

IN THE SUPREME COURT OF THE STATE OF NEVADA

RALPH FOSTER JACKSON, JR. A/K/A
RALPH JACKSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39208

FILED

OCT 24 2002

ORDER OF AFFIRMANCE

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

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 and motions for appointment of counsel and an evidentiary hearing.

On March 30, 2000, the district court convicted appellant, pursuant to a jury verdict, of one count of open or gross lewdness, five counts of sexual assault with the use of a deadly weapon, and three counts of sexual assault. The district court sentenced appellant to serve one year in the Clark County Detention Center on the open or gross lewdness count, two consecutive terms of ten to twenty-five years in the Nevada State Prison on each of the sexual assault with the use of a deadly weapon counts, and terms of ten to twenty-five years in the Nevada State Prison on each of the sexual assault counts. The district court imposed the terms for each count to be served concurrently. The district court also imposed a special sentence of lifetime supervision to commence upon appellant's

release from any term of probation, parole or imprisonment. This court affirmed appellant's conviction on direct appeal.¹

On October 4, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant also filed motions for appointment of counsel and an evidentiary hearing. The State opposed the petition and motions and appellant filed a reply to the State's opposition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On February 4, 2002, the district court denied appellant's petition.² This appeal followed.

Appellant raised six claims of ineffective assistance of trial counsel. To establish ineffective assistance of counsel, a petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.³ To show prejudice, a petitioner must show a reasonable probability that but for counsel's errors the result of the trial would have been different.⁴ "Tactical decisions are virtually unchallengeable absent

¹Jackson, Jr. v. State, Docket No. 35924 (Order of Affirmance, April 30, 2001).

²On January 9, 2002, the district court found that appellant was not entitled to an evidentiary hearing or appointment of counsel. To the extent appellant appeals from this decision, we conclude that the district court did not err. See NRS 34.750; NRS 34.770.

³Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 431, 683 P.2d 504, 505 (1984).

⁴Strickland, 466 U.S. at 694.

extraordinary circumstances."⁵ A court may consider the two test elements in any order and need not consider both prongs if an insufficient showing is made on either one.⁶

First, appellant claimed that trial counsel was ineffective for failing to develop and present exculpatory lab work. Specifically, appellant argued that counsel: (1) should have had a washcloth tested for appellant's DNA; (2) failed "to adequately prepare and investigate forensic analysis for further testing of semen stains of other depositor's"; (3) failed to challenge the results of the PCR testing; and (4) failed to lay a proper foundation for the introduction of forensic evidence. These claims are unsupported by specific factual allegations which would, if true, entitle appellant to relief.⁷ In addition, appellant's theory of defense was that he engaged in consensual sex with the victim and that she fabricated the rape charge in revenge for a real estate deal gone sour. Based on appellant's own theory of defense, the forensic evidence would have shown that appellant had sex with the victim. Accordingly, appellant failed to demonstrate that counsel's performance regarding the forensic evidence fell below an objective standard of reasonableness, or that but for these alleged errors of counsel the result of the trial would have been different. Therefore, we conclude that the district court did not err in denying this claim.

⁵Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691) (abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000)).

⁶Strickland, 466 U.S. at 697.

⁷See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Second, appellant claimed that trial counsel was ineffective for failing to utilize "three (3) additional reports" apparently generated by the "appointed investigator" regarding the financial status of the victim and her phone records. Appellant failed to specify what the reports and phone records would reveal other than that the victim was allegedly in debt, or how that information would have changed the result of the trial.⁸ Therefore, appellant failed to demonstrate that counsel was ineffective in this regard, and the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to contact witnesses. To the extent that this claim is supported by any factual allegations, it is belied by the record.⁹ The only witness referenced by appellant was "an individual who would have testified that she saw the defendant and the victim kissing passionately within an hour of the alleged rape." Appellant failed to identify the witness.¹⁰ Additionally, appellant testified at trial that he was a reluctant participant in the sex he had with the victim, and that when he walked her to her car after they were finished, he refused to kiss her in public because he did not want to be seen doing so. Therefore, appellant failed to demonstrate that counsel was ineffective in this regard, and the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to review medical records. Appellant failed to specify what medical records counsel should have reviewed and what those records would have

⁸See id.

⁹See id.

