IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY WAYNE LINDEMAN,

Appellant,

vs.

WARDEN, NEVADA STATE PRISON, JOHN IGNACIO,

Respondent.

No. 37630

FILED

JUL 30 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus.

Appellant was originally convicted, pursuant to a jury trial, of burglary (count I), battery with the use of a deadly weapon (count II), and assault with the use of a deadly weapon (count III). The district court sentenced appellant to serve a prison term of ten years for count I, a consecutive prison term of seven years for count II, and a concurrent prison term of four years for count III.

Appellant filed a direct appeal, arguing that there was insufficient evidence to support the jury's finding that he used a deadly weapon, and insufficient evidence that he committed assault because his actions were justified as self-defense. This court affirmed appellant's conviction, holding that there was sufficient evidence to support the jury's findings.[1]

[1]Lindeman v. State, Docket No. 26429 (Order Dismissing Appeal, December 18, 1996).

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Appellant then filed a post-conviction petition for a writ of habeas corpus. After conducting an evidentiary hearing, the district court denied appellant's petition. Appellant filed this timely appeal, alleging that the district court erred in denying his petition because his trial and appellate counsel were ineffective.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance fell below an objective standard of reasonableness; and (2) that but for counsel's deficient performance, the outcome of the proceedings would have been different.[2] Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound trial strategy.[3] Here, we conclude that the district court did not err in ruling that appellant's trial and appellate counsel were not ineffective. We will discuss each of appellant's contentions in turn.

First, appellant contends that his trial and appellate counsel were ineffective in failing to raise the issue of whether there was sufficient evidence to convict appellant of burglary. Particularly, appellant contends that in entering the storage unit he did not commit a burglary as a matter of law because the storage unit was uninhabitable,

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[2]Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); see also Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[3]Strickland, 466 U.S. at 689.

there was no evidence that he broke into the storage unit, and it was not capable of being "entered." We disagree.

We conclude that neither appellate nor trial counsel was ineffective. Appellant was not prejudiced by counsels' decision not to raise the issue of the sufficiency of the evidence of burglary because this issue lacked merit. The record reveals that there was ample evidence presented at trial that appellant committed a burglary. In fact, both victims testified that they discovered appellant rummaging through some boxes inside their previously-locked storage unit and observed some of their personal property collected outside the storage unit and inside appellant's car. When one of the victims attempted to detain appellant for the police, appellant picked up a club and, eventually, during a struggle with the male victim slashed the victim's arms with a pocketknife. This testimony was sufficient to support the jury's finding that appellant entered the storage unit with the intent to commit a felony therein.[4] Further, we need not address the evidence concerning habitability or "breaking" because neither is an element of the crime of burglary.[5]

Second, appellant contends that his trial counsel was ineffective in failing to investigate and uncover "internal inconsistencies" in the eyewitness testimony concerning whether one of the victims had "slammed" appellant

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[4]See NRS 205.060(1) (setting forth the elements of burglary).

[5]See McNeeley v. State, 81 Nev. 663, 666, 409 P.2d 135, 136 (1965); see also NRS 205.060(1) (defining burglary to include entry into warehouse with intent to commit felony therein).

into a wall. This testimony was arguably highly relevant to appellant's theory of the case; namely, that he neither battered nor assaulted the victims, but rather acted in self-defense.

We conclude that trial counsel's cross-examination of the witnesses did not fall below an objective standard of reasonableness. The record reveals that trial counsel cross-examined the victim, impeaching him by highlighting his prior statement to the police that he had "slammed" appellant into a wall. The record further reveals that trial counsel emphasized the victim's aggressive conduct and argued that appellant attacked only out of fear for his own life. Moreover, we cannot say that appellant suffered any prejudice from his trial counsel's conduct in investigating and preparing appellant's case in light of the overwhelming evidence of his guilt, including the fact that appellant was caught at the scene of the crime by two witnesses who testified against him.

Third, appellant contends that his trial counsel was ineffective in failing to present the theory that the victim sustained the cuts on his arms when he reached into the broken car window. In particular, appellant argues that trial counsel should have: (1) proffered expert testimony that the victim's injuries were consistent with cuts from shattered glass, rather than from appellant's pocketknife; and (2) elicited testimony from the female victim that the male victim cut his arm when he reached into the car's broken window.

We conclude that trial counsel's performance did not fall below an objective standard of reasonableness in making

the tactical decision not to present this theory to the jury. It was not unreasonable for trial counsel to opt to present the alternative theory that appellant used the pocketknife in self-defense in light of the fact that: (1) appellant admitted to the police that he had wielded the pocket knife; (2) the victim testified that appellant slashed him with the knife; and (3) the potential expert could not testify conclusively that all the victim's wounds were caused by shattered glass.

Finally, appellant contends that both trial and appellate counsel were ineffective for failing to challenge the self-defense instruction given to the jury.[6] We conclude that neither trial counsel nor appellate counsel acted in a manner below an objective standard of reasonableness in opting not to challenge the self-defense instruction because it accurately depicted Nevada law.[7] We further conclude that appellant was not prejudiced by his trial counsel's presentation of appellant's defense of self-defense. The record reveals that the jury received evidence and arguments supporting this defense, but rejected it. Finally, to the

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[6]Although appellant did not provide the jury instructions for this court's review, appellant's trial counsel's closing argument summarized the instruction as follows: "it is lawful for a person who is being assaulted to defend himself from attack if as a reasonable person he has grounds for believing and does believe that bodily injury is about to be inflicted upon him. In doing so a person may use all forms and means he believes to be reasonably necessary and would under some or similar circumstances be necessary to prevent the injury which appears to be imminent."

[7]See, e.g., Schoels v. State, 114 Nev. 981, 986-87 & n.5, 966 P.2d 735, 738-39 & n.5 (1998), rehearing granted on other grounds 115 Nev. 33, 975 P.2d 1275 (1999); State v. Skinner, 32 Nev. 70, 104 P. 223 (1909).

extent that appellant seeks to reargue whether there was insufficient evidence of assault because he acted in self-defense as a matter of law, his argument is barred by the law of the case.[8]

Having considered appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Shearing, J.

Agosti, J.

Rose, J.

cc: Hon. Peter I. Breen, District Judge
Attorney General
Washoe County District Attorney
Marc P. Picker
Washoe County Clerk

[8]See Valerio v. State, 112 Nev. 383, 387, 915 P.2d 874, 876 (1996) (claims raised in a direct appeal dismissed by this court may not be raised again in a post-conviction petition because "this court's prior orders dismissing them constitutes the law of the case").