

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY HOOKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38204

FILED

OCT 18 2002

ORDER OF AFFIRMANCE

JANE E. M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
DEPUTY CLERK

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 November 30 2000, the district court convicted appellant, pursuant to a jury verdict, of burglary and forgery.¹ The district court sentenced appellant to serve concurrent terms of sixteen to seventy-two months for burglary and twelve to thirty-four months for forgery in the Nevada State Prison. Appellant's conviction was affirmed by this court on direct appeal.²

On May 7, 2001, 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 June 1, 2001, the district court denied appellant's petition. This appeal followed.

¹The original judgment of conviction incorrectly stated that appellant had entered a guilty plea. An amended judgment of conviction was entered on February 22, 2001.

²Hooks v. State, Docket No. 37214 (Order of Affirmance, November 15, 2001).

In his petition, appellant claimed that the State, including the district court, the district attorney's office, the public defender's office, the department of parole and probation, the department of corrections, as well as the court reporter, conspired to have him convicted and sentenced. Appellant waived this claim by failing to raise it on direct appeal.³ As a separate and independent ground to deny relief, this claim is merely a bare and naked claim for relief.⁴ Appellant's argument that every State agency and State employee involved in his case was corrupted, and presumably bribed, by the "alleged victim" in an effort to make appellant the scapegoat in a "lucrative scheme" in which the "alleged victim" was involved, is not a factual allegation of sufficient specificity to support this claim.⁵ Therefore, the district court did not err in denying this claim.

Appellant also claimed that the State failed to follow "mandatory criminal procedure" pursuant to federal law. Appellant waived this claim by failing to raise it on direct appeal.⁶ As a separate and independent ground to deny relief, this claim is without merit. Appellant was charged and convicted pursuant to Nevada law; not federal law. Accordingly, it would have been improper to proceed under federal criminal procedure. Therefore, the district court did not err in denying this claim.

Appellant raised two claims of judicial misconduct. Appellant claimed that the district court committed judicial misconduct when it: (1)

³See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) (overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)).

⁴See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

⁵See id.

⁶See Franklin, 110 Nev. 750, 877 P.2d 1058.

did not submit the issue to the jury of whether appellant's statements were voluntary and therefore properly admitted as evidence; and (2) according to appellant, told the jury that Miranda⁷ was an issue for the court alone. This court has previously held that appellant's statements were admissible at trial and that appellant waived any right he may have had to insist that the jury determine the voluntariness of his statements. Further litigation regarding these issues is barred by the doctrine of the law of the case.⁸ Therefore, the district court did not err in denying these claims.

Appellant claimed he was denied his right to a speedy trial. Appellant waived this claim by failing to raise it on direct appeal.⁹ As a separate and independent ground to deny relief, this claim is without merit. "In considering this issue, it is necessary to consider the following factors: (1) the length of the delay; (2) the reason for delay; (3) the defendant's assertion of the right; and (4) prejudice to the defendant."¹⁰ Police reports are conflicting as to the date appellant was actually arrested; it was either March 17, 1998 or May 31, 1998. Appellant was bound over for trial on June 2, 1998. Appellant's trial began on October 17, 2000. Although the length of the delay was not insignificant, and appellant did complain to the district court that "the speedy trial right is being breached maliciously, diabolically even," the other factors "militate against a determination that appellant was denied his right to a speedy

⁷Miranda v. Arizona, 384 U.S. 436 (1966).

⁸See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

⁹See Franklin, 110 Nev. 750, 877 P.2d 1058.

¹⁰Leonard v. State, 117 Nev. 53, ___, 17 P.3d 397, 416 (2001) (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)).

trial."¹¹ The district court noted that there had been "various scheduling problems" and "miscommunication . . . to say the least." Further, the reasons for most of the delay do not appear to be the fault of the State or the court. For example, significant delay resulted from the fact that throughout the course of the proceedings appellant was represented by at least six different public defenders. The record reflects that appellant was consistently unhappy with the representation he received from the public defender's office, and was often uncooperative. At one point the district court continued the proceedings in order to allow appellant to obtain independent counsel, however, appellant failed to do so. Other delays occurred as the result of defense motions, appellant's failure to appear at some of the proceedings, and a court ordered psychiatric evaluation of appellant. Appellant also failed to demonstrate prejudice. Appellant did not show, for example, that any defense "witnesses died or otherwise became unavailable owing to the delay."¹² Appellant claimed that due to delays, State's witness Las Vegas Metropolitan Police Department Detective Paul Evans was unable to recall certain facts regarding the chain of custody of "the only exculpatory evidence." However, appellant failed to articulate what that evidence consisted of, or how the chain of custody was broken.¹³ Moreover, Detective Evans' testimony at trial addressed whether, and if so by whom, appellant was Mirandized. If appellant's claim is an attempt to challenge whether his statements were admissible, for the reasons already discussed, further litigation regarding

¹¹See Leonard, 117 Nev. at ___, 17 P.3d at 416.

