

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNNIE MITCHELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38359

FILED

JUL 11 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. May*
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 August 31, 1995, the district court convicted appellant, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon (count I), burglary in possession of a deadly weapon (count II), conspiracy to commit robbery (count III), and robbery with the use of a deadly weapon (count IV).¹ The district court sentenced appellant to serve terms totaling fifty-two years in the Nevada State Prison. This court affirmed the district court's ruling on direct appeal.²

On November 17, 1999, 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

¹Appellant was also charged with one count of possession of a firearm by an ex-felon. The jury found appellant not guilty of that charge.

²Mitchell v. State, 114 Nev. 1417, 971 P.2d 813 (1998).

conduct an evidentiary hearing. On August 9, 2001, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that his trial and appellate counsel were ineffective. Our review of the record on appeal reveals that the district court did not err in denying appellant's post-conviction petition for a writ of habeas corpus.

Appellant raised nine claims of ineffective assistance of trial counsel. To establish ineffective assistance of counsel, appellant must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.³ To show prejudice, appellant must show a reasonable probability that but for counsel's errors the result of the trial would have been different.⁴ "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."⁵ 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.⁶

First, appellant claimed that his trial counsel was ineffective for failing to file a pretrial motion to sever the ex-felon in possession of a firearm charge. In Brown v. State, 114 Nev. 1118, 967 P.2d 1126 (1998)

³Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴Strickland, 466 U.S. at 694.

⁵Howard 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).

⁶Strickland, 466 U.S. at 697.

this court held that severance is required when the State seeks convictions on multiple counts that include a count of possession of a firearm by an ex-felon. However, this rule applies prospectively.⁷ Appellant was tried in 1995, before this rule was articulated. Accordingly, appellant's trial counsel was not deficient for failing to file a motion to sever the charge.

Second, appellant claimed that his trial counsel was ineffective for failing to object to the reading to the jury of the ex-felon in possession of a firearm charge. As discussed, Brown was not applicable. Therefore, appellant has failed to demonstrate that trial counsel was ineffective in this regard.

Third, appellant claimed that his trial counsel was ineffective for failing to request a jury instruction for a lesser included offense of attempted murder with the use of a deadly weapon; specifically, assault with the use of a deadly weapon. At the time that appellant was tried a defendant was only entitled to a jury instruction on a lesser included offense under the following conditions: "(1) the offense for which the instruction is sought is a lesser included offense of the charged offense, (2) the defendant's theory of defense is consistent with a conviction for the lesser included offense, and (3) evidence of the lesser offense exists."⁸ Even if appellant's trial counsel had requested an instruction on assault

⁷Schoels v. State, 115 Nev. 33, 36, 975 P.2d 1275, 1277 (1999).

⁸Walker v. State, 110 Nev. 571, 574, 876 P.2d 646, 648 (1994). This court has since adopted the "elements test" articulated in Blockburger v. United States, 284 U.S. 299 (1932) and Lisby v. State, 82 Nev. 183, 414 P.2d 592 (1966) to determine whether a lesser included offense instructions are required. See Barton v. State, 117 Nev. ___, ___, 30 P.3d 1103, 1108 (2001).

with the use of a deadly weapon, such an instruction would have been inconsistent with appellant's theory of defense. Appellant's defense was that he was not a participant in the robbery, but merely present when it took place. Moreover, appellant failed to show that he was prejudiced by trial counsel's failure to proffer such instructions. Because there was sufficient evidence to find appellant guilty of attempted murder with the use of a deadly weapon beyond a reasonable doubt, appellant did not show that the outcome of the proceeding would have been different had a lesser-included offense instruction been given.⁹ Therefore, appellant failed to demonstrate that trial counsel was ineffective in this regard.

Fourth, appellant claimed that his trial counsel was ineffective for failing to request a jury instruction on specific intent. Specific intent to kill is an element of attempted murder.¹⁰ "An attempt to kill with malice is . . . completely consistent with the specific intent requirement of attempt."¹¹ Jury instruction number 4 defines "attempt murder" exactly as this court has - "the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill."¹² Accordingly, the jury was properly instructed on specific intent with regard to attempted murder and no additional instruction was necessary. Therefore, trial counsel was not ineffective in this regard.

