not satisfied beyond a reasonable doubt that appellant had committed battery with a deadly weapon, it could, upon determining there was sufficient evidence, find him guilty of the lesser included offense of battery, and counsel argued this during closing argument. Accordingly, the jury was adequately instructed that if it did not believe appellant sexually assaulted the victim, but did feloniously use violence or force against her, it could either find him not guilty of both charges, or guilty of battery. Therefore, appellant did not show that counsel's performance fell below an objective standard of reasonableness resulting in prejudice, and trial counsel was not ineffective in this regard.

Tenth, appellant claimed that his trial counsel was ineffective for failing to ensure a complete record was preserved for appeal. Specifically, appellant argued that counsel failed to "assure the records of sidebar conferences and settling jury instruction." Appellant failed to articulate the content of any discussions that should have been conducted on the record or how he was prejudiced. In addition, the transcript does include a discussion of jury instructions, and appellant failed to specify what additional discussion took place that should have been part of the record or how he was prejudiced.²² Therefore, appellant did not show that counsel's performance fell below an objective standard of reasonableness resulting in prejudice, and trial counsel was not ineffective in this regard.

²²See id.

Finally, appellant raised three claims of ineffective assistance of appellate counsel. To prevail on a claim of ineffective assistance of appellate counsel appellant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that appellant was prejudiced by the deficient performance.²³ Appellate counsel is not required to raise every non-frivolous issue on appeal in order to be effective.²⁴ In fact, this court has noted that "appellate counsel is most effective when she does not raise every conceivable issue on appeal."²⁵ To show prejudice, appellant must show that the omitted issue would have had a reasonable probability of success on appeal.²⁶

First, appellant claimed that his appellate counsel was ineffective for appealing frivolous issues. Specifically, appellant argued that counsel's argument on appeal regarding the State's alleged failure to preserve evidence should have been presented as a Brady²⁷ violation. This claim is belied by the record. This court's order dismissing appellant's direct appeal shows that this court considered whether the State's failure to impound the victim's clothing was a Brady violation, and determined it was not.²⁸ Accordingly, even assuming appellate counsel failed to raise

²³Strickland, 466 U.S. at 687-88.

²⁴Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

²⁵Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (citing Jones, 463 U.S. at 752).

²⁶Strickland, 466 U.S. at 687; Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

²⁷See Brady v. Maryland, 373 U.S. 83 (1963).

²⁸See Hargrove, 100 Nev. 498, 686 P.2d 222.

the issue of a Brady violation on direct appeal, appellant failed to show he was prejudiced. Therefore, appellant did not show that counsel's performance fell below an objective standard of reasonableness resulting in prejudice, and appellate counsel was not ineffective in this regard.

Second, appellant claimed that his appellate counsel was ineffective for not appealing "key issues." Specifically, appellant argued that appellate counsel should have challenged the admissibility of appellant's prior rape conviction, the victim's clothing, a knife and a flashlight.²⁹ As discussed, the issues involving the victim's clothing and appellant's prior rape conviction were determined by this court on direct appeal, and the knife and flashlight were not admitted into evidence. Therefore, appellant did not show that counsel's performance fell below an objective standard of reasonableness resulting in prejudice, and appellate counsel was not ineffective in this regard.

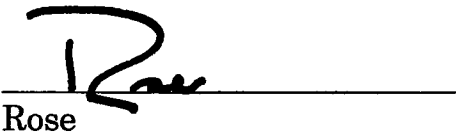
Third, appellant claimed that his appellate counsel was ineffective for ignoring the defense theory on appeal that "the dispute between the alleged victim and petitioner concern[ed] money." This was not an appropriate issue for appeal and accordingly would not have had a reasonable probability of success. Therefore, appellant did not show that counsel's performance fell below an objective standard of reasonableness resulting in prejudice, and appellate counsel was not ineffective in this regard.

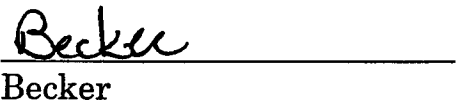
²⁹Appellant also argued that appellant counsel should have challenged "the exhibition of the prosecution's fleeing exhibit during its closing." As discussed, it is unclear from examination of the record what appellant is referring to.

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.³⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.³¹

 J.
Shearing

 J.
Rose

 J.
Becker

cc: Hon. Mark W. Gibbons, District Judge
Attorney General/Carson City
Clark County District Attorney
Henry Arthur Evans
Clark County Clerk

³⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

³¹We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.