

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFRY P. BRADLEY A/K/A JEFFREY
P. BRADLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38963

FILED

SEP 20 2002

JANET L. M. BLOOM
CLERK OF SUPREME COURT
BY *Richard*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE IN PART AND REVERSAL AND REMAND

IN PART

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 January 2, 1997, the district court convicted appellant, pursuant to a jury verdict, of one count of invasion of the home, one count of burglary, one count of second degree kidnapping with the use of a deadly weapon, and one count of possession of a firearm by an ex-felon. The district court adjudicated appellant to be a habitual criminal and sentenced appellant to serve terms totaling two hundred and forty months to eight hundred and sixty months in the Nevada State Prison. This court dismissed appellant's direct appeal.¹

On April 6, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, and appellant filed a reply. Pursuant to NRS

¹Bradley v. State, Docket No. 29757 (Order Dismissing Appeal, April 11, 2000).

34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing.² On April 2, 2002, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised six 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.³ The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁴

First, appellant claimed that his trial counsel failed to prepare for trial by hiring an investigator to take photographs of the Hileah Motel. Appellant claimed that the photographs would have proven that the 911-caller could not have viewed the incident from the location of the

²The record on appeals contains an affidavit from appellant's appellate counsel refuting appellant's claims of ineffective assistance of appellate counsel. This court recently held that a petitioner's statutory rights are violated when the district court improperly expands the record with the use of an affidavit in lieu of conducting an evidentiary hearing when an evidentiary hearing is required. Mann v. State, 118 Nev. ___, 46 P.3d 1228 (2002). Although we conclude that the district court erred in considering the affidavit filed by appellate counsel, we conclude that appellant was not prejudiced by the error because appellant was not entitled to an evidentiary hearing on the claims that he raised in the petition.

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

⁴Strickland, 466 U.S. at 697.

telephone as he had claimed. In dismissing his direct appeal, this court determined that there was overwhelming evidence of appellant's guilt presented at trial. Thus, we conclude that appellant failed to demonstrate that obtaining photographs of the Hileah Motel would have had a reasonable probability of altering the outcome of the trial. There are no facts in the record to indicate from where the 911-call originated. Further, as this court observed on direct appeal, the district court found that the statements made to the 911-dispatcher were present sense impressions, thus indicating that the 911-call originated from a location in view of the crime scene. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel failed to interview the apartment manager to obtain a rent receipt that would prove Lisa Bradley, the victim, had lied during her testimony. Appellant claimed that the receipt would show that Lisa Bradley was living with him at the time of the incident and had not broken-up with him four to five weeks earlier as she testified to during the trial. We conclude that appellant failed to demonstrate that obtaining the receipt would have had a reasonable probability of altering the outcome of the trial. The jury was presented with appellant's testimony that his wife was living with him at the time of the incident and Lisa Bradley's testimony that she was not living with him at the time of the incident. Appellant cannot demonstrate prejudice because the matter that he claimed his counsel failed to investigate was, in fact, presented to the jury at trial, and the jury had a

full and fair opportunity to evaluate the matter.⁵ Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to file a motion to dismiss the charges. Appellant claimed that the charges of home invasion and burglary violated double jeopardy because home invasion and burglary are the same offense. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Convictions for both burglary and home invasion do not violate double jeopardy. This court follows the test articulated by the United States Supreme Court in Blockburger v. United States, 284 U.S. 299 (1932), for determining whether two separate offenses exist for double jeopardy purposes.⁶ Pursuant to Blockburger, a defendant may not be convicted of two offenses premised on the same facts unless each offense "requires proof of a fact which the other does not."⁷ The offense of burglary requires proof that the defendant entered a building, vehicle, or other enumerated location "with the intent to commit grand or petit larceny, assault or battery on any person or any felony."⁸ On the other hand, the offense of invasion of the home does not necessitate the showing

⁵See Homick v. State, 112 Nev. 304, 311, 913 P.2d 1280, 1285 (1996) (holding that defendant was not entitled to relief based on ineffective assistance of counsel where theory to have been advanced by witness was presented at trial and jury had chance to evaluate theory, which it ultimately rejected).

⁶McIntosh v. State, 113 Nev. 224, 225, 932 P.2d 1072, 1073 (1997).

⁷Id. (quoting Blockburger, 284 U.S. at 304).