⁹See Strickland, 466 U.S. at 694.

¹⁰Keys v. State, 104 Nev. 736, 739, 766 P.2d 270, 272 (1988).

¹¹Id.

¹²Id.

Fifth, appellant claimed that his trial counsel was ineffective for failing to object to the jury instruction on attempted murder. As discussed, the jury was properly instructed on attempted murder. Therefore, appellant has failed to demonstrate that counsel was ineffective in this regard.

Sixth, appellant claimed that his trial counsel was ineffective for failing to object to the jury instruction on malice. The jury instruction on malice, jury instruction number 5, was misleading.¹³ However, it was cured by the preceding instruction which correctly defined attempted murder.¹⁴ Moreover, even assuming the error was not cured, it was harmless.¹⁵ In light of the facts that appellant's co-conspirator shot three times at a security guard, once at point blank range, we conclude beyond a reasonable doubt that the jury would have found appellant guilty of attempted murder even absent the erroneous instruction.¹⁶ Therefore, appellant has failed to demonstrate that he was prejudiced and that trial counsel was ineffective in this regard.

¹³See id. at 740, 766 P.2d at 273 ("Attempted murder can be committed only when the accused's acts are accompanied by *express malice*, malice in fact.").

¹⁴See Riebel v. State, 106 Nev. 258, 262, 790 P.2d 1004, 1007 (1990).

¹⁵See Neder v. United States, 527 U.S. 1 (1999); Collman v. State, 116 Nev. 687, ___, 7 P.3d 426, 429 (2000) (holding that an erroneous instruction is subject to harmless error analysis).

¹⁶See Neder, 527 U.S. at 15; Collman, 116 Nev. at ___, 7 P.3d at 449; Ford v. State, 105 Nev. 850, 852, 784 P.2d 951, 952 (1989) (citing Strickland, 466 U.S. at 697).

Seventh, appellant claimed that his trial counsel was ineffective for failing to request a jury instruction on mere presence. Jury instruction number 15 stated that "[m]ere presence at the scene of a crime cannot support an inference that one is a party to an offense. However, the defendant's presence, companionship, and conduct before, during and after the crime are circumstances from which you may infer his participation in the criminal act." Accordingly, the jury was properly instructed on mere presence. Therefore, trial counsel was not ineffective in this regard.

Eighth, appellant claimed that his trial counsel was ineffective for failing to object to the jury instruction on aiding and abetting. Appellant raised the substantive underlying issue on direct appeal and this court found that "the instruction given below . . . adequately communicated the law regarding this issue."¹⁷ The doctrine of the law of the case prevents further litigation on this issue.¹⁸ Therefore, appellant failed to demonstrate that trial counsel was ineffective in this regard.

Ninth, appellant claimed that his trial counsel was ineffective for failing to object to the prosecution's closing argument regarding aiding and abetting. Specifically, appellant argued that because the evidence did not show that he had the specific intent to kill, trial counsel should have objected when, during closing argument, "the State incessantly informed the jury that [appellant] could be convicted . . . based upon the aiding and abetting theory." This argument is without merit. The State was correct in stating that if the jury found that appellant aided and abetted the

¹⁷Mitchell, 114 Nev. at 1427 n.3, 971 P.2d 813, 820 n.3 (1998).

¹⁸See Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

commission of a felony, appellant could be treated as a principal in the crime.¹⁹ Therefore, appellant failed to demonstrate that trial counsel was ineffective in this regard.

Appellant also raised six claims of ineffective assistance of appellate counsel. To prevail on a claim of ineffective assistance of appellate counsel appellant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that appellant was prejudiced by the deficient performance.²⁰ Appellate counsel is not required to raise every non-frivolous issue on appeal in order to be effective.²¹ In fact, this court has noted that "appellate counsel is most effective when she does not raise every conceivable issue on appeal."²² To show prejudice, appellant must show that the omitted issue would have had a reasonable probability of success on appeal.²³

First, appellant claimed that appellate counsel was ineffective for failing to premise the arguments raised on direct appeal on federal law, thereby denying appellant federal habeas corpus review. Specifically,

¹⁹See NRS 195.020. Additionally, this court clarified this issue on appellant's direct appeal, stating that "a conviction for attempted murder will lie even if the defendant did not have the specific intent to kill provided the attempted murder was the natural and probable consequence of the aider and abettor's target crime." Mitchell, 114 Nev. at 1427, 971 P.2d at 820.