¹⁰See id.

revealed.¹¹ Therefore, appellant failed to demonstrate that counsel was ineffective in this regard, and the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to explain the consensual sex instruction to the jury. Apparently appellant was referring to jury instruction number eight which stated:

Physical force is not a necessary ingredient in the commission of sexual assault. The crucial question is not whether the victim was physically forced to engage in a sexual assault but whether the act was committed without her consent. There is no consent where the victim is induced to submit to the sexual act through fear of death or serious bodily injury.

Appellant failed to specify what counsel should have explained to the jury, or how that explanation would have changed the result of the trial.¹² Therefore, appellant failed to demonstrate that counsel was ineffective in this regard, and the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to object to the district court's ruling that the defense could not present character witnesses at sentencing. Appellant failed to state who the defense would have presented as character witnesses for appellant and what their testimony would have consisted of, other than that witnesses should have been allowed "to testify regarding his business ventures."¹³

¹¹See id.

¹²See id.

¹³See id.

Therefore, appellant failed to demonstrate that counsel was ineffective in this regard, and the district court did not err in denying this claim.

Next appellant raised ten claims of ineffective assistance of appellate counsel. To prevail on a claim of ineffective assistance of appellate counsel a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that petitioner was prejudiced by the deficient performance.¹⁴ Appellate counsel is not required to raise every non-frivolous issue on appeal in order to be effective.¹⁵ In fact, this court has noted that "appellate counsel is most effective when she does not raise every conceivable issue on appeal."¹⁶ To show prejudice, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.¹⁷

First, appellant claimed that appellate counsel was ineffective for failing "to discuss any appeal tactics," and because counsel admitted that he was prejudiced and had a conflict of interest. These are naked claims unsupported by any specific factual allegations.¹⁸ Therefore, appellant failed to demonstrate that counsel was ineffective in this regard, and the district court did not err in denying these claims.

Second, appellant claimed that appellate counsel was ineffective for failing to make an "argument regarding First Amendment

¹⁴Strickland, 466 U.S. at 687.

¹⁵Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

¹⁶Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (citing Jones, 463 U.S. at 752).

¹⁷Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

¹⁸See Hargrove, 100 Nev. 498, 686 P.2d 222.

rights." Appellant failed to state which of his First Amendment rights had been violated and how. Therefore, appellant failed to show that this issue would have had a reasonable probability of success on appeal, and the district court did not err in denying this claim.

Third, appellant claimed that appellate counsel was ineffective for failing to raise the issue of whether one of the State's witnesses, a crime lab supervisor, misled the jury by committing perjury and supplying false forensic evidence. This is a naked claim unsupported by any specific factual allegations.¹⁹ Therefore, appellant failed to demonstrate that counsel was ineffective in this regard, and the district court did not err in denying this claim.

Fourth, appellant claimed that appellate counsel was ineffective for failing to raise several issues regarding the forensic evidence. Specifically, appellant claimed that appellate counsel should have argued that: (1) the State withheld a laboratory test which exculpated appellant; (2) the State knew that DNA testing had not been performed; (3) forensic evidence was mishandled by the police and the State because DNA samples were never tested; and (4) trial counsel breached her duty to appellant by failing to find the "real donor of positive semen tracks." These are naked claims unsupported by any specific factual allegations.²⁰ In addition, as noted, based on appellant's own theory of defense, the forensic evidence would have been expected to show that appellant had sex with the victim. Therefore, appellant failed to demonstrate that counsel's performance fell below an objective standard of

¹⁹See id.

²⁰See id.

reasonableness, or that these issues would have had a reasonable probability of success on appeal, and the district court did not err in denying this claim.

Fifth, appellant claimed that appellate counsel was ineffective for failing to raise the issue of whether the district court abused its discretion by admitting into evidence the knife used in the sexual assault because appellant's fingerprints were not found on it. There was evidence that the knife had been used in a sexual assault on the victim. The victim described the knife and the drawer in the kitchen where appellant put it after the assault. The owner of the home where the assault took place immediately went to that kitchen drawer when the police gave him the victim's description of the knife and found the knife inside. The owner testified that there was only one such knife in the house. Accordingly, we conclude that the district court's admission of the knife into evidence was not manifestly wrong.²¹ Therefore, appellant failed to demonstrate that counsel's performance fell below an objective standard of reasonableness, or that this issue would have had a reasonable probability of success on appeal, and the district court did not err in denying this claim.

