

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN CRAIG ROMINE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38293

FILED

SEP 05 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF 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 June 25, 1997, the district court convicted appellant, pursuant to a guilty plea, of driving and/or being in actual physical control while under the influence of intoxicating liquor resulting in death and substantial bodily injury. The district court sentenced appellant to serve a term of eight to twenty years in the Nevada State Prison. This court dismissed appellant's direct appeal.¹

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

¹Romine v. State, Docket No. 31246 (Order Dismissing Appeal, June 9, 2000).

First, appellant claimed that he received inadequate appellate review of his direct appeal by this court. The district court does not sit in review of this court.² Accordingly, a petition for a writ of habeas corpus is not the proper means by which to raise this issue. If appellant wished to challenge this court's review of his direct appeal, he was required to file a timely petition for rehearing pursuant to NRAP 40(c).

Second, appellant claimed that his guilty plea was not knowingly and intelligently entered. Specifically, appellant argued that his plea was invalid because: (1) the district court abused its discretion by accepting his guilty plea and denying his motion to withdraw his guilty plea; (2) the district court accepted his guilty plea without a valid factual basis for conviction; (3) appellant did not understand the elements of the charged offense; (4) the district court failed to conduct a proper Faretta³ canvass to determine whether appellant's waiver of counsel at sentencing was knowing and voluntary; and (5) because his waiver of counsel was unknowing and involuntary the district court did not have jurisdiction to sentence him. This court has already determined on direct appeal that appellant's waiver of counsel and guilty plea were made knowingly and intelligently, and that the district court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea. Accordingly, further litigation on this issue is prohibited, and appellant cannot avoid the doctrine of the law of the case "by a more detailed and precisely focused argument subsequently made after reflection upon the previous

²See Nev. Const. art. 6, § 6.

³See Faretta v. California, 422 U.S. 806 (1975).

proceedings."⁴ Therefore, the district court did not err in denying these claims.

Third, appellant claimed that: (1) he was not properly Mirandized,⁵ and that the police refused to allow him to speak to an attorney; (2) the statute he was charged under, NRS 484.3795, is unconstitutional; (3) the justice court was biased against him; (4) the State failed to disclose exculpatory evidence; (5) the district court abused its discretion in sentencing appellant because it prevented him from presenting legal arguments and mitigating factors; and (6) the district court abused its discretion by failing to order an evaluation pursuant to NRS 484.3796. These claims fell outside the narrow scope of issues that may be raised in a post-conviction petition challenging a judgment of conviction based on a guilty plea.⁶ Therefore, the district court did not err in denying these claims.

Fourth, appellant claimed that his trial counsel was ineffective. To invalidate a judgment of conviction based on a guilty plea, an appellant must demonstrate that his counsel's performance fell below an objective standard of reasonableness.⁷ Further, an appellant must demonstrate a reasonable probability that, but for counsel's errors,

⁴Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

⁵See Miranda v. Arizona, 384 U.S. 436 (1966).

⁶See NRS 34.810(1)(a) (providing that a post-conviction petition challenging a judgment based on a guilty plea may raise only challenges to the validity of the plea or claims of ineffective assistance of counsel).

⁷Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

appellant would not have pleaded guilty and would have insisted on going to trial.⁸ This court need not consider both prongs of the test if the appellant makes an insufficient showing on either prong.⁹

Appellant claimed that his counsel was ineffective during the proceedings before the justice court for: (1) failing to investigate the facts and the law; (2) failing to obtain discovery; (3) misstating the facts; (4) failing to make objections; (5) failing to advocate on appellant's behalf; (6) failing to communicate with appellant; (7) arguing with appellant; (8) advising appellant to plead guilty; (9) advising appellant to waive the preliminary hearing; and (10) failing to consult and retain experts. These arguments are without merit. The evidence against appellant was overwhelming.¹⁰ The accident itself was videotaped by casino security cameras. Appellant's failure to pass sobriety tests given by police at the scene were videotaped by television news cameras. Appellant admitted he was under the influence of alcohol, and his blood alcohol level was three times the legal limit.¹¹ Moreover, in exchange for his plea the State dropped one count of reckless driving and agreed to one count of liability for all four victims. Accordingly, appellant failed to demonstrate that but for counsel's actions he would not have pleaded guilty and insisted on going to trial. Therefore, counsel was not ineffective in this regard.

⁸Id.

⁹Strickland, 466 U.S. at 697; Kirksey, 112 Nev. at 987, 923 P.2d at 1107.

¹⁰See Ford v. State, 105 Nev. 850, 852, 784 P.2d 951, 952 (1989) ("overwhelming evidence of guilt is relevant to the question of whether a client had ineffective counsel") (citing Strickland, 466 U.S. at 697).

