

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDDIE HECKARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39155

FILED

OCT 15 2002

ORDER OF AFFIRMANCE

HANETTE M. BLOOM
CLERK OF SUPREME COURT
[Signature]

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 October 19, 1999, the district court convicted appellant, pursuant to a jury verdict, of trafficking in a controlled substance. The district court sentenced appellant to serve a term of 26 to 72 months in the Nevada State Prison to be served concurrently to another district court case. This court affirmed appellant's judgment of conviction.¹

On November 9, 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 district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On February 11, 2002, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised two claims 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 counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that

¹See Heckard v. State, Docket No. 35083 (Order of Affirmance, August 9, 2001).

they rendered the jury's verdict unreliable.² The court need not consider both prongs of the Strickland test if the petitioner fails to make a showing on either prong.³

First, appellant claimed that his trial counsel was ineffective for failing to file a pre-trial petition for a writ of habeas corpus challenging the sufficiency of the evidence to bind him over for trial. We conclude that the district court did not err in denying this claim. Sufficient evidence was produced at the preliminary hearing to bind appellant over for trial. At the preliminary hearing, Officer Lardomita testified that he had set up surveillance of a hotel room at the Desert Moon Motel in Las Vegas after a confidential informant notified him that a man named Eddie, who drove a white Cadillac, was selling drugs out of room 6. Lardomita testified that he observed appellant entering and exiting the room, at times accompanied by unidentified people. In addition, he testified that a confidential informant purchased drugs inside of room 6 and that appellant was present in the room at the time of the purchase. Lardomita then testified that he obtained a search warrant to search the hotel room, where he found over 14 grams of crack cocaine. Appellant was arrested with over \$2395 of cash in his pocket a few blocks from the motel immediately after the search. Thus, appellant failed to demonstrate his counsel's performance was unreasonable or that he was prejudiced by counsel's failure to file a pre-trial petition for a writ of habeas corpus challenging the sufficiency of the evidence.⁴

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

³See Strickland, 466 U.S. at 697.

⁴See Strickland, 466 U.S. 668.

Second, appellant claimed that his trial counsel was ineffective at the Petrocelli⁵ hearing. Appellant failed to support this claim with sufficient factual allegations.⁶ The district court did not err in denying this claim.

Next, appellant claimed that the statements of confidential informants were hearsay statements that should have been excluded. Appellant also claimed that he should have been able to confront these confidential informants. We conclude that the district court did not err in denying this claim. Appellant waived this claim by failing to raise it on direct appeal.⁷ Appellant failed to demonstrate good cause for failing to raise this claim earlier.⁸

Next, appellant claimed that his Terry⁹ stop was prolonged and in violation of his constitutional right to be free from illegal searches and seizures. He further claimed that \$2395 in cash found in his pocket after he was stopped should have been suppressed. These claims were considered and rejected by this court on direct appeal. The doctrine of law of the case bars further litigation regarding these claims.¹⁰ Appellant cannot attempt to avoid this doctrine "by a more detailed and precisely focused argument subsequently made after reflection upon previous

⁵See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

⁶See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

⁷See NRS 34.810(1)(b)(2); see also Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

⁸See NRS 34.810(3).

⁹See Terry v. Ohio, 392 U.S. 1 (1968).

¹⁰See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

proceedings.”¹¹ In an attempt to demonstrate good cause for raising these claims again, appellant claimed that his appellate counsel failed to properly raise these claims on direct appeal.¹² Specifically, he claimed that his counsel should have challenged the reliability of the confidential informant because the informant’s information was unverified and the officers based their stop of appellant on this unverified information. We conclude that appellant failed to demonstrate good cause. The officers verified the confidential informant’s information by surveilling the motel and appellant’s actions. The district court did not err in denying this claim.

Next, appellant claimed that prior bad act evidence of the sale of drugs, possession of counterfeit money, and trafficking in a controlled substance should not have been admitted. Appellant raised this claim on direct appeal and this court considered and rejected it. The doctrine of law of the case prevents further litigation of this claim.¹³ In an attempt to demonstrate good cause for raising this claim again, appellant claimed that this court’s reasoning on direct appeal was erroneous. Appellant also claimed that he was raising this claim again because on direct appeal his appellate counsel only challenged the admission of the prior trafficking arrest and failed to challenge the evidence regarding the sale of drugs and the possession of the counterfeit money.¹⁴ Appellant’s arguments do not

¹¹See id. at 316, 535 P.2d at 799.

¹²To the extent that appellant raised the claim, we conclude that appellant failed to demonstrate that his appellate counsel was ineffective. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

¹³See Hall, 91 Nev. 314, 535 P.2d 797.

¹⁴To the extent that appellant raised the claim, we conclude that appellant failed to demonstrate that his appellate counsel was ineffective. See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

overcome the doctrine of law of the case. Moreover, we note that the sale of drugs and possession of the counterfeit money occurred at the same time as the trafficking arrest and thus were part of the evidence of the trafficking arrest. The district court did not err in denying this claim.

Lastly, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that there was insufficient evidence at trial to show that he had dominion and control over the drugs and was guilty of trafficking in a controlled substance. Specifically, he claimed that he was never in actual possession of the drugs, he was not present when the drugs were found, he was not a registered guest at the hotel, and the confidential informant who executed the controlled buy merely stated that appellant was present when he bought the drugs. "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)."¹⁵ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁶ This court has held that appellate counsel is most effective when every conceivable issue is not raised on appeal.¹⁷ "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."¹⁸ Sufficient evidence was produced at trial for the jury to find beyond a reasonable doubt appellant was guilty of trafficking in a controlled substance. Appellant failed to demonstrate that this claim would have had a reasonable probability of

¹⁵See id.

¹⁶See Jones v. Barnes, 463 U.S. 745 (1983).

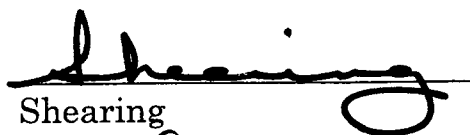
¹⁷See Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).


¹⁸See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

success on appeal; thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

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.¹⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²⁰

 J.
Shearing

 J.
Leavitt

 J.
Becker

cc: Hon. John S. McGroarty, District Judge
Attorney General/Carson City
Clark County District Attorney
Eddie Heckard
Clark County Clerk

¹⁹See Lockett 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.