

IN THE SUPREME COURT OF THE STATE OF NEVADA

LEWIS ANDREW THUES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 39038

FILED

DEC 30 2003

ORDER OF AFFIRMANCE

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

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

On June 7, 1999, the district court convicted Thues, pursuant to a jury verdict, of one count of conspiracy to commit murder, two counts of burglary while in possession of a firearm, and two counts of attempted murder with the use of a deadly weapon. The district court adjudicated Thues a habitual criminal and sentenced him to serve five concurrent terms of life in the Nevada State Prison without the possibility of parole. This court affirmed Thues' conviction on direct appeal.<sup>1</sup>

On August 21, 2001, Thues filed a proper person post-conviction petition for a writ of habeas corpus, and a motion for the appointment of counsel, in the district court. The State opposed the petition and the motion. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Thues or to conduct an

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<sup>1</sup>Thues v. State, Docket No. 34412 (Order of Affirmance, December 8, 2000).

evidentiary hearing. The district court denied Thues' petition and motion on December 19, 2001.<sup>2</sup> This appeal followed.

In his petition, Thues 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.<sup>3</sup> Both prongs of the test do not need to be considered if the petitioner makes an insufficient showing on either.<sup>4</sup>

First, Thues contended that his trial counsel was ineffective for failing to correct allegedly false information contained in a temporary protective order (TPO). However, the record reveals that the admission of the TPO into evidence was objected to by Thues' trial counsel. This court reviewed the issue on direct appeal and concluded that the TPO was properly admitted into evidence. Moreover, Thues failed to demonstrate that the information contained in the TPO was actually false and how he was prejudiced by its admission into evidence.<sup>5</sup> Therefore, Thues failed to show that his trial counsel was ineffective on this issue.

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<sup>2</sup>We conclude that the district court did not abuse its discretion when it denied Thues' motion for the appointment of counsel.

<sup>3</sup>See Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984).

<sup>4</sup>See Strickland, 466 U.S. at 697.

<sup>5</sup>See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Second, Thues contended that his trial counsel was ineffective for failing to call a police officer as a witness that he encountered on the day the TPO was issued. However, Thues failed to proffer any specific facts showing that the testimony of this officer would have aided his defense or altered the outcome of his trial.<sup>6</sup> Therefore, Thues failed to show that his trial counsel was ineffective on this issue.

Third, Thues contended that his trial counsel failed to timely file a motion for a new trial. However, Thues failed to cite to any specific factual allegations or reasons why he should have been granted a new trial or how such a motion would have been successful.<sup>7</sup> On direct appeal, this court concluded that the cumulative effect of any trial error did not mandate a new trial. Therefore, Thues failed to show that his trial counsel was ineffective on this issue.

Fourth, Thues contended that his trial counsel failed to object to the admission of 9-1-1 recordings into evidence or ask for a mistrial on this basis. However, this court reviewed the admissibility of the 9-1-1 recordings on direct appeal and concluded that the calls were properly admitted into evidence. Thus, Thues' allegation was belied by the record,<sup>8</sup> and he cannot show any prejudice by his trial counsel's performance. Therefore, Thues failed to show that his trial counsel was ineffective on this issue.

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<sup>6</sup>Id.

<sup>7</sup>Id.

<sup>8</sup>Id. at 503, 686 P.2d at 225.

Fifth, Thues contended that his trial counsel was ineffective for failing to administer a lie detector test. This court has recognized that lie detector tests are not competent evidence of truthfulness and reliability.<sup>9</sup> Therefore, Thues cannot show he was prejudiced by any failure by his trial counsel in not pursuing such a test, as the results of such a test would not have been reliable evidence.

Sixth, Thues contended that his trial counsel was ineffective for failing to conduct DNA testing on blood found at the crime scene. However, the record reveals that there was no reason to believe that the blood of anyone other than the victim would have been found at the crime scene. Thues also failed to specify how DNA testing would have aided his defense.<sup>10</sup> Therefore, Thues did not show that he was prejudiced by any failure of his trial counsel with respect to this issue.

Seventh, Thues contended that his trial counsel was ineffective for failing to investigate the phone records of the victim and to introduce Thues' pager records into evidence. Although such evidence may have corroborated Thues' defense theory, Thues testified during trial about these communications. Moreover, these communications did not go to the issue of innocence or guilt such that Thues was prejudiced by their absence from the record. Therefore, Thues failed to show that his trial counsel was ineffective on this issue.

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<sup>9</sup>See Warden v. Lischko, 90 Nev. 221, 224, 523 P.2d 6, 8 (1974) (stating that lie detector tests have "no bearing at all upon the charge that trial counsel was ineffective"), overruled on other grounds by Pellegrini v. State, 117 Nev. 860, 885-86, 34 P.2d 519, 536 (2001).

