IN THE SUPREME COURT OF THE STATE OF NEVADA

DARNELL LEROY PARRISH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37363

FILED

AUG 21 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 April 1, 1998, the district court convicted appellant, pursuant to a jury verdict, of second degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole. This court dismissed appellant's direct appeal.[1]

On September 27, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant filed a supplement to the petition. The State opposed the petition. Appellant filed a reply to the State's opposition. 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 January 24, 2001, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of counsel. To establish ineffective assistance of counsel,

[1]Parrish v. State, Docket No. 32285 (Order Dismissing Appeal, February 16, 2000).

appellant must show both that counsel's performance fell below an objective standard of reasonableness, and that the deficient performance prejudiced the defense.[2] 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.[3]

First, appellant claimed that his counsel was ineffective because he coerced appellant to proceed in proper person.[4] A criminal defendant has a constitutional right to self-representation and may waive assistance of counsel.[5] Waiver of the right to counsel must be made "knowingly and intelligently."[6] "[T]o withstand constitutional scrutiny, the judge need only be convinced that the defendant made his decision with a clear comprehension of the attendant risks."[7] This court gives deference to a district court judge's determination that the defendant understands the dangers of self-representation.[8] The district court conducted a Faretta canvass during which appellant answered all the questions appropriately, including whether he understood that "self-

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[2]Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[3]Strickland, 466 U.S. at 697.

[4]Appellant waived his right to counsel and represented himself at trial. The public defender originally assigned to appellant's case served as stand-by counsel.

[5]Faretta v. California, 422 U.S. 806 (1975).

[6]Id. at 835 (quoting Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938); Wayne v. State, 100 Nev. 582, 584, 691 P.2d 414, 415 (1984)).

[7]Graves v. State, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996).

[8]Id.

representation is almost always unwise and may be detrimental," but nevertheless knowingly, intelligently and voluntarily waived his right to be represented by counsel. Appellant cannot now repudiate statements he made on the record.[9] Therefore, appellant did not show that counsel's performance fell below an objective standard of reasonableness, and counsel was not ineffective in this regard.

Second, appellant argued that his stand-by counsel was ineffective for failing to file pretrial motions on behalf of appellant and failing to advise appellant "of any new trial options." "[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'"[10] Appellant attempted to circumvent this rule by arguing that it was stand-by counsel who rendered ineffective assistance. When an accused invokes the right to self-representation the "State may . . . appoint a 'standby counsel' to aid the accused," but it is not required to do so.[11] "The right to effective assistance of counsel . . . does not arise if the counsel was appointed pursuant to the court's discretion."[12] Therefore, because appellant did not have a right to stand-by counsel, he did not have a right to effective assistance of stand-by counsel, and this claim is without merit.

Appellant also raised claims of ineffective assistance of appellate counsel. To prevail on a claim of ineffective assistance of

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[9]See generally Lundy v. Warden, 89 Nev. 419, 422, 514 P.2d 212, 213-14 (1973).

[10]Faretta, 422 U.S. at 834 n.46.

[11]Id.

[12]Crump v. Warden, 113 Nev. 293, 303 n. 5, 934 P.2d 247, 253 n.5 (1997).

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.[13] Appellate counsel is not required to raise every non-frivolous issue on appeal in order to be effective.[14] In fact, this court has noted that "appellate counsel is most effective when she does not raise every conceivable issue on appeal."[15] To show prejudice, appellant must show that the omitted issue would have had a reasonable probability of success on appeal.[16]

First, appellant claimed that appellate counsel was ineffective for failing to challenge the lawfulness of (1) the "Vigilante attack" against appellant by a neighbor; and (2) the "Joint Attack" against appellant by a security guard. These claims are without merit. A felony had been committed, the neighbor had reasonable cause for believing appellant committed it, and was entitled to summon the aid of the security guard.[17] Therefore, these issues would not have had a reasonable probability of

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[13]Strickland, 466 U.S. at 687; Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996).

[14]Kirksey, 112 Nev. at 993, 923 P.2d at 1113-14 (citing Jones v. Barnes, 463 U.S. 745, 751-54 (1983)).

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

[16]Strickland, 466 U.S. at 687; Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[17]See NRS 171.126(3) ("A private person may arrest another . . . [w]hen a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it."); NRS 171.132 ("Any person making an arrest may orally summon as many persons as he deems necessary to aid him therein.").

success on appeal, and appellant failed to demonstrate that appellate counsel was ineffective in this regard.

