

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK ALLEN SPADT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38965

FILED

NOV 21 2003

ORDER OF AFFIRMANCE

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

This is a proper person appeal from a district court order denying appellant Mark Spadt's post-conviction petition for a writ of habeas corpus.

On November 26, 1996, the district court convicted Spadt, pursuant to a jury verdict, of one count of voluntary manslaughter with the use of a deadly weapon. The district court sentenced Spadt to serve a term of 120 months in the Nevada State Prison with the possibility of parole in 48 months, plus an equal and consecutive term for using a deadly weapon during the crime. Spadt filed a direct appeal to this court from his judgment of conviction. This court dismissed Spadt's appeal.¹ The remittitur issued on September 25, 2000.

On September 7, 2001, Spadt 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 Spadt or to conduct

¹Spadt v. State, Docket No. 29771 (Order Dismissing Appeal, December 20, 1999) (clarified on rehearing by Spadt v. State, Docket No. 29771 (Order Denying Rehearing, September 7, 2000)).

an evidentiary hearing. On December 31, 2001, the district court denied Spadt's petition. This appeal followed.

In his petition, Spadt raised numerous allegations of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that his trial counsel's performance fell below an objective standard of reasonableness, and a reasonable probability that, but for his counsel's errors, the results of the proceedings would have been different.² Both prongs of the test do not need to be considered if the petitioner makes an insufficient showing on either.³

First, Spadt contended that his trial counsel was ineffective for failing to file a motion to dismiss based on the alleged failure of the State to gather evidence—two beer bottles—from the crime scene. However, Spadt raised this issue on direct appeal, contending that the district court should have dismissed his case on this basis. This court concluded on direct appeal that Spadt's argument was without merit. Therefore, Spadt's trial counsel was not ineffective for failing to file a motion to dismiss, as such a motion would have also been without merit.

Second, Spadt contended that his trial counsel was ineffective for failing to object to the State's opening and closing arguments. Specifically, Spadt contended that the State improperly commented on evidence obtained in violation of Miranda.⁴

²See Strickland v. Washington, 466 U.S. 668, 686-87, 694 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984).

³See Strickland, 466 U.S. at 697.

⁴See Miranda v. Arizona, 384 U.S. 436 (1966).

Spadt's trial counsel raised at least two objections during the State's closing argument, and this court reviewed the State's closing argument on direct appeal. Thus, Spadt's allegation that his trial counsel was ineffective for failing to preserve this issue for appeal is partially belied by the record.⁵ Moreover, this court concluded on direct appeal that the statements Spadt made before and after his Miranda warning was given were properly admitted into evidence by the district court. Thus, this court concluded on direct appeal that the State did not improperly comment on evidence obtained in violation of Miranda during its closing argument. The State's opening argument similarly does not reveal any improper comment on evidence obtained in alleged violation of Miranda. Therefore, Spadt failed to show that his trial counsel was ineffective on this issue, as it did not have any likely success on appeal.

Third, Spadt contended that his trial counsel was ineffective for failing to object to a reasonable doubt jury instruction, and to properly prepare other jury instructions. On direct appeal, this court reviewed the State's use of the reasonable doubt instruction and concluded that the State improperly expanded upon this instruction during closing arguments. However, this court also concluded that the district court gave the jury the proper reasonable doubt instruction, and that the State's expansion on the instruction was harmless error. Jury instructions concerning identification witnesses, self-defense, murder, and premeditation were also reviewed by this court on direct appeal and determined to be proper. An instruction proffered by Spadt concerning the two beer bottles was also determined by this court on direct appeal to have

⁵See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

been properly denied by the district court. Spadt failed to provide any specific facts as to what other instructions were improper, why they were improper, and how these instructions affected the outcome of his trial.⁶ Therefore, Spadt failed to show that his trial counsel was ineffective on these issues.

Fourth, Spadt contended that his trial counsel was ineffective for failing to challenge and impeach various trial witnesses. Yet, Spadt failed to name all but one of these witnesses and also failed to describe any evidence that would have impeached these witnesses' credibility.⁷ Moreover, Spadt's trial counsel thoroughly cross-examined each of the State's witnesses, and re-cross examined many of them. Therefore, Spadt's allegation was belied by the record and without merit.⁸

Finally, Spadt contended that his trial counsel was ineffective for failing to object to cumulative errors that occurred during his trial. However, Spadt's allegation of cumulative trial error was reviewed by this court on direct appeal and determined not to warrant relief. Therefore, Spadt's trial counsel was not ineffective on this issue.

