

IN THE SUPREME COURT OF THE STATE OF NEVADA

CORNELL DEWAYNE BELT,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38553

FILED

AUG 21 2002

ORDER OF AFFIRMANCE

JANEITE 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 July 28, 1999, the district court convicted appellant, pursuant to a jury verdict, of one count of larceny from the person. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a term of five to twenty years in the Nevada State Prison. This court dismissed appellant's direct appeal.<sup>1</sup>

On June 21, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant supplemented the petition. 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

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<sup>1</sup>Belt v. State, Docket No. 34631 (Order Dismissing Appeal, June 13, 2000).

October 22, 2001, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised two claims of ineffective assistance of trial counsel. 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.<sup>2</sup> The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.<sup>3</sup>

First, appellant claimed that his trial counsel was ineffective for failing to object to prosecutorial abuse in obtaining continuances for a preliminary hearing and filing an indictment after the case was allegedly dismissed with prejudice. Appellant noted that at three separate dates set for a preliminary hearing the district attorney was not prepared to go forward because of the absence of the victim or a witness. The justice's court dismissed the case on the third date. We conclude that the district court did not err in denying this claim. The underlying substantive issue, appellant's challenge to the State's conduct during the preliminary hearing proceedings and the filing of the indictment, had already been

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

<sup>3</sup>Strickland, 466 U.S. at 697.

considered and rejected by this court on direct appeal. Appellant's trial counsel filed a motion to dismiss the indictment based upon the State's conduct during the preliminary hearing proceedings. Appellant challenged the denial of his motion to dismiss on direct appeal, and this court determined that the district court did not abuse its discretion in denying appellant's motion to dismiss the indictment. This court stated that the district court determined that the dismissal of the case was without prejudice. This court further stated, "the record does not reflect that the delays in the first prosecution were a result of 'willful disregard' or 'conscious indifference' on the part of the State." The law of the case prevents further relitigation of this issue.<sup>4</sup> Appellant failed to demonstrate that his counsel's performance was unreasonable or that he was prejudiced.

Second, appellant claimed that his trial counsel was ineffective for failing to file a pretrial habeas corpus petition alleging lack of jurisdiction because appellant was not provided with adequate notice of the grand jury proceedings.<sup>5</sup> We conclude that the district court did not err in concluding that this claim lacked merit. Even assuming that appellant did not receive adequate Marcum notice, we conclude that appellant failed to demonstrate prejudice as a result of counsel's failure to

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<sup>4</sup>Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

<sup>5</sup>NRS 172.241; Sheriff v. Marcum, 105 Nev. 824, 783 P.2d 1389 (1989).

challenge the indictment. Appellant did not allege that the State could not have obtained a second indictment, or that the second indictment would have been any different from the first. The issue of whether or not appellant received adequate notice of the grand jury proceedings is not jurisdictional. Further, there was no prejudice to appellant because appellant was ultimately convicted by a jury of the charged offense.<sup>6</sup> Therefore, appellant failed to demonstrate that his counsel was ineffective in this regard.

Next, appellant raised several claims of ineffective assistance of appellate counsel.<sup>7</sup> “A claim of ineffective assistance of appellate counsel is reviewed under the ‘reasonably effective assistance’ test set forth in Strickland v. Washington, 466 U.S. 668 (1984).”<sup>8</sup> Appellate

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<sup>6</sup>United States v. Mechanik, 475 U.S. 66 (1986) (holding that a jury’s verdict of guilty beyond a reasonable doubt demonstrated that there was probable cause to charge the defendants with the offenses for which they were convicted despite a violation of a rule relating to the grand jury proceedings); see also Lisle v. State, 114 Nev. 221, 954 P.2d 744 (1998).

<sup>7</sup>To the extent that appellant raised any of his claims independently from his ineffective assistance of appellate counsel claims, appellant waived these issues. 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). We nevertheless address appellant’s claims in connection with his contention that appellate counsel should have raised the claims on direct appeal.

