

IN THE SUPREME COURT OF THE STATE OF NEVADA

CALVIN O'NEIL JACKSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37745

FILED

MAY 23 2002

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

ORDER OF AFFIRMANCE AND LIMITED REMAND FOR

CORRECTION OF JUDGMENT OF CONVICTION

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 burglary (Count I), battery with the intent to commit a crime (count II), first-degree kidnapping with the use of a deadly weapon (count III), and two counts of sexual assault with the use of a deadly weapon (counts IV and V). The district court sentenced appellant to serve the following terms in the Nevada State Prison: for count I, a maximum term of one hundred and twenty months and a minimum term of forty-eight months; for count II, a maximum term of one hundred and eighty months and a minimum term of seventy-two months; for count III, a term of life with the possibility of parole, plus an equal and consecutive term of life with the possibility of parole for the deadly weapon enhancement; for count IV, a term of life with the possibility of parole plus an equal and consecutive term of life with the possibility of parole for the deadly weapon enhancement; and for count V, a term of life with the possibility of parole plus an equal and consecutive term of life with the

possibility of parole for the deadly weapon enhancement. All sentences were ordered to run consecutively. This court affirmed appellant's judgment of conviction.¹

On October 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 January 22, 2001, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised several claims of ineffective assistance of appellate counsel.² "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)."³ Appellate counsel is not required to raise every non-frivolous issue on appeal.⁴ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.⁵ "To establish

¹*Jackson v. State*, Docket No. 34890 (Order of Affirmance, February 7, 2001).

²To the extent that appellant raised any of the same issues underlying his claim that his appellate counsel was ineffective as independent constitutional violations, they are waived. *Franklin v. State*, 110 Nev. 750, 877 P.2d 1058 (1994) overruled in part on other grounds by *Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). We nevertheless address appellant's claims in connection with his contention that appellate counsel rendered ineffective assistance.

³*Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (1996).

⁴*Jones v. Barnes*, 463 U.S. 745 (1983).

⁵*Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

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.”⁶

First, appellant claimed that his appellate counsel was ineffective for failing to raise the claim that the prosecutor committed misconduct by intimidating, threatening, and interfering with the victim, who signed a statement to help the appellant. Specifically, appellant claims that the prosecution coerced the victim to testify by threatening to charge her with perjury. Appellant’s claim is belied by the record.⁷ The record indicates that the victim was found hiding-out at a hotel, and was taken into custody on a material witness warrant. At trial, the victim, who had been involved in a prolonged, highly abusive relationship with appellant, testified that she had been threatened not to testify against appellant and was frightened for her life. The victim stated multiple times that she was testifying truthfully and voluntarily, and further stated that the prosecution had not threatened her with perjury charges or any other repercussions. Additionally, the victim testified that the notarized written statement was not in her own words, and that she had merely copied a fabricated statement presented to her by appellant’s mother. Therefore, we conclude that appellant failed to demonstrate that his counsel was ineffective because this issue did not have a reasonable probability of success on appeal.⁸

⁶Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

⁷See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

⁸See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

Second, appellant claimed that his appellate counsel was ineffective for failing to raise the claim that appellant's conviction was obtained by the knowing use of perjured testimony that conflicted with the victim's notarized written statement. Appellant's claim is repelled by the record.⁹ While it is true that the victim's testimony contradicted the written statement, as discussed above, the victim discredited the written statement by testifying that it was untrue and that appellant's mother merely had her copy and sign it. Therefore, we conclude that appellant failed to demonstrate that his counsel was ineffective because this issue did not have a reasonable probability of success on appeal.¹⁰

In reviewing the documents before this court, we observed that the judgment of conviction did not include an equal and consecutive sentence of life with the possibility of parole for the deadly weapon enhancement on count III, first-degree kidnapping with the use of a deadly weapon. NRS 193.165 makes the imposition of an additional consecutive sentence mandatory in cases where the defendant uses a deadly weapon. In this case, the jury expressly found that appellant had used a deadly weapon. Accordingly, we remand this matter for the limited purpose of correcting the judgment of conviction to include an equal and consecutive sentence of life with the possibility of parole for the deadly weapon enhancement on count III, first-degree kidnapping with the use of a deadly weapon.


⁹See Hargrove, 100 Nev. 498, 686 P.2d 222.


¹⁰See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

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.¹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND THIS MATTER TO THE DISTRICT COURT FOR THE LIMITED PURPOSE OF CORRECTING THE JUDGMENT OF CONVICTION AS DIRECTED ABOVE.¹²

 J.
Young

 J.
Agosti

 J.
Leavitt

cc: Hon. Joseph T. Bonaventure, District Judge
Attorney General/Carson City
Clark County District Attorney
Calvin O'Neil Jackson
Clark County Clerk

¹¹See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹²We have considered all proper person documents filed or received in this matter. We conclude that appellant is entitled only to the relief described herein.