

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN SHERONZ DEAL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38458

FILED

FEB 13 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying, in part, appellant's post-conviction petition for a writ of habeas corpus. Appellant was originally convicted, pursuant to a jury verdict, of one count of attempted robbery, two counts of robbery, and one count of attempted robbery. On direct appeal, this court concluded that the district court had misapplied the habitual criminal statute, and remanded the case for resentencing.¹

Upon resentencing before a different district judge, the district court imposed a harsher sentence than that originally imposed. Appellant failed to raise this issue on his appeal from the second judgment of conviction, arguing only that the district court abused its discretion because the sentence was too harsh. This court therefore affirmed the judgment of conviction.²

¹Deal v. State, Docket No. 31621 (Order of Remand, September 8, 1998).

²Deal v. State, Docket No. 33335 (Order Dismissing Appeal, March 11, 1999).

Appellant filed a proper person petition for a writ of habeas corpus in the district court on August 2, 1999. In the petition, appellant alleged various instances of ineffective assistance of trial and appellate counsel. The district court appointed counsel for appellant, and counsel filed a supplemental petition on January 5, 2000.

Following an evidentiary hearing, the district court granted the petition in part and denied it in part. Specifically, the district court found that: (1) appellate counsel was ineffective for failing to argue that the harsher sentence after remand should be vacated; (2) there was insufficient evidence to support the conviction for attempted robbery; and (3) the conviction for attempted grand larceny and one of the robbery counts violated the proscription against double jeopardy. The district court therefore reversed appellant's convictions for attempted robbery and attempted grand larceny and set the matter for a new sentencing hearing.

In this appeal, appellant challenges the district court's denial of his remaining claims. 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 counsel's errors were so severe that they rendered the jury's verdict unreliable.³

Appellant first contends that the district court erred by upholding both robbery convictions. Specifically, appellant argues that neither of the incidents constituted the crime of robbery pursuant to this court's decision in Martinez.⁴ This court held in Martinez that "where

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

⁴Martinez v. State, 114 Nev. 746, 961 P.2d 752 (1998).

force is used only to facilitate escape, the use of force must be . . . used to compel acquiescence to the escaping with the property in order to constitute the crime of robbery."⁵ In the instant case, the force or threat of force was used to compel acquiescence to appellant's escape with the stolen property. Accordingly, we conclude that the district court correctly found that appellant's actions constituted the crime of robbery, and appellant's counsel was therefore not ineffective for failing to pursue this issue either before trial or on appeal.

Appellant next contends that the district court erred by concluding that counsel was not ineffective for failing to challenge the charging documents and jury instructions. Specifically, appellant takes issue with language in the information and jury instruction No. 13 which defines robbery as "willfully and unlawfully" taking personal property. NRS 200.380(1) does not require that a taking be willful to constitute robbery, only that the taking be unlawful. We conclude that even assuming that appellant's counsel should have challenged the information and jury instruction, appellant was not prejudiced by counsel's performance.

Appellant's argument on this issue is not entirely clear, but to the extent that appellant argues that the information and jury instruction added an element to the crime of robbery, that would presumably work in appellant's favor because it would have required the jury to find an additional element in order to convict appellant. To the extent that appellant argues that there was insufficient evidence to prove that the takings were "willful," such proof is not necessary. Moreover, the district court found that there was sufficient evidence to support the two counts of

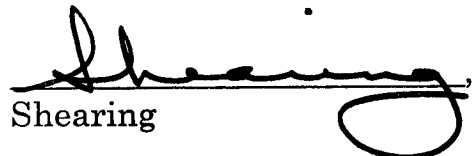
⁵Id. at 748, 961 P.2d at 754.

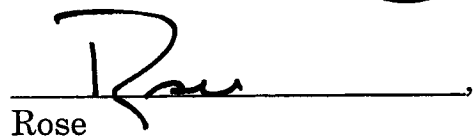
robbery, and appellant has not demonstrated that that finding is not supported by substantial evidence. We therefore conclude that appellant's contention is without merit.

Finally, appellant contends that his counsel was ineffective for allowing the trial on the robbery charges to be joined with his trial for an unrelated escape charge. The district court found, however, that appellant requested that the trials be joined, and that finding is supported by the record. We therefore conclude that the district court did not err by denying relief on this issue.

Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Shearing


_____, J.
Rose


_____, J.
Becker

cc: Hon. Jerome Polaha, District Judge
Attorney General/Carson City
Washoe County District Attorney
Karla K. Butko
Washoe District Court Clerk