¹²See id. (quoting Barker, 407 U.S. at 534).

¹³See Hargrove, 100 Nev. 498, 686 P.2d 222.

this issue is barred by the doctrine of the law of the case.¹⁴ Accordingly, we conclude that the district court did not err in denying this claim.

Appellant claimed that he was deprived of his "due process right to be present during all proceedings." Appellant waived this claim by failing to raise it on direct appeal.¹⁵ As a separate and independent ground to deny relief, appellant also waived this claim by failing to appear at all of the proceedings. The record reflects that appellant failed to appear at the status check to reset trial date held on July 13, 2000, because he was in custody at the time and the State failed to transport him. The record reflects that appellant's attorney waived appellant's presence on October 19, 2000, when the district court met with the attorneys while the jury was deliberating to address a request by the jury for supplemental evidence.¹⁶ However, as noted, the record also reflects that earlier in the proceedings when appellant was not in custody, he failed several times to appear at scheduled proceedings. Therefore, the district court did not err in denying this claim.

Appellant claimed that the prosecutor committed "perjury." Specifically, appellant complained that the prosecutor informed the court during the discussion on jury instructions, that the State and defense had agreed to remove the words "or innocence" from the sentence "You are here to determine the guilt or innocence of the defendant" form proposed jury instruction number six. Appellant claimed that the prosecutor lied because at the time he made the statement, he knew that "the jury deliberated with the word innocence illegally emphasized with a line

¹⁴See Hall, 91 Nev. 314, 535 P.2d 797.

¹⁵See Franklin, 110 Nev. 750, 877 P.2d 1058.

¹⁶The request was denied.

drawn through it." Appellant waived this claim by failing to raise it on direct appeal.¹⁷ As a separate and independent ground to deny relief, this claim is belied by the record.¹⁸ Jury instruction number six did not include the words "or innocence" in the sentence in question, but rather stated in its entirety: "You are here to determine the guilt of the Defendant from the evidence in this case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty."¹⁹ Therefore, the district court did not err in denying this claim.

Appellant also raised nine claims of ineffective assistance of trial counsel. To establish ineffective assistance of counsel, a petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.²⁰ To show prejudice, a petitioner must show a reasonable probability that but for counsel's errors the result of the trial would have been different.²¹ "Tactical decisions are virtually unchallengeable absent

¹⁷See Franklin, 110 Nev. 750, 877 P.2d 1058.

¹⁸See Hargrove, 100 Nev. 498, 686 P.2d 222.

¹⁹The word "innocence" was lined through on the copy of the transcript of the discussion in question which was provided by appellant with his petition. However, the line through did not appear on the copy of the transcript contained in the record on appeal, nor as discussed, on the copy of jury instruction number six.

²⁰Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

²¹Strickland, 466 U.S. at 694.

extraordinary circumstances."²² A 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.²³

First, appellant claimed that he was denied his "right to continuous representation" which resulted in his receiving ineffective assistance of trial counsel.²⁴ As discussed, even assuming appellant had such a right, his failure to obtain "continuous representation" was due in large part to his inability to cooperate with the attorneys assigned to his case. Therefore, appellant failed to show that his counsels' performance fell below an objective standard of reasonableness, and counsel were not ineffective in this regard.

Second, appellant claimed that trial counsel was ineffective for failing to conduct a pretrial investigation. Specifically, appellant argued that, had counsel conducted such an investigation, he would have based his defense theory on the ulterior "motive of corrupt officials indifference" to the law, due to the fact that the "alleged victim" was involved in a "lucrative scheme," the proceeds of which were being used in "scapegoating" appellant. These allegations are not of sufficient factual specificity to support this claim.²⁵ Therefore, appellant failed to show that counsel's performance fell below an objective standard of reasonableness, and counsel was not ineffective in this regard.

²²Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691) abrogation on other grounds recognized by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

²³Strickland, 466 U.S. at 697.

²⁴Apparently, appellant is referring to the fact that he was assigned six different public defenders during the course of the proceedings.

²⁵See Hargrove, 100 Nev. 498, 686 P.2d 222.

Third, appellant claimed that trial counsel was ineffective for allowing "unreasonable delays" resulting in the loss of exculpatory evidence. Specifically appellant argued that due to delays, State's witness Detective Evans could not recall certain facts regarding the chain of custody of "the only exculpatory evidence." As discussed, appellant did not articulate what this evidence consisted of, or how the chain of custody was broken.²⁶ Therefore, appellant failed to show that counsel's performance fell below an objective standard of reasonableness, and counsel was not ineffective in this regard.