¹¹See NRS 484.379.

Appellant argued that counsel was ineffective during the proceedings before the district court for: (1) failing to attend the initial arraignment and failing to attend the bail hearing; (2) failing to properly present appellant's plea at the continued arraignment, failing to recognize appellant's reluctance to plead guilty, and refusing to file a motion to withdraw the guilty plea; and (3) attending a bench conference after he had been replaced by appellant as counsel. To the extent that these claims are supported by factual allegations, they are belied by the record.¹² First, the record reflects that appellant was represented by a deputy public defender at the initial arraignment and at the bail hearing. Second, as discussed, this court has already determined that appellant's plea was entered knowingly and intelligently.¹³ Third, counsel was acting as standby counsel at the time of the bench conference, and as such acted appropriately. Moreover, as discussed, the evidence against appellant was overwhelming and he failed to demonstrate that but for counsel's actions he would not have pleaded guilty and insisted on going to trial. Therefore, counsel was not ineffective in this regard.

Fifth, appellant claimed that his appellate counsel was ineffective. To prevail on a claim of ineffective assistance of appellate counsel, appellant must demonstrate that counsel's performance fell below

¹²See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

¹³See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (holding that in order to withdraw a guilty plea, the defendant must show that his guilty plea was not entered knowingly and intelligently) superceded on other grounds by Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000); Hall, 91 Nev. at 315, 535 P.2d at 798 (holding that the law of the first appeal is the law of the case).

an objective standard of reasonableness and that appellant was prejudiced by the deficient performance.¹⁴ Appellate counsel is not required to raise every non-frivolous issue on appeal in order to be effective.¹⁵ In fact, this court has noted that "appellate counsel is most effective when she does not raise every conceivable issue on appeal."¹⁶ To show prejudice, appellant must show that the omitted issue would have had a reasonable probability of success on appeal.¹⁷

Appellant argued that appellate counsel's ineffectiveness in investigating, obtaining records, and communicating with appellant resulted in failure to raise certain issues on appeal. Specifically, appellant argued that appellate counsel should have argued on direct appeal that trial counsel was ineffective. Generally, claims of ineffective assistance of counsel must be raised in the district court in the first instance by filing a post-conviction petition for a writ of habeas corpus.¹⁸ Moreover, as discussed, appellant failed to demonstrate that trial counsel was ineffective. Accordingly, appellant cannot show that this issue would have had a reasonable probability of success on appeal. Therefore, appellate counsel was not ineffective in this regard.

¹⁴Strickland, 466 U.S. at 687.

¹⁵Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

¹⁶Ford, 105 Nev. at 853, 784 P.2d at 953 (citing Jones, 463 U.S. at 752).

¹⁷Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

¹⁸See Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995); Pellegrini v. State, 117 Nev. ___, ___, 34 P.3d 519, 534 (2001).

Next, appellant argued that appellate counsel was ineffective for failing to "perform reasonably and diligently in pursuing bail pending appeal."¹⁹ Appellant failed to show that this issue would have had a reasonable probability of success on appeal.²⁰ Therefore, appellant did not show that he was prejudiced, and appellate counsel was not ineffective in this regard.

Appellant also argued that appellate counsel was ineffective for "failing to "adequately prepare and perform ineffectively [sic] at oral arguments." Appellant failed to show that this issue would have had a reasonable probability of success on appeal.²¹ Therefore, appellant did not show that he was prejudiced, and appellate counsel was not ineffective in this regard.

Finally, appellant claimed that cumulative errors deprived him of "fundamental constitutional rights." Because appellant failed to establish that there were errors, we conclude that appellant has not "met the burden of showing that the decision reached would reasonably likely have been different absent the errors."²²

¹⁹Appellant filed an appeal from an order of the district court denying a motion for own recognizance release or bail pending appeal. On January 18, 2000, appellant filed a motion to withdraw the appeal, conceding that this court lacked jurisdiction to consider it. See Romine v. State, Docket No. 35237 (Order Dismissing Appeal, March 1, 2000).

²⁰See NRS 178.488 (providing that bail pending appeal is discretionary to the district court).


²¹See NRAP 34(f)(1) (providing that this court may order a case submitted for decision without oral argument).

²²See Gonzales v. McKune, 247 F.3d 1066, 1078-79 (10th Cir. 2001).

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.²³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²⁴


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. John S. McGroarty, District Judge
Attorney General/Carson City
Clark County District Attorney
Steven Craig Romine
Clark County Clerk

²³See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²⁴We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.