In his petition, Spadt also raised numerous allegations of ineffective assistance of appellate counsel. A claim of ineffective assistance of appellate counsel is also reviewed under the reasonably

⁶See *id.* at 502, 686 P.2d at 225.

⁷We note that Spadt did refer to one State witness, Penny Drake, and alleged that she could have been impeached with evidence from the two beer bottles. However, Spadt failed to show how the impeachment of Drake with this evidence would have altered the outcome of his trial and, therefore, Spadt was not entitled to relief on this issue.

⁸See *id.* at 503, 686 P.2d at 225.

effective assistance of counsel test.⁹ Appellate counsel is not required to raise every non-frivolous issue on direct appeal.¹⁰ Rather, appellate counsel will be most effective when every conceivable issue is not raised on direct appeal.¹¹ "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."¹²

First, Spadt contended that his appellate counsel was ineffective for failing to argue that he received ineffective assistance of trial counsel on direct appeal. Claims of ineffective assistance of trial counsel are properly raised in the first instance in a post-conviction petition for a writ of habeas corpus.¹³ Therefore, Spadt's appellate counsel was not ineffective for failing to raise this argument on direct appeal.

Second, Spadt contended that his appellate counsel was ineffective for failing to raise claims of prosecutorial misconduct on direct appeal. Spadt's allegations of prosecutorial misconduct with respect to the State's closing argument were reviewed on direct appeal and his argument is therefore partially belied by the record.¹⁴ Moreover, Spadt failed to raise any allegation of misconduct that has not been reviewed by this

⁹See Strickland, 466 U.S. at 686-87; Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

¹⁰Jones v. Barnes, 463 U.S. 745, 751 (1983).

¹¹Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

¹²Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

¹³See Pellegrini v. State, 117 Nev. 860, 882-83, 34 P.3d 519, 534-35 (2001).

¹⁴See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

court and determined to be either without merit or harmless error. Therefore, Spadt failed to show how his appellate counsel was ineffective on this issue.

Third, Spadt contended that his appellate counsel was ineffective for failing to raise Miranda violations on direct appeal.¹⁵ Yet, as previously discussed, Spadt's appellate counsel raised allegations of Miranda violations on direct appeal. These allegations were reviewed by this court on direct appeal and were determined to be without merit. Therefore, Spadt's allegation was belied by the record.¹⁶

Fourth, Spadt contended that his appellate counsel was ineffective for failing to raise all of his claims on direct appeal as violations of the United States Constitution. Spadt failed to show that his claims would have had a reasonable probability of success on appeal, even if his counsel had raised his claims as violations of his rights under the United States Constitution. Therefore, Spadt's appellate counsel was not ineffective on this basis.

Finally, Spadt contended that his appellate counsel was ineffective for failing to do the following on direct appeal: argue the sufficiency of the evidence to convict him of voluntary manslaughter; raise a Batson challenge to the dismissal of a potential juror; argue that the district court abused its discretion by excluding a video of the crime scene from evidence; and, argue that the district court abused its discretion by admitting a diagram of the crime scene into evidence.¹⁷ However, each of

¹⁵See Miranda, 384 U.S. 436.

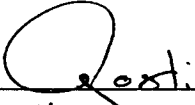
¹⁶See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

¹⁷See Batson v. Kentucky, 476 U.S. 79 (1986).

these issues was raised on direct appeal and was determined to be without merit. Therefore, Spadt's allegation that his appellate counsel was ineffective for failing to raise these issues is belied by the record,¹⁸ and the district court properly denied his petition.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Spadt is not entitled to relief and that briefing and oral argument are unwarranted.¹⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²⁰


_____, C.J.
Agosti


_____, J.
Rose


_____, J.
Maupin

cc: Hon. Michael L. Douglas, District Judge
Mark Allen Spadt
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁸See Hargrove, 100 Nev. at 503, 686 P.2d at 425.

¹⁹See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²⁰We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.