

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY DOW,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38762

**FILED**

SEP 12 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.

On November 29, 1995, the district court convicted appellant, after a jury trial, of one count of possession of a stolen motor vehicle, two counts of possession of a controlled substance, and one count of possession of tools commonly used for commission of burglary. The district court adjudicated appellant to be a habitual criminal and sentenced him to serve a term of life in the Nevada State Prison with the possibility of parole.<sup>1</sup> This court dismissed appellant's untimely direct appeal for lack of jurisdiction.<sup>2</sup>

On April 27, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel, and counsel filed a supplement to the petition. The State filed a motion to dismiss the petition on the ground

---

<sup>1</sup>On November 30, 1995, the district court entered an amended judgment of conviction to include a provision that the sentence in the instant district court case would run consecutively to the sentence appellant was serving in another district court case.

<sup>2</sup>Dow v. State, Docket No. 32267 (Order Dismissing Appeal, June 2, 1998).

that it was untimely filed.<sup>3</sup> Appellant filed an opposition to the State's motion to dismiss. Pursuant to NRS 34.770, the district court elected to conduct an evidentiary hearing. On September 28, 2001, the district court determined that appellant had demonstrated good cause to excuse the untimely filing of his petition and denied appellant's petition in part and granted appellant's petition in part.<sup>4</sup> This appeal followed.

In this appeal appellant argues that the district court erroneously denied several of his claims of ineffective assistance of 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>5</sup> The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.<sup>6</sup> Finally, a district court's factual findings regarding a claim of ineffective assistance are entitled to deference so long as they are supported by substantial evidence and are not clearly wrong.<sup>7</sup>

---

<sup>3</sup>NRS 34.726(1) (providing that a post-conviction petition for a writ of habeas corpus must be filed within one year of entry of the judgment of conviction).

<sup>4</sup>The district court granted appellant's petition in part and ordered a new sentencing hearing to be conducted due to alleged errors that occurred during the original sentencing hearing. The State does not challenge on appeal the granting in part of appellant's petition, and therefore, this court will not review that portion of the district court's order.

<sup>5</sup>Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>6</sup>Strickland, 466 U.S. at 697.

<sup>7</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Appellant contends that his counsel was ineffective for failing to present an opening argument at trial. Appellant argues that the failure to present an opening argument led the jury to believe that appellant had no case or defense to the charges. We conclude that the district court did not err in determining that appellant failed to demonstrate that he was prejudiced by the lack of an opening argument. Appellant fails to demonstrate a reasonable probability that the outcome of the trial would have been different if counsel had presented an opening argument. Appellant's trial counsel cross-examined witnesses and presented a closing argument. Therefore, the jury was not led to believe that appellant had no case or defense to the charges. Appellant's counsel was not ineffective in this regard.

Second, appellant argues that his trial counsel was ineffective for stipulating to essential elements of one of the crimes charged. Specifically, appellant argues that his trial counsel's stipulations that the drugs found in the car were controlled substances and that appellant's urine specimen came back positive for various controlled substances allowed the State to argue that the evidence was unrefuted in respect to the controlled substance charges. We conclude that the district court did not err in concluding that appellant failed to demonstrate that his counsel's performance was unreasonable or that he was prejudiced by counsel's performance. Appellant presented no evidence during the evidentiary hearing that the stipulated facts were untrue. Further, there is no indication that the State would not have been able to prove the stipulated facts at trial beyond a reasonable doubt in absence of the stipulation.<sup>8</sup> Appellant's counsel was not ineffective in this regard.

---

<sup>8</sup>In fact, the record reveals that the criminalist that tested the drugs found in the car was on the stand when trial counsel entered the first

*continued on next page . . .*

Next, appellant argues that the district court erred in the handling of his appeal deprivation claim.<sup>9</sup> In the petition below, appellant argued that he requested his counsel to file a direct appeal and that he believed his trial counsel had filed a direct appeal on his behalf. Appellant only learned of counsel's failure to pursue a direct appeal after he submitted a status check three years later. During the evidentiary hearing, the district court found that appellant's counsel was deficient for failing to file an appeal and considered the four direct appeal claims raised in appellant's petition. The district court determined that appellant's claim that prior bad act evidence was improperly admitted lacked merit. However, the district court determined that one of appellant's claims that an error occurred during the sentencing hearing did have merit and ordered a new sentencing hearing. Appellant now argues that the district court erroneously determined that his claim of improper admission of prior bad act evidence lacked merit. Appellant further argues that the district court improperly concluded that he had failed to demonstrate prejudice in regards to his appeal deprivation claim and that he should be given a further opportunity to present direct appeal claims pursuant to the remedy set forth in Lozada.<sup>10</sup> We conclude that appellant's arguments are without merit.

First, appellant argues that the district court should not have allowed the State to present evidence of appellant's urine specimen that tested positive for various controlled substances. Appellant argues that

---

*... continued*

stipulation. The record further reveals that the State was prepared to call an additional witness to testify about the urine specimen.