⁸NRS 205.060(1).

of a specific intent to commit a crime.⁹ Rather, a defendant is guilty of invasion of the home if the defendant commits a forcible entry of an inhabited dwelling without the occupant's permission.¹⁰ Thus, each offense requires proof of an element that the other does not. Moreover, the record reveals that different facts were presented to prove both offenses had occurred. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his counsel was ineffective for failing to object to his habitual criminal adjudication on the ground that the two prior convictions were not proven by fingerprints, prison photographs and sentencing transcripts. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. The State presented certified copies of two prior judgments of conviction during the trial, and during cross-examination appellant admitted to the two prior felony convictions.¹¹ Appellant offered no challenge to the validity of the prior convictions during trial and did not offer any specific challenge to the validity of the prior convictions in his petition. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to object to appellant's receiving four habitual criminal penalties. Appellant claimed that he should not have received a sentence pursuant to NRS 207.010 for each primary offense, but rather, he should

⁹NRS 205.067(1).

¹⁰Id.

¹¹The two prior felony convictions admitted to during trial were the same convictions alleged in the notice of habitual criminality.

only have received one sentence. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. The sentence for each felony committed may be enhanced pursuant to NRS 207.010.¹² In the instant case, appellant committed four felonies. Therefore, the district court could properly exercise its discretion to adjudicate appellant a habitual criminal for each primary offense and impose a sentence for each primary offense pursuant to the provisions of NRS 207.010(1)(a). Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel's performance was deficient for the following reasons: (1) his counsel failed to object to continuous prosecutorial misconduct during the trial, (2) his counsel was "embarrassed and rendered inadequate on account of trial court[s] failure to sustain an important objection," (3) his counsel "was not able to put on a [viable] defense for his client due to unexpected events arising after [the] trial court denied defense motion for severance, admission of defendant[s] illegally obtained statement which rendered his efforts listless," (4) his counsel "failed to turn over the trial transcripts, work produc[t] notes and confer with the attorney on appeal about what he thought was error," (5) his counsel failed to thoroughly investigate the facts of the case, and (6) his counsel failed to file pretrial motions. Appellant failed to provide any

¹²NRS 207.010(1)(a) provides, in pertinent part, "a person convicted in this state of . . . [a]ny felony, who has previously been two times convicted . . . is a habitual criminal and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 5 years and a maximum term of not more than 20 years."

specific facts supporting these claims.¹³ Therefore, we conclude that the district court did not err in denying these claims.

Next, appellant raised seven claims of ineffective assistance of appellate counsel. "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)."¹⁴ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁵ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹⁶ "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."¹⁷

First, appellant claimed that his appellate counsel was ineffective for failing to argue that his burglary and home invasion convictions violated double jeopardy. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. As discussed above, convictions for burglary and home invasions do not violate double jeopardy. Therefore, we conclude that the district court properly denied this claim.

¹³Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

¹⁴Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

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

¹⁶Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

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

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the trial court abused its discretion in allowing the offense of ex-felon in possession of a firearm to be tried with the other offenses. We conclude that appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. In Brown v. State, 114 Nev. 1118, 967 P.2d 1126 (1998), this court held that where the State seeks convictions on multiple counts, including a count of possession of a firearm by an ex-felon, severance of the counts is required. However, the rule announced in Brown applies prospectively only.¹⁸ Appellant's trial commenced and was completed prior to our decision in Brown. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court abused its discretion in denying defense motions to exclude inadmissible hearsay. Appellant pointed to three instances of alleged inadmissible hearsay that were allowed to be presented over defense objection: (1) Sergeant Alexander testified that Officer Wagner had read appellant his Miranda¹⁹ rights, (2) 911 tapes were admitted that allegedly contained double hearsay, and (3) Ms. Janis Gemma, the custodian of the 911 tapes, provided hearsay testimony. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant failed to provide an intelligible, factually specific argument in support of these claims.²⁰

¹⁸114 Nev. 1118, 1126, 967 P.2d 1126, 1131; see also Schoels v. State, 115 Nev. 33, 975 P.2d 1275 (1999).

¹⁹Miranda v. Arizona, 384 U.S. 436 (1966).

²⁰Hargrove, 100 Nev. 498, 686 P.2d 222.

