

IN THE SUPREME COURT OF THE STATE OF NEVADA

AMADOR E. NABOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38452

FILED

NOV 21 2002

ORDER OF AFFIRMANCE

JANET M. BOGAL
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 July 14, 1997, the district court convicted appellant, pursuant to a jury verdict, of robbery. The district court adjudicated appellant a habitual criminal¹ and sentenced him to serve a term of ten to twenty-five years in the Nevada State Prison. This court dismissed appellant's direct appeal.²

On May 25, 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 September 4, 2001, the district court denied appellant's petition. This appeal followed.

¹See NRS 207.010.

²Nabor v. State, Docket No. 30785 (Order Dismissing Appeal, April 26, 2000).

In his petition, appellant raised ten claims of ineffective assistance of trial counsel. To establish ineffective assistance of trial 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.³ 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.⁴ "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."⁵ This 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 trial counsel breached the duty of loyalty to appellant. Specifically, appellant argued that counsel: (1) failed to attend the "client attorney appointment interview;" (2) failed to respond to appellant's letter regarding various 911 recordings; and (3) conspired with the State to undermine appellant's defense by "refusing to submit discovery." To the extent that these claims are supported by specific factual allegations, they are belied by the record.⁷ The record reflects that although counsel missed a meeting with appellant, counsel

³Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (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; Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

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

did meet with appellant several times, that the 911 calls were investigated, and that the defense received the State's entire file excepting work product. Therefore, appellant failed to show that counsel was ineffective in this regard, and the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to conduct a pretrial investigation of the facts. Specifically, appellant argued that counsel should have investigated: (1) whether appellant was falsely arrested and imprisoned; (2) discrepancies in the voluntary statement given to police by the victim; (3) the statement given to police by witness Celeste Johnson; (4) the recordings of several 911 calls made to the police by witnesses and bystanders; and (5) whether a "trainee" officer forged the signatures of two other officers on the police incident report. These arguments are unsupported by any specific factual allegations which would, if true, entitle appellant to relief.⁸ Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to investigate the law. Specifically, appellant complained that counsel "failed to cite one case" at the hearing held on the defense motion to suppress the statements appellant made to the police after his arrest. To the extent that this claim is supported by specific factual allegations it is belied by the record.⁹ The motion to suppress did contain citations to case law. At the hearing appellant expressed dissatisfaction with his attorney and was allowed to argue for himself at length before the district

⁸See id.

⁹See id.

court denied the motion. Therefore, appellant failed to show that counsel was ineffective in this regard, and the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to file a motion for appellant's charges to be reduced to the lesser offense of petty larceny, then challenge the jurisdiction of the district court to try a misdemeanor. Appellant was charged with alternate felonies, robbery and larceny from the person, for stealing a woman's purse. The facts clearly supported both charges. Therefore, appellant failed to show that counsel's failure to file such a motion fell below an objective standard of reasonableness, and the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to develop a theory of defense. Specifically, appellant argued that counsel should have raised the defenses of false arrest and false imprisonment. The record reflects that counsel did question the State's witnesses regarding discrepancies in the way the perpetrator was described and appellant's appearance when arrested. Therefore, appellant failed to show that counsel was ineffective in this regard and the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to make certain objections. Specifically, appellant argued that counsel should have objected to: (1) the allegedly falsified incident report; (2) the fact that "corrupt badges" of the Las Vegas Metropolitan Police Department (LVMPD) lost exculpatory evidence; (3) evidence admitted by the "corrupt badges" of the LVMPD; (4) the "perjured" testimony of witness Celeste Johnson; and (5) the victim's "impeachment perjury." Appellant failed to allege any specific facts in support of these

contentions.¹⁰ Accordingly, appellant failed to show that any of these objections would have been sustained. Therefore appellant failed to show a reasonable probability that had counsel made the objections the result of the trial would have been different and the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for failing to move to have appellant's case dismissed, pursuant to NRS 34.500,¹¹ on the grounds that the process under which appellant was arrested and charged was defective. Appellant's argument appears to be based on the supposition that he was misidentified by witnesses. Even assuming this was true, it does not render the process under which appellant was arrested and charged defective. Therefore, appellant did not show that counsel was ineffective in this regard, and the district court did not err in denying this claim.

Eighth, appellant claimed that trial counsel was ineffective for failing to call certain witnesses. Specifically, appellant argued that counsel should have called: (1) "Metro officers who participated process investigation Nabor arrested [sic];" (2) the district manager of Payless (the victim's employer); and (3) "newly discovered witness" LVMPD Officer Kardos. At trial the jury heard the testimony of three LVMPD officers

¹⁰See id.

¹¹NRS 34.500(3) states that:

If it appears on the return of the writ of habeas corpus that the petitioner is in custody by virtue of process from any court of this state, or judge or officer thereof, the petitioner may be discharged . . .

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involved in the arrest of appellant and four eye witnesses, including the victim. Appellant did not establish how the testimony of additional officers or the victim's employer would have assisted the defense. Therefore, appellant failed to establish that counsel was ineffective in this regard and the district court did not err in denying this claim.