<sup>10</sup>See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Eighth, Thues contended that his trial counsel was ineffective for failing to request an alterative, or curative, jury instruction regarding evidence of his prior bad acts, and testimony from the victim that suggested Thues was associated with a gang, that was admitted into evidence during trial. This court reviewed the district court's admission of evidence of Thues' prior bad acts on direct appeal and concluded that the evidence was either properly admitted or any error in its admission was harmless. Moreover, the record reveals that the victim's testimony that Thues may have been associated with a gang was first introduced during a line of questioning pursued by Thues' trial counsel. The decision by Thues' counsel to pursue this line of questioning was strategic in nature,<sup>11</sup> as he was attempting to impeach the victim's credibility. The jury also received a general limiting instruction regarding the bad act evidence admitted against Thues. Therefore, Thues failed to show that his trial counsel was ineffective on this issue.

Ninth, Thues contended that his trial counsel was ineffective for failing to call Lacer Kyle, Robert Reed, Brenda McGee, and Billy Thomas to testify as witnesses during trial. Thues failed to mention any of these witnesses during his entire trial testimony. Thues also failed to specify as to what information these witnesses would have testified such that it would have proven his innocence or otherwise altered the outcome of his trial.<sup>12</sup> Therefore, Thues failed to show that he was prejudiced by his trial counsel's performance on this issue.

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<sup>11</sup>See Strickland, 466 U.S. at 689-90.

<sup>12</sup>See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Tenth, Thues contended that his trial counsel was ineffective for failing to introduce evidence of his good character during trial. However, Thues failed to cite to any specific evidence of his good character that could have been admitted and describe how such evidence would have altered the outcome of his trial.<sup>13</sup> Therefore, Thues failed to show that his trial counsel was ineffective on this issue.

Eleventh, Thues contended that his trial counsel was ineffective for failing to present bad character evidence of the victim to impeach her credibility. Thues failed to show how bad character evidence of the victim would have aided his defense such that it would have altered the outcome of his trial.<sup>14</sup> Moreover, the weight and credibility to give to a witnesses' testimony is an issue for the jury to determine.<sup>15</sup> The record reveals that over seventy pages of the trial transcript concerns cross-examination and recross-examination of the victim by Thues' trial counsel in an attempt to impeach her credibility. Thues, failed to show how he would have benefited from a more extensive cross-examination of the victim. Therefore, Thues failed to show that his trial counsel was ineffective on this issue.

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<sup>13</sup>See id.

<sup>14</sup>We note that Thues alleged that the victim had an outstanding warrant for her arrest for writing a bad check at the time she testified. However, Thues' trial counsel sought to admit the warrant into evidence. The district court denied the request, finding the warrant irrelevant. We conclude that the district court did not abuse its discretion and that Thues' trial counsel was not ineffective on this issue.

<sup>15</sup>See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Finally, Thues contended that his trial counsel was ineffective for failing to investigate the alleged existence of a videotape of a television news report containing statements by an eyewitness that were favorable to his defense, and to investigate whether the State lost, destroyed, or suppressed this evidence. Yet, Thues failed to identify this alleged eyewitness or state when the news report aired. Thues also failed to show that the videotape actually existed, his trial counsel was aware of the videotape's existence, or that the videotape was ever in the State's possession. Rather, Thues' allegations remained unsupported by any reliable and specific facts.<sup>16</sup> Therefore, Thues failed to show that his trial counsel was ineffective on this issue.

In his petition, Thues also raised numerous allegations of ineffective assistance of appellate counsel. A claim of ineffective assistance of appellate counsel is also reviewed under the reasonably effective assistance of counsel test.<sup>17</sup> Appellate counsel is not required to raise every non-frivolous issue on direct appeal.<sup>18</sup> Rather, appellate counsel will be most effective when every conceivable issue is not raised on direct appeal.<sup>19</sup> To establish prejudice, "the defendant must show that the omitted issue would have a reasonable probability of success on appeal."<sup>20</sup>

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<sup>16</sup>See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

<sup>17</sup>See Strickland, 466 U.S. at 687; Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

<sup>18</sup>Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

<sup>19</sup>Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

<sup>20</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

First, Thues contended that his appellate counsel was ineffective for failing to argue on direct appeal that the district court did not make a specific habitual criminal adjudication pursuant to NRS 207.010.<sup>21</sup> However, during the sentencing hearing, the district court concluded that the State produced certified copies of three prior felony convictions, and found Thues to be a habitual criminal. In fact, the district court specifically stated that it had "looked at this matter long and hard" before it found Thues to be a habitual criminal. Therefore, Thues' allegation that the district court did not make a habitual criminal adjudication was belied by the record.<sup>22</sup> As this issue had no likely success on direct appeal, Thues failed to show his appellate counsel was ineffective for not raising this issue.

