IN THE SUPREME COURT OF THE STATE OF NEVADA

LEWIS STEWART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39020

FILED

NOV 0 6 2002

CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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 19, 2000, the district court convicted appellant, after a jury trial, of one count of conspiracy to commit robbery, one count of burglary, one count of first degree kidnapping of a victim sixty-five years or older, one count of battery causing substantial bodily harm of a victim sixty-five years or older, and one count of robbery of a victim sixty-five years or older. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole and two consecutive terms totaling four to ten years. The remaining terms were imposed to run concurrently. This court affirmed appellant's judgment of conviction.[1]

On October 16, 2001, appellant 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

[1]Stewart v. State, Docket No. 35545 (Order of Affirmance, December 18, 2000).

district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On January 28, 2002, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised several 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.[2] The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.[3]

First, appellant claimed that his trial counsel was ineffective for: (1) failing to meet with appellant in person, (2) failing to interview witnesses, (3) failing to investigate, (4) failing to formalize discovery, (5) failing to challenge appellant's statement to the police, (6) failing to make reasonable efforts to establish a relationship of trust and confidence with appellant, and (7) failing to object to the State's erroneous and prejudicial statements. Appellant failed to offer sufficient specific facts in support of these claims.[4] Therefore, appellant failed to demonstrate that his counsel was ineffective.

Second, appellant claimed that his trial counsel was ineffective for failing to meet with the State to discuss a plea bargain. The

---

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

[3]Strickland, 466 U.S. at 697.

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

record on appeal belies this claim.[5] Therefore, appellant failed to demonstrate that his counsel was ineffective.

Third, appellant claimed that his trial counsel was ineffective for failing to develop witness impeachment evidence. Appellant claimed that his attorney should have cross-examined the victim about inconsistencies in her prior statements. These inconsistencies included statements made in a hospital report, a voluntary statement, the photographic line-up of Bruce Norman, and the preliminary hearing of Bruce Norman. We conclude that appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel cross-examined the victim about her identification of Bruce Norman. Appellant failed to demonstrate that cross-examination regarding the victim's statement to the emergency room doctor, her voluntary statement to the police, or the photographic line-up would have had a reasonable probability of changing the outcome of the trial. Therefore, appellant failed to demonstrate that his counsel was ineffective.

Next, appellant raised several 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)."[6] Appellate counsel is not required to raise every non-frivolous issue on appeal.[7] This court has held that appellate counsel will be most effective when every conceivable issue

---

[5]Id.

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

[7]Jones v. Barnes, 463 U.S. 745, 751 (1983).

is not raised on appeal.[8] "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."[9]

First, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court improperly denied his oral motion, made six days prior to trial, to dismiss appointed counsel and hire counsel of his choice. Appellant claimed that the district court did not make an adequate inquiry into the reasons for appellant's dissatisfaction with his appointed counsel. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. The district court did not abuse its discretion in denying appellant's motion to substitute counsel.[10] Appellant made an oral motion to dismiss counsel at a hearing six days prior to trial. Although appellant stated that he would hire his own attorney, that he had money coming to him from out-of-state, and that he had talked to another attorney about representation, appellant did not present any documentation or evidence that he was able to hire his own attorney or that he had in fact hired his own attorney.[11] The district court's determination that the motion was untimely and would delay the proceedings was supported by the record; appellant himself informed the

---

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

[9]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

[10]Baker v. State, 97 Nev. 634, 637 P.2d 1217 (1981), overruled on other grounds by Lyons v. State, 106 Nev. 438, 796 P.2d 210 (1990).

[11]Schell v. Witek, 218 F.3d 1017, 1025 (9th Cir. 2000) (holding that the qualified right of choice of counsel applies only to persons who can afford to retain counsel).

court that he would need additional time to prepare for trial.[12] The district court did inquire into the reasons appellant was dissatisfied with his counsel's representations, and the district court directed counsel to meet with appellant in person and to discuss plea negotiations in order to address appellant's concerns.[13] Appellant did not demonstrate that there was a conflict of interest with his counsel.[14] Therefore, appellant failed to demonstrate that his appellate counsel was ineffective.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the State suppressed material, exculpatory evidence. Appellant claimed that the State violated Brady v. Maryland[15] by failing to present information from the documents containing the victim's alleged prior inconsistent statements.[16] Appellant believed that the State had a duty to present information from these documents at trial in order to cast doubt upon the victim's truthfulness. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. The State did not violate Brady merely because the State did not present information from these documents at the trial. Appellant acknowledged that his counsel had access to some of the

---

[12]The State opposed any continuance, and appellant's appointed counsel informed the district court that he was ready to proceed to trial.

[13]The record reveals that appellant ultimately rejected the offer made pursuant to the negotiations.

[14]Schell, 218 F.3d at 1026.

[15]373 U.S. 83 (1963).

[16]These documents included the hospital report, the victim's voluntary statement to the police, the photographic line-up of Bruce Norman, and the transcript of Bruce Norman's preliminary hearing.

documents. Appellant failed to demonstrate that the documents contained material, exculpatory evidence. Therefore, appellant failed to demonstrate that his appellate counsel was ineffective.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that the first degree kidnapping jury instruction was an erroneous statement of law because it allowed the jury to find that there was a kidnapping absent the element of asportation. Appellant essentially asserted that his kidnapping count was incidental to the robbery count. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. This court considered and rejected appellant's challenge that the kidnapping count was incidental to the robbery count on direct appeal. The doctrine of the law of the case prevents further relitigation of this issue and cannot be avoided by a more precisely focused and detailed argument.[17] Further, the jury instruction was not an incorrect statement of law.[18] Therefore, appellant's counsel was not ineffective.

Finally, appellant claimed that his appellate counsel was ineffective for failing to argue that his trial counsel rendered ineffective assistance of counsel. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. Claims of ineffective assistance of counsel may not be raised on direct appeal, "unless there has already been an evidentiary hearing."[19] In the instant case, no evidentiary

---

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

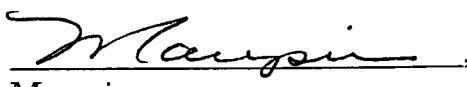
[18]Hutchins v. State, 110 Nev. 103, 867 P.2d 1136 (1994).

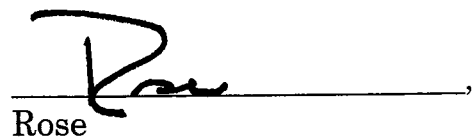
[19]Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

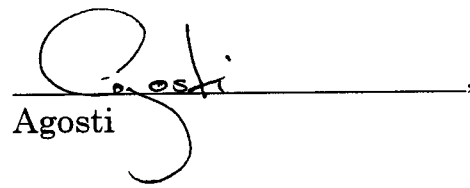
hearing had been conducted. Therefore, appellant's appellate counsel was not ineffective.

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.[20] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[21]


, C.J.
Maupin


, J.
Rose


, J.
Agosti

cc: Hon. Joseph T. Bonaventure, District Judge
Attorney General/Carson City
Clark County District Attorney
Lewis Stewart
Clark County Clerk

---

[20]Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

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