<sup>8</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

counsel is not required to raise every non-frivolous issue on appeal.<sup>9</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>10</sup> “To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal.”<sup>11</sup>

First, appellant claimed that his appellate counsel was ineffective for failing to challenge the prosecutorial abuse in obtaining continuances for a preliminary hearing and filing an indictment. Appellate counsel did challenge the district court’s denial of appellant’s motion to dismiss the indictment. As stated above, the underlying substantive issue was considered and rejected by this court. Appellant failed to demonstrate that his appellate counsel was ineffective in this regard.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court lacked jurisdiction because appellant was not provided adequate notice of the grand jury proceedings. The issue of whether or not appellant received adequate notice of the grand jury proceedings is not a jurisdictional issue. Therefore, appellant failed to demonstrate that his appellate counsel’s

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<sup>9</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>10</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

<sup>11</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

performance was unreasonable or that this issue had a reasonable probability of success on appeal.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that the State had improperly and without authority amended the indictment to include notice of habitual criminality without presenting the issue to the grand jury. NRS 207.010(2) provides that if an indictment is found it is within the discretion of the district attorney whether to file a notice of habitual criminality. NRS 207.016(2) specifically provides that no allegation of a conviction may be read in the presence of the grand jury considering an indictment for the primary offense. The State properly sought leave from the district court to amend the indictment to include notice of habitual criminality. The district court granted the State leave to file the amended indictment. Therefore, appellate counsel was not ineffective in failing to raise this argument on direct appeal.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that the State improperly stated at sentencing that appellant should be adjudicated a habitual criminal because he was suspected of killing a witness in the case. The district court specifically stated that it was disregarding this argument of the State. Thus, there is no indication that the district court relied in any manner on this argument by the State.<sup>12</sup> Therefore, appellant failed to

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<sup>12</sup>Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976).

demonstrate that this issue had a reasonable probability of success on appeal.

Fifth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court abused its discretion at sentencing by relying upon the presentence investigation report as proof of his prior convictions.<sup>13</sup> During sentencing, the State presented the district court with certified copies of the prior convictions. The minutes for the sentencing hearing indicate that the State lodged three exhibits with the district court. Appellant did not argue or demonstrate that there were any infirmities in the prior convictions. The district court, in adjudicating appellant a habitual criminal, properly relied upon the totality of the information presented to the court. Therefore, appellant failed to demonstrate that his counsel was ineffective in this regard.

Sixth, appellant claimed that his appellate counsel was ineffective for failing to argue that his habitual criminal adjudication violated Apprendi v. New Jersey, 530 U.S. 466 (2000). Apprendi specifically excludes from its holding a sentencing enhancement involving an increased penalty based upon the fact of a prior conviction.<sup>14</sup> NRS 207.016(2) provides that prior convictions included in a notice of habitual

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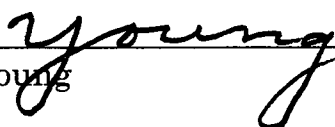
<sup>13</sup>To the extent that appellant claimed that his trial counsel was ineffective for failing to object at sentencing, appellant failed to demonstrate that his counsel was ineffective.

<sup>14</sup>Id. at 490.

criminality may not be alluded to on trial of the primary offense nor read to the jury trying the primary offense. The State amended the indictment to include notice of habitual criminality. The district court was presented with certified copies of the prior convictions. This court already determined on direct appeal that it was reasonable to conclude that the district court determined that adjudication of appellant as a habitual criminal was just and proper. Therefore, appellant failed to demonstrate that this issue had a reasonable probability of success on appeal.

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.<sup>15</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>16</sup>

  
\_\_\_\_\_, J.  
Young

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Leavitt

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<sup>15</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>16</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.



cc: Hon. Michael A. Cherry, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Cornell Dewayne Belt  
Clark County Clerk