<sup>9</sup>Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

<sup>10</sup>110 Nev. at 359, 871 P.2d at 950.

the evidence was irrelevant because he was not charged with using or being under the influence of a controlled substance and that the evidence was extremely prejudicial. Appellant also argues that a proper Petrocelli hearing was not conducted in this case.<sup>11</sup>

Before admitting evidence of a prior bad act under NRS 48.045(2), the district court must, outside the presence of the jury, determine that: (1) the incident is relevant to the crimes charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.<sup>12</sup> The district court's failure to conduct a proper Petrocelli hearing on the record is cause for reversal unless: (1) the record is sufficient for this court to determine that the evidence is admissible under the three-factor test set forth in Tinch; or (2) where the result would have been the same if the district court had not admitted the prior bad act evidence.<sup>13</sup>

Based upon our review of the documents before this court, we conclude that the district court did not improperly admit this evidence. Although the district court did not conduct a full Petrocelli hearing, the record is sufficient to determine that the evidence was admissible under Tinch. First, the evidence of the urine specimen was relevant. Because appellant's theory of defense was that the drugs found in the camera bag on the front passenger seat of the vehicle that he solely occupied at the time of the vehicle stop were not his and that he did not know that any drugs were in the bag, the evidence that appellant had the same drugs in

---

<sup>11</sup>Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

<sup>12</sup>Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

<sup>13</sup>Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998).

his system at the time of his arrest was probative in establishing his knowledge. Second, the act was established by clear and convincing evidence because appellant stipulated at trial that the urine specimen was positive for various controlled substances and that the drugs found in the camera bag were controlled substances. Third, the district court did listen to arguments from counsel outside the presence of the jury and concluded that the probative value of the evidence was not substantially outweighed by prejudice.

In a related argument, appellant argues that it was error for the district court not to give a limiting jury instruction on the prior bad act evidence. Appellant relies upon this court's holding in Tavares v. State, 117 Nev. \_\_\_, 30 P.3d 1128 (2001), that a limiting jury instruction should be given both at the time evidence of the uncharged bad act is admitted and in the district court's final charge to the jury.

We conclude that appellant is not entitled to relief on this claim. "[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."<sup>14</sup> In Tavares, however, this court stated that the failure to give a limiting jury instruction was a non-constitutional error. Thus, the rule announced in Tavares did not apply retroactively to appellant. Moreover, even assuming Tavares would apply retroactively, appellant failed to demonstrate that his substantial rights were prejudiced by the court's failure to give a limiting instruction sua sponte.

Next, appellant argues that the district court improperly determined that he had not demonstrated prejudice and that he should be given a further opportunity to present direct appeal claims pursuant to the remedy set forth in Lozada. We conclude that the district court

---

<sup>14</sup>Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

erroneously stated that appellant had not demonstrated prejudice because the direct appeal claims that he raised were largely without merit. This court has held that a finding that counsel's deficient performance deprived a defendant of the right to a direct appeal results in presumed prejudice when the underlying conviction was the result of a jury trial.<sup>15</sup> Nevertheless, we conclude that appellant has had a full and fair opportunity to litigate direct appeals claims with the assistance of counsel pursuant to the remedy set forth in Lozada. In Lozada, this court determined that an appropriate remedy to cure the deprivation of the right to appeal was to allow Lozada an opportunity to raise in a habeas corpus petition, with the assistance of counsel, any issues that he could have raised on direct appeal.<sup>16</sup> The district court permitted appellant to present the direct appeal claims that his post-conviction counsel raised in the supplemental habeas corpus petition at the evidentiary hearing. The district court considered the claims on the merits and determined that one of the claims was meritorious and ordered that appellant be given a new sentencing hearing. Therefore, we conclude that appellant received all of the relief required by Lozada.

Finally, in reviewing the documents before this court, we observed an error in the judgment of conviction. Specifically, the sentence set forth in the judgment of conviction provides for only one definite term: a term of life with the possibility of parole. Appellant, however, was convicted of four offenses. Therefore, it appears that appellant was not sentenced to definite terms for each offense. This appears to have been the result of some confusion regarding the application of the habitual criminal statute. When the district court adjudicates a defendant as a

---

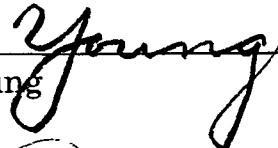
<sup>15</sup>Lozada, 110 Nev. at 357, 871 P.2d at 949.

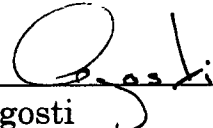
<sup>16</sup>110 Nev. at 359, 871 P.2d at 950.

habitual criminal, the habitual criminal statute allows for enhancement of the sentence for the substantive crimes charged.<sup>17</sup> Thus, in such cases, the district court uses the habitual criminal statute to determine the penalty to be imposed for the substantive crimes charged. Although the district court may in its discretion adjudicate appellant a habitual criminal in only one of the substantive offenses, the district court must also sentence appellant pursuant to the relevant statutory provisions for the remaining substantive offenses. At the new sentencing hearing, the district court's failure to specify a sentence for each of appellant's convictions must also be corrected. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

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

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

cc: Hon. Brent T. Adams, District Judge  
Attorney General/Carson City  
Washoe County District Attorney  
Nathalie Huynh  
Washoe District Court Clerk

---

<sup>17</sup>NRS 207.010.