Ninth, appellant claimed that trial counsel was ineffective for suborning perjury. Specifically, appellant claimed that his counsel suborned the perjured testimony of: (1) the victim, (2) arresting Officer Bruce Harper, (3) Lt. Stavros Anthony, and (4) Officer William Stockdale. Appellant's accusation of perjury is a bare claim unsupported by any specific factual allegations. Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that his trial counsel was ineffective in regard to appellant's direct appeal. Specifically, appellant claimed that his trial counsel was ineffective for failing to file a direct appeal and failing to send appellant his files. To the extent that these claims are supported by any specific factual allegations, they are belied by the record.¹² Appellant's conviction was appealed and the record reflects that the file was sent to him. Appellant also claimed that his trial counsel failed to "inform [the district] court he was never appointed to be appellant's counsel" on appeal. Even assuming counsel did not so inform the district court, appellant did not show how he was prejudiced. Finally, appellant claimed that in failing to file for an extension of time to file an

... continued

. [w]hen the process is defective in some matter of substance required by law, rendering it void.

¹²See Hargrove, 100 Nev. 498, 686 P.2d 222.

opening appellate brief his trial counsel committed "perjury." This claim is unsupported by any specific factual allegations.¹³ Therefore, appellant failed to show that counsel was ineffective in this regard and the district court did not err in denying these claims.

Next, appellant raised five claims of ineffective assistance of appellate counsel. 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.¹⁴ Appellate counsel is not required to raise every non-frivolous issue on appeal in order to be effective.¹⁵ This court has noted that "appellate counsel is most effective when she does not raise every conceivable issue on appeal."¹⁶ To show prejudice, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.¹⁷

First, appellant claimed that appellate counsel was ineffective because, although he filed an opening brief, he "refused" to file for an extension of time to file an opening brief. Appellant failed to demonstrate that he was prejudiced by the fact that counsel did not file for an extension of time. Therefore, appellant did not show that counsel was ineffective in this regard and the district court did not err in denying this claim.

¹³See id.

¹⁴Strickland, 466 U.S. at 687.

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

¹⁶Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (citing Jones, 463 U.S. at 752).

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

Second, appellant claimed that appellate counsel was ineffective for withholding "exculpatory evidence." Specifically, appellant argued that counsel "withheld" the 911 tapes, voluntary witness statements, the black purse with a gold chain handle belonging to the victim, and the money taken from the victim. It is not the role of an attorney on appeal to present evidence. Therefore, appellant failed to show that counsel was ineffective in this regard, and the district court did not err in denying this claim.

Third, appellant claimed that appellate counsel was ineffective for failing to pursue "substantial meritorious issues." Specifically, appellant argued that counsel should have addressed the "bad faith" on the part of the State, including prosecutorial, police and judicial misconduct. Appellant's claim of "obstruction of justice, corruption, perjury" on the part of "all the attorneys," "all" the State's witnesses, the district court judge, the court reporter, and the LVMPD is not of sufficient factual specificity to support this claim.¹⁸ Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that appellate counsel was ineffective for failing to raise on direct appeal the issue of whether the district court exceeded its authority by telling the "prosecutors which crimes to prosecute [and] when to prosecute them;" and ordering that a "stun belt" be put on appellant. To the extent that these claims are supported by specific factual allegations they are belied by the record.¹⁹

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

¹⁹See id.

At a hearing scheduled to hear evidence regarding the defense's motion to suppress, the district court told the State:

I'm really upset with the State. I wanted to get rid of this case. I told you that Mr. Lalli. I want this case resolved. It's not resolved. And as far as I'm concerned, the State should have told their witnesses to be here for the evidentiary hearing and been here Monday for trial. I'm very upset with the State.

Contrary to appellant's contention, this statement does not constitute telling the State which crimes to prosecute and when to prosecute them. The record also reflects that it was the decision of the Clark County Detention Center to restrain appellant with a "stun belt," not that of the district court. Therefore, appellant failed to show that counsel was ineffective in this regard and the district court did not err in denying this claim.

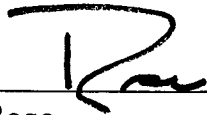
Finally, appellant claimed that appellate counsel was ineffective for failing to raise the issue of whether appellant was improperly denied his right to self-representation at trial. Appellant made his request to represent himself at calendar call on the day of the evidentiary hearing on the defense's motion to suppress and the day before the trial was scheduled to start. Accordingly, the request was untimely.²⁰ In addition, the right to self-representation may be denied where the

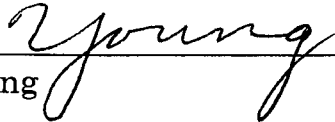
²⁰See Lyons v. State, 106 Nev. 438, 445-46, 796 P.2d 210, 214 (1990). (holding that a request to represent oneself at trial may be denied as untimely if the request does not come early enough to allow the defendant to prepare for trial without the need for a continuance), abrogated on other grounds by Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001).

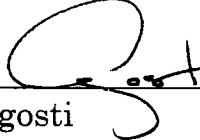
request is equivocal.²¹ Appellant's request was equivocal because at the time he told the district court he wanted to represent himself he also told the court that he wanted a new lawyer. Therefore, appellant failed to show that this issue would have a reasonable probability of success on appeal, and 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.²² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

cc: Hon. Sally L. Loehrer, District Judge
Attorney General/Carson City
Clark County District Attorney
Amador E. Nabor
Clark County Clerk

²¹See id. at 443, 796 P.2d at 213, abrogated on other grounds by Vanisi, 117 Nev. 330, 22 P.3d 1164.

²²See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).