Fourth, appellant claimed that trial counsel was ineffective for requesting that appellant be evaluated to determine whether he was competent. Specifically, appellant argued that counsel requested the evaluation because appellant refused to plead guilty, and counsel was attempting to protect his "unblemished trial record." This allegation is not supported by facts of sufficient specificity.²⁷ Appellant further alleged that counsel was ineffective because, as a result of the evaluation, appellant was placed in an "insane asylum" where he was abused and assaulted by the staff and other patients, sexually "accosted" by his caseworker, and denied "meaningful access to legal research material." Even assuming appellant had been subjected to such treatment, appellant did not indicate how counsel was responsible for the abuse and assault committed by others. Therefore, appellant failed to show that counsel's performance fell below an objective standard of reasonableness, and counsel was not ineffective in this regard.

Fifth, appellant claimed that trial counsel was ineffective for failing to challenge jury instruction number six. As discussed, jury

²⁶See id.

²⁷See id.

instruction number six was an appropriate instruction. Therefore, appellant failed to show that counsel's performance fell below an objective standard of reasonableness, and counsel was not ineffective in this regard.

Sixth, appellant claimed that trial counsel was ineffective for failing to request an instruction to the jury that they should "question the credibility of each witness independently." Appellant failed to show a reasonable probability that had counsel requested this instruction the result of the trial would have been different. Therefore, appellant did not establish that he was prejudiced, and counsel was not ineffective in this regard.

Seventh, appellant claimed that trial counsel was ineffective for failing to request a jury instruction stating that appellant should be acquitted because of insufficient evidence. "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."²⁸ Accordingly, it would have been inappropriate for the jury to be so instructed. Therefore, appellant failed to show that counsel's performance fell below an objective standard of reasonableness, and counsel was not ineffective in this regard.

Eighth, appellant claimed that trial counsel was ineffective for failing to request a jury instruction regarding whether there was sufficient evidence that appellant's statement to the police was voluntary and whether it was made before or after appellant was Mirandized.²⁹ As discussed, this court has previously held that appellant's statements were admissible at trial and that appellant waived any right he may have had to insist that the jury determine the voluntariness of his statements, and

²⁸See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (citing Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975)).

²⁹See Miranda, 384 U.S. 436.

further litigation regarding these issues is barred by the doctrine of the law of the case.³⁰ Therefore, counsel was not ineffective in this regard.

Ninth, appellant claimed that trial counsel was ineffective for failing to object when the district court stated during the reading the instructions to the jury that "the defendant is guilty." This claim is belied by the record.³¹ Apparently, appellant has taken the words "the defendant is guilty" out of the context of the following statement read to the jury by the district court: "It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the defendant is guilty of one or more of the offenses charged." The record shows that the district court never told the jury during the reading of the instructions that appellant was guilty. Therefore, appellant failed to show that counsel's performance fell below an objective standard of reasonableness, and counsel was not ineffective in this regard.

Appellant also claimed that his appellate counsel was ineffective. To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that petitioner was prejudiced by the deficient performance.³² Appellate counsel is not required to raise every non-frivolous issue on appeal in order to be effective.³³ In fact, this court has noted that "appellate counsel is most

³⁰See Hall, 91 Nev. 314, 535 P.2d 797.

³¹See Hargrove, 100 Nev. 498, 686 P.2d 222.

³²Strickland, 466 U.S. at 687.

³³Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

effective when she does not raise every conceivable issue on appeal."³⁴ To show prejudice, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.³⁵

Appellant claimed that his appellate counsel was ineffective because he was not an appellate attorney and his performance was "lackadaisical." After appellant was convicted and sentenced, his trial counsel told the district court that he would file a notice of appeal, but requested that the court appoint someone else to represent appellant on appeal because "I don't do appeals." Appellant failed to show that counsel's performance fell below an objective standard of reasonableness or that he was prejudiced. Therefore appellate counsel was not ineffective in this regard.

Finally, appellant claimed that his sentence is facially illegal. A motion to correct an illegal sentence is limited in scope and may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence, or the sentence was imposed in excess of the statutory maximum.³⁶ "A motion to correct an illegal sentence 'presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.'"³⁷ To the extent that appellant's motion sought correction of an illegal sentence, the claims raised are without merit. Appellant's

³⁴Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (citing Jones, 463 U.S. at 752).

³⁵Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

³⁶Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

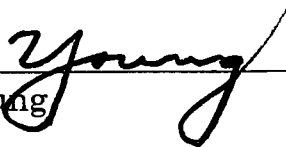
³⁷Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

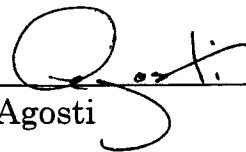
sentence is within the statutory maximum.³⁸ Therefore, the district court did not err in denying this claim.

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.³⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁴⁰


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

cc: Hon. John S. McGroarty, District Judge
Attorney General/Carson City
Clark County District Attorney
Jerry Hooks
Clark County Clerk

³⁸See NRS 205.060; NRS 205.090; NRS 205.110.

³⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁴⁰We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.