Second, appellant claimed that appellate counsel was ineffective for failing to challenge the legality of his arrest by the Las Vegas Metropolitan Police Department. Specifically, appellant argued that his arrest was illegal because: (1) the arresting officer did not have probable cause to arrest him; and (2) he was not Mirandized[18] at the time of his arrest. Appellant failed to preserve these claims for appeal, therefore his appellate counsel was not ineffective for failing to raise them.[19] Moreover, the claims are without merit. "[A]n illegal arrest alone does not entitle a defendant to have a conviction set aside."[20] Appellant's arrest was not illegal because under the circumstances there was probable cause to support it.[21] In addition, Miranda is implicated only in situations

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[18]See Miranda v. Arizona, 384 U.S. 436 (1966).

[19]See Smith v. State, 112 Nev. 871, 873, 920 P.2d 1002, 1002 (1996); Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991) (as a general rule, the failure to object below bars appellate review) (abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000)).

[20]Graves, 112 Nev. at 129, 912 P.2d at 241 (citing United States v. Crews, 445 U.S. 463, 474 (1980)).

[21]See Alward v. State, 112 Nev. 141, 156, 912 P.2d 243, 253 (1996) ("a warrantless felony arrest may be made if the arresting officer knows of facts and circumstances sufficient to lead a prudent person to believe that a felony was committed by the arrestee"); Doleman v. State, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991) ("Probable cause to conduct a warrantless arrest exists when police have reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been or is being committed by the person to be arrested.").

of custodial interrogation.[22] The arresting officer did not attempt to question appellant, and appellant was Mirandized prior to being questioned later by a detective. Therefore, these issues would not have had a reasonable probability of success on appeal, and appellant failed to demonstrate that appellate counsel was ineffective in this regard.

Third, appellant claimed that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence. Specifically, appellant argued that the testimony of six witnesses for the State was either not "substantial," was "exculpatory," and/or was "tainted." Appellant failed to show that no rational juror could have found the existence of the charged offenses beyond a reasonable doubt.[23] Therefore, these claims would not have had a reasonable probability of success on appeal, and appellant failed to demonstrate that appellate counsel was ineffective in this regard.

Fourth, appellant claimed that appellate counsel was ineffective for failing to raise the issue that appellant was denied an evidentiary hearing regarding the admissibility of his taped confession. This argument is belied by the record.[24] The district court did in fact hold an evidentiary hearing regarding this matter at which appellant was given a full opportunity to conduct cross-examination and offer argument.

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[22]Miranda, 384 U.S. at 444.

[23]See Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994) ("it is for the jury to determine the degree of weight, credibility and credence to give to testimony and other trial evidence, and this court will not overturn such findings absent a showing that no rational juror could have found the existence of the charged offenses beyond a reasonable doubt").

[24]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Therefore, this issue would not have had a reasonable probability of success on appeal, and appellant failed to demonstrate that appellate counsel was ineffective in this regard.

Fifth, appellant claimed that appellate counsel was ineffective for failing to challenge the admissibility of a tape of a 911 call made by the victim earlier that day involving an incident with appellant. Appellant failed to preserve this claim for appeal.[25] At the time that the State moved to admit the tape into evidence, the district court explicitly asked appellant whether he had an objection and appellant stated, "No objection." Therefore, this issue would not have had a reasonable probability of success on appeal, and appellant failed to demonstrate that appellate counsel was ineffective in this regard.

Sixth, appellant claimed that appellate counsel was ineffective for failing to raise the issue that photographs of the victim's body were improperly admitted.[26] "It is in the sound discretion of the court to admit or exclude photographs, and absent a showing of abuse of this discretion the decision will not be overturned."[27] The district court considered appellant's objections to the photographs; admitted some and excluded others.[28] The record reflects that the district court did not abuse its discretion; the photographs admitted into evidence depicted what the

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[25]See Smith, 112 Nev. at 873, 920 P.2d at 1002; Emmons, 107 Nev. at 61, 807 P.2d at 723 (abrogated on other grounds by Harte, 116 Nev. 1054, 13 P.3d 420).

[26]Appellant failed to specify which photographs should have been challenged on direct appeal.

[27]Dearman v. State, 93 Nev. 364, 370, 566 P.2d 407, 410 (1977).

[28]See id.

witnesses described and were helpful in assisting the jury.[29] Therefore, this issue would not have had a reasonable probability of success on appeal, and appellant failed to demonstrate that appellate counsel was ineffective in this regard.

Seventh, appellant claimed that appellate counsel was ineffective for failing to raise the issue that the State suppressed evidence by not admitting appellant's clothing into evidence. Specifically, appellant argues that his clothing was not properly admitted because the prosecutor did not open the sealed evidence bag containing the clothes. Appellant failed to preserve this claim for appeal.[30] Moreover, this claim is belied by the record.[31] Appellant's clothing, along with properly admitted photographs depicting appellant's clothing, were admitted into evidence. Therefore, this issue would not have had a reasonable probability of success on appeal, and appellant failed to demonstrate that appellate counsel was ineffective in this regard.