Further, appellate counsel did challenge on appeal the admission of a 911-tape and appellant's voluntary admission made at the police station. The doctrine of the law of the case prevents further relitigation of these issues.²¹ Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that the police used trickery, deceit, and duress to coerce a confession. Appellant claimed that while he was laying on the ground one of the arresting officer's placed a gun to his head and asked appellant where was the gun that he had used. Appellant claimed that in order to save his life he told the officer that he threw the gun away where the officer would not find it. Appellant further claimed that there was not any evidence that he had been read his Miranda rights. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. The testimony at trial of the arresting officers and an officer present at the Clark County Detention Center did not support appellant's recitation of the facts relating to his statement about the gun. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his appellate counsel was ineffective for failing to argue that the prosecutor committed misconduct by withholding evidence of a promise made to the victim. Appellant substantially raised this claim on direct appeal. This court considered and rejected the claim. The doctrine of the law of the case prevents further

²¹Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

relitigation.²² Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court improperly enhanced all four of appellant's offenses pursuant to NRS 207.010. Appellant further claimed that his appellate counsel should have argued that his identity was not proven in the prior convictions. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. As discussed above, the district court did not err in imposing an enhanced sentence for each of the primary offenses and there was not a meritorious issue relating to the validity of the prior convictions. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his appellate counsel was ineffective for the following reasons: (1) failing to secure a complete trial transcript, (2) failing to review the trial record for best appealable issues, (3) failing to exchange ideas with trial counsel relating to appealable issues, (4) failing to act as a zealous advocate, (5) failing to raise certain issues, (6) filing the opening brief without appellant's consent, and (7) failing to file a reply brief to refute any misleading or erroneous facts presented by the State. Appellant failed to provide specific facts in support of these claims demonstrating that he was entitled to relief. Therefore, we conclude that the district court did not err in denying these claims.

In his reply to the State's opposition, appellant claimed that his sentence for Count V, second degree kidnapping with the use of a

²²Id.

deadly weapon, was improperly enhanced.²³ Specifically, appellant claimed that his sentence for Count V could not be enhanced pursuant to the habitual criminal enhancement and the deadly weapon enhancement. We agree. This court has held that the sentencing court may enhance each primary offense pursuant to only one enhancement statute.²⁴ Because the district court stated that it was adjudicating appellant a habitual criminal for Count V, the district court should have only imposed one term for Count V. We conclude that the district court erroneously denied this claim challenging the legality of appellant's sentence.²⁵ We further conclude that the district court must resentence appellant pursuant to NRS 207.010(1)(a), the small habitual criminal enhancement because: (1) in its notice of habitual criminality, the State listed only two prior judgments of conviction to be considered by the district court, (2) during the trial, the State presented copies of only two prior felony convictions, and (3) at the sentencing hearing, the State argued that appellant should be adjudicated a small habitual criminal.²⁶ Therefore,

²³In the January 2, 1997 judgment of conviction, appellant was adjudicated a habitual criminal for Count V and sentenced to two consecutive terms of sixty to two hundred and fifteen months for Count V.

²⁴Odoms v. State, 102 Nev. 27, 714 P.2d 568 (1986).

²⁵NRS 176.555.

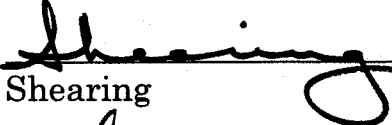
²⁶NRS 207.010(1)(a), the small habitual criminal provision, provides for "imprisonment in the state prison for a minimum term of not less than 5 years and a maximum term of not more than 20 years." It appears that subsequent to denying the habeas corpus petition, the district court erroneously attempted to correct the sentence for Count V by imposing a term pursuant to the large habitual criminal enhancement of NRS 207.010(1)(b), a term that exceeded the statutory maximum for small habitual criminal adjudication pursuant to NRS 207.010(1)(a). Appellant

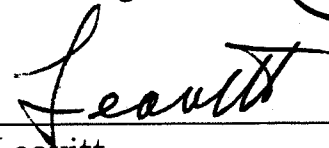
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we reverse the district court's order to the extent that it denied this claim and remand for resentencing as described herein.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.²⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED in part and REVERSED AND REMANDED in part for further proceedings consistent with this order.


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

... continued

could not have been adjudicated a large habitual criminal because three prior felony convictions were not noticed, presented, or argued before the district court at the time of trial and sentencing. NRS 207.010(1)(b). To the extent that any subsequent amended judgments have been entered against appellant imposing the large habitual criminal enhancement, we direct the district court to correct the judgment of conviction to conform with the conclusions stated in this order.

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

cc: Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Jeffry P. Bradley
Clark County Clerk