²⁰Strickland, 466 U.S. at 687.

²¹Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

²²Ford, 105 Nev. at 853, 784 P.2d at 953 (citing Jones, 463 U.S. at 752).

²³Id.; Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1113-14 (1996).

appellant argues that his claims on direct appeal should have been premised on the Fifth Amendment right against self-incrimination, the Sixth Amendment right to a fair trial, and the Fourteenth Amendment right to due process of law. This claim is without merit. On direct appeal, appellant claimed that he was not Mirandized²⁴ before making incriminating statements to detectives which were admitted at trial, he was wrongly convicted of attempted murder on a theory of aiding and abetting, his sentence was improperly enhanced, and he was vindictively sentenced because he refused to plea bargain.²⁵ This court expressly analyzed appellant's Miranda claim as a Fifth Amendment claim, therefore appellant failed to demonstrate that he was prejudiced. In addition, even assuming appellate counsel's failure to premise the remaining claims on the Sixth and Fourteenth Amendments fell below an objective standard of reasonableness, appellant failed to demonstrate that these issues would have had a reasonable probability of success on appeal. Therefore, appellant failed to demonstrate that appellate counsel was ineffective in this regard.

Second, appellant claimed that appellate counsel was ineffective for failing to challenge on direct appeal the district court's failure to sua sponte sever the possession of a firearm by an ex-felon charge. As discussed, the rule that severance is required when the State seeks convictions on multiple counts that include a count of possession of a firearm by an ex-felon applies prospectively.²⁶ Therefore, appellant failed

²⁴See Miranda v. Arizona, 384 U.S. 436 (1966).

²⁵Mitchell, 114 Nev. at 1419, 971 P.2d at 815.

²⁶Schoels, 115 Nev. at 36, 975 P.2d at 1277.

to show that this issue would have had a reasonable probability of success on appeal, and appellate counsel was not ineffective in this regard.

Third, appellant claimed that appellate counsel was ineffective for failing to challenge on direct appeal the district court's failure to sua sponte provide a jury instruction on the lesser included offense of assault with the use of a deadly weapon. As discussed, there was sufficient evidence to find appellant guilty of attempted murder with the use of a deadly weapon beyond a reasonable doubt, and such an instruction would have been inconsistent with appellant's theory of defense. Therefore, appellant failed to show that this issue would have had a reasonable probability of success on appeal, and appellate counsel was not ineffective in this regard.

Fourth, appellant claimed that appellate counsel was ineffective for failing to challenge on direct appeal the jury instruction on attempted murder. Appellant argued that this jury instruction misled the jury as to the definition and elements of the charge. As discussed, the jury was adequately instructed on attempted murder. Therefore, appellant failed to show that this issue would have had a reasonable probability of success on appeal, and appellate counsel was not ineffective in this regard.

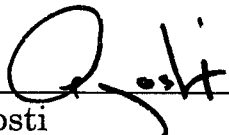
Fifth, appellant claimed that appellate counsel was ineffective for failing to challenge on direct appeal the jury instruction on malice. Appellant argued that this jury instruction misled the jury as to implied malice regarding attempted murder. As discussed, the misleading instruction was cured, and even assuming it was not, any error was harmless. Therefore, appellant failed to show that this issue would have had a reasonable probability on appeal, and appellate counsel was not ineffective in this regard.


Sixth, appellant claimed that appellate counsel was ineffective for failing to challenge on direct appeal whether mere presence is sufficient to establish a conviction. As discussed, the jury was properly instructed on mere presence. Therefore, appellant failed to show that this issue would have had a reasonable probability of success on appeal, and appellate counsel was not ineffective in this regard.

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.²⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²⁸


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Sally L. Loehrer, District Judge
Attorney General/Carson City
Clark County District Attorney
Johnnie Mitchell
Clark County Clerk

²⁷See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²⁸We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.