Eighth, appellant claimed that appellate counsel was ineffective for failing to raise the issue that the district court erred by having an a conversation with the jury off the record, and by denying the jury an opportunity to speak with appellant. Specifically, appellant claimed that the district court had an improper conversation with the jury during its deliberations. To the extent that these allegations are

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[29]See Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993) (vacated on other grounds by Libby, 115 Nev. 45, 975 P.2d 833).

[30]See Smith, 112 Nev. at 873, 920 P.2d at 1002; Emmons, 107 Nev. at 61, 807 P.2d at 723 (abrogated on other grounds by Harte, 116 Nev. 1054, 13 P.3d 420).

[31]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

supported by factual claims, they are belied by the record.[32] As support for this claim, appellant relied on a letter sent to him by his appellate counsel. The letter stated that the jury had been deadlocked 9 to 3 in favor of first degree murder, and compromised by convicting appellant of second degree murder instead. Appellant deduced from this that the trial judge spoke to the jury during deliberations and "encouraged [them] to compromise so as to avoid another trial." Contrary to appellant's assertions, this information does not indicate that the judge had such a conversation with the jury. Appellant also claimed that the letter from his appellate counsel proved that the judge stated "from his own mouth" that "[t]he Jury wanted to talk to the Defendant but I told them no." It is unclear how appellant deduced this from the letter as it does not refer in any way to such a request from the jury. Therefore, these issues would not have had a reasonable probability of success on appeal, and appellant failed to demonstrate that appellate counsel was ineffective in this regard.

Ninth, appellant claimed that appellate counsel was ineffective for failing to raise the issue that the district court hindered the testimony of the only defense witness. All of appellant's questions to the witness related to the contents of a telephone conversation the witness had with someone from the coroner's office. Each time appellant asked the witness what was said during the conversation, the State objected, and the district court sustained the objection. Hearsay is inadmissible unless it meets one of the exceptions to the hearsay rule.[33] Because appellant offered no exception that would permit the admission of the statements

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[32]See id.

[33]NRS 51.065.

made during the telephone conversation, the district court did not err in sustaining the State's objections. Therefore, this issue would not have had a reasonable probability of success on appeal, and appellant failed to demonstrate that appellate counsel was ineffective in this regard.

Next, appellant claimed that appellate counsel was ineffective for failing to confer with appellant prior to the filing of his direct appeal, and that this failure resulted in certain claims not being raised. As discussed, the claims appellant wished to raise on direct appeal were without merit. Accordingly, appellant cannot demonstrate he was prejudiced by showing that the omitted issues would have had a reasonable probability of success on appeal. Moreover, this claim is belied by the record.[34] The record reveals that appellate counsel corresponded with appellant regarding his direct appeal, and that appellate counsel reviewed appellant's proposed additional claims and decided not to raise them. Therefore, appellant failed to demonstrate that appellate counsel was ineffective in this regard.

Finally, appellant claimed that appellate counsel was ineffective for failing to file a reply brief in appellant's direct appeal. Specifically, appellant argued that appellate counsel should have filed a reply brief prepared by appellant. The record reflects that appellate counsel researched the issues raised in the State's answering brief and concluded that "there were no additional arguments to be presented to the Court in a reply brief." Therefore, appellant failed to demonstrate that counsel's performance fell below an objective standard of reasonableness, and appellate counsel was not ineffective in this regard.

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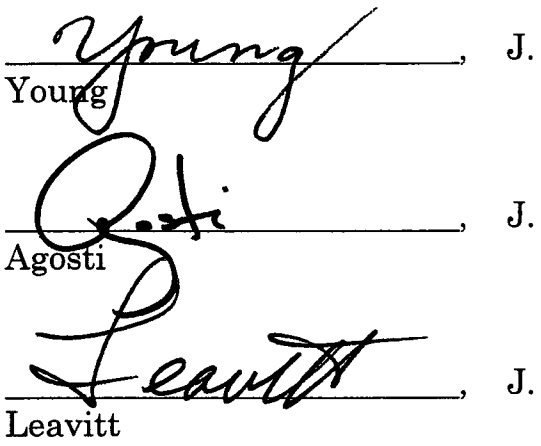
[34]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

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.[35] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[36]



_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Mark W. Gibbons, District Judge
Attorney General/Carson City
Clark County District Attorney
Darnell Leroy Parrish
Clark County Clerk

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

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