Second, Thues contended that his appellate counsel failed to argue that his prior felony convictions were non-violent offenses, attempted offenses, and were remote in time to his current convictions and, therefore, should not have been considered by the district court in adjudicating him a habitual criminal. However, this court has held that "NRS 207.010 makes no special allowance for non-violent crimes or for the

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<sup>21</sup>We note that Thues also generally alleged that his trial counsel was ineffective for failing to challenge the district court's habitual criminal adjudication. However, we conclude that Thues failed to show that his trial counsel was ineffective on this issue for the same reasons we conclude that his appellate counsel was not ineffective.

<sup>22</sup>See Hargrove, 100 Nev. at 503, 686 P.2d at 225.



remoteness of convictions."<sup>23</sup> Moreover, the record reveals that Thues' trial counsel did argue mitigating circumstances regarding the three prior felony convictions during the sentencing hearing. The finding of habitual criminal status was within the district court's discretion.<sup>24</sup> Therefore, Thues failed to show that his appellate counsel would have had a reasonable probability of success by raising this issue on direct appeal.

Third, Thues contended that his appellate counsel was ineffective for failing to argue on direct appeal that the district court failed to make a specific finding that his three prior felony convictions were final and entered with the effective assistance of counsel. However, Thues did not allege that his three prior felony convictions were, in fact, not final and not entered without the effective assistance of counsel.<sup>25</sup> Rather, during the sentencing hearing, Thues' trial counsel acknowledged the existence of the three prior convictions. Therefore, Thues failed to show that his appellate counsel was ineffective on this issue.

Finally, Thues contended that his appellate counsel was ineffective for failing to argue on direct appeal that the district court justified its finding of his habitual criminal status based on the five new felony convictions at issue in this case. Although the district court referred to Thues' five new felony convictions during the sentencing hearing as one among a number of considerations in adjudicating him a

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<sup>23</sup>Tillema v. State, 112 Nev. 266, 271, 914 P.2d 605, 608 (1996) (quoting Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992)).

<sup>24</sup>See id.

<sup>25</sup>See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

habitual criminal, Thues' three prior felony convictions provided an independent basis for a habitual criminal finding. Therefore, Thues' allegation was belied by the record,<sup>26</sup> and he failed to show that his appellate counsel was ineffective on this issue.

In his petition, Thues also raised multiple allegations that either the district court or the State committed errors in his case. Specifically, Thues contended the following: the State improperly delayed disclosing the 9-1-1 recordings; the State introduced insufficient evidence to support his burglary conviction; the State should have charged him with home invasion; the district court unconstitutionally removed him from a preliminary hearing; the district court abused its discretion by allowing the State to file an amended information, limiting his preemptory challenges, and denying the admission of bad character evidence of the victim; the district court improperly removed a juror during voir dire and improperly permitted the niece of a Clark County District Attorney to participate in voir dire; and, the district court improperly gave a number of erroneous jury instructions and omitted other necessary instructions.

With respect to each of these allegations, Thues failed to specify that either his trial or appellate counsel were ineffective. To the extent that Thues was attempting to raise these allegations independent of his ineffective assistance of counsel claims, they have been waived.<sup>27</sup>

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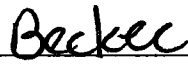
<sup>26</sup>Id. at 503, 686 P.2d at 225.

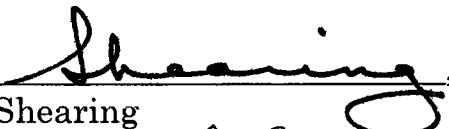
<sup>27</sup>See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); NRS 34.810(1)(b).

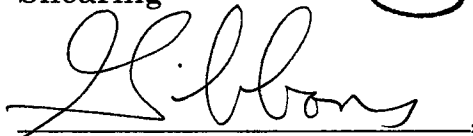
However, Thues did assert in his petition that "All Issues Now Being Raised Under Ineffective Trial Counsel & Direct Appeal Counsel." This court has expressly disapproved of such catchall attempts to assert allegations of ineffective assistance of counsel.<sup>28</sup> We have nonetheless reviewed the merits of these claims as allegations of ineffective assistance of both trial and appellate counsel.<sup>29</sup> Our review of these allegations reveals that Thues failed to show in each of these allegations that he was prejudiced by his trial and appellate counsel's performance. We conclude, therefore, that the district court properly denied Thues' petition.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that Thues was not entitled to relief, and that briefing and oral argument are unwarranted.<sup>30</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Gibbons

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<sup>28</sup>See Evans v. State, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001).

<sup>29</sup>See Kirksey, 112 Nev. at 998 n.10, 923 P.2d at 1114 n.10.

<sup>30</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Michael L. Douglas, District Judge  
Lewis Andrew Thues  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk