IN THE SUPREME COURT OF THE STATE OF NEVADA

REGINALD CLARENCE HOWARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38108

FILED

JAN 15 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Rihark
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 July 15, 1998, the district court convicted appellant, pursuant to a jury verdict, of burglary.[1] The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a term of life in the Nevada State Prison with a minimum parole eligibility of ten years. This court dismissed appellant's direct appeal.[2]

On April 19, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to

[1]On February 9, 1998, the court declared a mistrial. Appellant was retried on February 10, 1998.

[2]Howard v. State, Docket No. 32854 (Order Dismissing Appeal, August 11, 2000).

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represent appellant or to conduct an evidentiary hearing. On June 11, 2001, the district court denied appellant's petition. This appeal followed.

In his petition, appellant initially raised several claims of ineffective assistance of counsel.[3] 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 but for counsel's errors, the result of the proceeding would have been different.[4] There is a presumption that counsel provided effective assistance unless petitioner demonstrates "'strong and convincing proof to the contrary.'"[5] Further, this court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.[6]

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[3]To the extent that appellant attempted to raise any of the same issues underlying his ineffective assistance of trial counsel claims as ineffective assistance of appellate counsel claims, we conclude that because there is no merit to these underlying issues, appellant was not prejudiced by appellate counsel's failure to raise them on direct appeal. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Additionally, to the extent that appellant attempted to raise any of the issues underlying his ineffective assistance of counsel claims as independent constitutional violations, they are waived. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) (holding claims that are appropriate on direct appeal must be pursued on direct appeal, or they are waived) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

[4]See Strickland v. Washington, 466 U.S. 668 (1984).

[5]Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991) (quoting Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981)).

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

First, appellant contended that his trial counsel was ineffective for failing to challenge the information as fatally defective. Specifically, appellant contended that his counsel failed to argue that (1) the district court had no jurisdiction because the amended information erroneously charged appellant with "burglary second offense" which is not an offense under Nevada statutory law, (2) the district court improperly used two different informations, and (3) appellant was not given fifteen days notice prior to sentencing of the State's intention to seek habitual criminal adjudication.[7] Appellant's claims are belied by the record and lack merit.[8] On December 3, 1997 appellant was charged by information with one count of burglary.[9] On December 11, 1997, the State properly filed an amended information charging appellant with "BURGLARY (Felony – NRS 205.060) (Second Offense)." The amended information contained notice of the State's intention to seek habitual criminal adjudication and stated that appellant had previously been convicted of multiple felonies in Nevada.[10] On June 29, 1998, after appellant's trial,

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[7]See NRS 207.016(2) (providing that a habitual criminal count "may be separately filed after conviction of the primary offense, but if it is so filed, sentence must not be imposed . . . until 15 days after the separate filing").

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

[9]See NRS 205.060.

[10]The amended information stated that appellant had previously been convicted of the following felony offenses: burglary, possession of a controlled substance, possession of cocaine, attempted possession of stolen property, possession of stolen property, and possession of a credit card without the cardholder's consent.

the State filed an amended notice of intent to seek habitual criminal adjudication, and on July 6, 1998, appellant was sentenced. All of the felony offenses contained in the amended notice of intent to seek habitual criminal adjudication had previously been enumerated in the first amended information.[11] Thus, we conclude that appellant failed to demonstrate that he suffered any prejudice; he was properly charged and had sufficient notice that the State was seeking a burglary conviction and habitual criminal adjudication.

Second, appellant contended that his trial counsel was ineffective for failing to argue that appellant could not be retried after a mistrial had been declared because it would subject appellant to double jeopardy. Double jeopardy bars retrial in two situations, either where the district court's declaration of mistrial was not required by "manifest necessity or the ends of justice" or, in the event manifest necessity is present, where the prosecution is responsible for the circumstances creating the necessitated declaration of mistrial.[12] Further, "[a] trial judge properly exercises his discretion to declare a mistrial . . . if a verdict of conviction could be reached but would have to be reversed on appeal due to

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[11]The amended notice of intent to seek habitual criminal adjudication stated that appellant had been found guilty of burglary in the instant case, and had previously been convicted of the following felony offenses: burglary, possession of a controlled substance, attempted possession of stolen property, possession of stolen property, and possession of a credit card without the cardholder's consent.

[12]See Beck v. District Court, 113 Nev. 624, 627, 939 P.2d 1059, 1060 (1997) (citing Hylton v. District Court, 103 Nev. 418, 422-23, 743 P.2d 622, 625 (1987)).

an obvious procedural error in the trial."[13] In appellant's first trial, the district court properly declared a mistrial on the grounds that the district court clerk committed a procedural error by referring to appellant's previous conviction in the presence of the jury during the reading of the information.[14] Thus, we conclude that appellant is not entitled to relief on this claim.

Third, appellant contended that his trial counsel was ineffective for failing to (1) question witness Diane Blake as to whether she actually saw appellant enter her garage, and (2) object to the introduction of evidence of tools found at the crime scene. Appellant failed to support these claims with any specific facts, and failed to demonstrate that these additional actions by counsel would have assisted the defense or produced a different result at trial.[15]

Fourth, appellant contended that his trial counsel was ineffective at sentencing for failing to object to (1) the copies of appellant's previous felony convictions because they were allegedly uncertified and lacked case numbers, and (2) the sentencing hearing date because appellant allegedly did not have notice of the State's intention to seek habitual criminal adjudication fifteen days prior to sentencing. These

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[13]Illinois v. Somerville, 410 U.S. 458, 464 (1973).

[14]See NRS 207.016(2) (providing that no previous conviction "may be alluded to on trial of the primary offense, nor may any allegation of the conviction be read in the presence of a jury trying the offense").

[15]See Hargrove, 100 Nev. 498, 686 P.2d 222; Strickland, 466 U.S. 668.

claims are belied by the record and lack merit.[16] The record indicates that the State properly provided certified copies of appellant's previous felony convictions.[17] Further, as previously discussed, appellant had sufficient notice prior to sentencing that the State was seeking habitual criminal adjudication.

Finally, appellant contended that (1) he had been denied the right to testify on his own behalf at the preliminary hearing, (2) the district court clerk's reading of the amended information prejudiced appellant, (3) the curbside lineup was unduly suggestive, (4) the physical evidence was tainted, (5) the State failed to prove all the elements of burglary, (6) and the State committed a Brady[18] violation by tampering with and withholding evidence. Appellant waived these claims by failing to raise them in his direct appeal and by failing to plead specific facts that demonstrate good cause for failing to raise them in the earlier proceeding.[19]

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[16]See Hargrove, 100 Nev. 498, 686 P.2d 222.

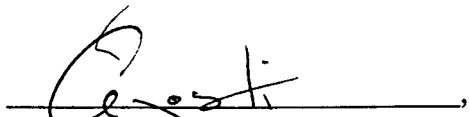
[17]See NRS 207.016(5) providing that "for the purposes of NRS 207.010, 207.012 and 207.014, a certified copy of a felony conviction is prima facie evidence of conviction of a prior felony."

[18]Brady v. Maryland, 373 U.S. 83, 87 (1963).

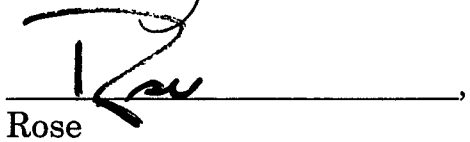
[19]See NRS 34.810(1)(b)(2), (3) (providing that the district court shall dismiss a petition, absent a demonstration of good cause and prejudice, if the claims raised in the petition could have been raised on direct appeal); see also Franklin, 110 Nev. 750, 877 P.2d 1058, overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

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.[20] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[21]



_____, C.J.
Agosti



_____, J.
Rose

_____, J.
Maupin

cc: Hon. Stewart L. Bell, District Judge
Attorney General/Carson City
Clark County District Attorney
Reginald Clarence Howard
Clark County Clerk

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

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