

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKY LEE PATE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37259

FILED

FEB 14 2002

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

On September 15, 1999, the district court convicted appellant, pursuant to a jury verdict, of one count of burglary and one count of grand larceny (auto). The district court sentenced appellant to serve two concurrent terms of forty-eight to one hundred and twenty months in the Nevada State Prison. This court dismissed appellant's direct appeal.¹

On August 31, 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 conduct an evidentiary hearing. On December 5, 2000, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that his trial counsel was ineffective for stipulating that appellant took the vehicle. Appellant

¹Pate v. State, Docket No. 34989 (Order Dismissing Appeal, June 13, 2000).

further contended that his trial counsel told appellant that he did not care for appellant.

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.² Furthermore, the tactical decisions of defense counsel are "virtually unchallengeable absent extraordinary circumstances."³ The court need not consider both prongs of the Strickland test if the defendant makes an insufficient showing on either prong.⁴

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate "any deficiency in the performance of counsel." Appellant's trial counsel's strategy was to argue that the State had not met its burden of proof on the grand larceny and burglary charges, felony offenses, and to argue instead that appellant had committed a lesser included offense of unlawful taking of a vehicle without the owner's consent, a gross misdemeanor. In order to argue for the lesser-included offense, appellant's trial counsel was obligated to concede that appellant took the vehicle without the owner's consent. Appellant agreed to this strategy on the record. Appellant failed to set forth any other defenses that trial counsel could have pursued or facts that trial counsel failed to elicit at

²See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004 (1985).

³Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691).

⁴Strickland, 466 U.S. at 697.

trial. Appellant failed to demonstrate how trial counsel's alleged personal feelings about appellant influenced trial counsel's performance. Given the overwhelming evidence of identity and appellant's confession to his cousin, trial counsel pursued a sound trial strategy. Therefore, we conclude that appellant failed to demonstrate that his counsel's performance was deficient.

Second, appellant argued that his trial counsel should not have filed the fast track statement in the direct appeal because after the jury verdict was announced the district court granted appellant's motion to dismiss counsel and appointed replacement counsel for sentencing. Appellant's trial counsel filed the fast track statement in this court because appellant's replacement counsel informed this court that trial counsel was responsible for the appeal.⁵ NRAP 3C(b) provides that trial counsel is responsible for the fast track statement. Appellant's trial counsel was in a better position than replacement counsel to address any direct appeal issues because trial counsel represented appellant throughout the trial proceedings. Appellant did not argue that he was prevented from raising any issues on direct appeal due to the ineffective assistance of appellate counsel. Thus, appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced by the performance of counsel.⁶

Finally, appellant argued that he was wrongfully convicted because he was never indicted by a grand jury. First, appellant waived this claim by failing to raise it on direct appeal and failing to demonstrate

⁵See Pate v. State, Docket No. 34989 (Order, January 6, 2000).

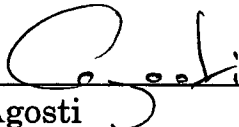
⁶See Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996); see also Strickland, 466 U.S. 668.

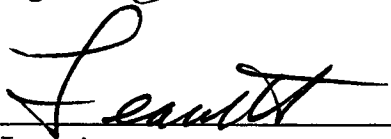
good cause for his failure to do so.⁷ Moreover, as a separate and independent ground for denial, appellant's claim is wholly without merit. A prosecution may be initiated by either the filing of a grand jury presentment or indictment or the filing of an information.⁸ Appellant's case originated with the filing of an information after a preliminary hearing.

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.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁰


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

⁷See NRS 34.810(1)(b).

⁸See Nev. Const. art. 1, § 8; see also NRS 172.015; NRS 173.015; NRS 173.025; NRS 173.035.

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

¹⁰We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Joseph T. Bonaventure, District Judge
Attorney General/Carson City
Clark County District Attorney
Ricky Lee Pate
Clark County Clerk