Sixth, appellant claimed that appellate counsel was ineffective for failing to raise the issue of whether the district court erred in overruling the defense objection regarding certain testimony on the ground that it violated the attorney-client privilege. The sexual assault took place in the home of a friend of appellant's with whom appellant was

²¹See Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999), cert. denied 528 U.S. 1119 (2000), (" A district court's decision to admit or exclude evidence rests within its sound discretion and will not be disturbed unless it is manifestly wrong.").

staying. The friend, an attorney, testified that he and appellant also had an attorney-client relationship and though he was not "sure he actually did work as an attorney" for appellant, they had discussed "title issues on some real estate" and "talked a little bit about estate planning." He also testified that he made it clear when appellant inquired that neither he nor anyone in his firm could do that. At that point, the State began to inquire about some phone calls made between appellant and the witness, and the defense objected. The district court held an in camera discussion and ruled that although the issue of attorney-client privilege was a close one, the State would be allowed to continue its line of questioning. However, the State decided that "in order to keep the record clean" it would not pursue the matter. Accordingly, even assuming the district court erred, the error was harmless because the jury never heard the evidence in question and therefore it cannot be shown beyond a reasonable doubt that the evidence contributed to the verdict.²² Therefore, appellant failed to demonstrate that counsel's performance fell below an objective standard of reasonableness, or that this issue would have had a reasonable probability of success on appeal, and the district court did not err in denying this claim.

Seventh, appellant claimed that appellate counsel was ineffective for failing to raise numerous claims regarding prosecutorial misconduct. Specifically, appellant argued that the prosecutor committed misconduct by: (1) knowingly admitting false forensic evidence; (2) knowing that there was forensic evidence which would provide conclusive proof of appellant's innocence; (3) "improper trial tactics" by refusing to

²²See Chapman v. California, 386 U.S. 18, 24 (1967).

allow the jury to inspect an exhibit sealed inside a bag; (4) concealing evidence of the victim's alleged social and business relationship with Judge Gene T. Porter; (5) concealing court records of alleged liens on the victim's home; (6) knowing that the results of the "PCR" test were "improper and unreliable" and failing to challenge the results; (7) misleading the jury as to "an alternative explanation for an alleged 'abrasion'" on the victim's vagina; (8) failing to explain to the jury that evidence of semen found at the scene could have come from someone other than appellant; (9) knowing that there was insufficient evidence; (10) failing to lay the proper foundation for the forensic evidence; (11) failing to "provide proof of the authentication of forensic evidence"; (12) failing to "instruct the jury regarding consensual sex theory"; and (13) "mislead[ing] the circumstantial evidence instruction." None of these claims are supported by specific factual allegations²³ or an explanation of how appellant was prejudiced. Additionally, appellant failed to object or to assign any alleged prosecutorial misconduct at trial. "As a general rule, the failure to object, assign misconduct, or request an instruction will preclude review by this court."²⁴ That rule does not apply however, where "the prosecutorial misconduct was so prejudicial as to require court intervention sua sponte to protect the defendant's right to a fair trial."²⁵ After reviewing the record, we conclude that appellant presented no evidence that the State committed any misconduct whatsoever. Therefore, appellant failed to demonstrate that counsel's performance fell below an

²³See Hargrove, 100 Nev. 498, 686 P.2d 222.

²⁴Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 234-35 (1986).

²⁵Id. at 125, 716 P.2d at 235.

objective standard of reasonableness, or that these issues would have had a reasonable probability of success on appeal, and the district court did not err in denying these claims.

Eighth, appellant claimed that appellate counsel was ineffective for failing to raise the issue of whether appellant was entitled to "an evidentiary hearing on the reliability of PCR forensic testing done by a non-expert." This claim is unsupported by any factual allegations which would, if true, entitle appellant to relief.²⁶ Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that appellate counsel was ineffective for failing to raise the issue of whether the prosecutor violated the professional code of conduct by failing to inform the district court after the trial of juror misconduct. Appellant raised the issue of juror misconduct on direct appeal and this court held that the information relied on by appellant regarding this claim did "not evidence juror misconduct warranting a new trial."²⁷ Appellant cannot avoid the doctrine of the law of the case "by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."²⁸ Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that appellate counsel was ineffective for failing to raise the issue of whether the district court abused its discretion by admitting evidence of appellant's prior convictions. The

²⁶See Hargrove, 100 Nev. 498, 686 P.2d 222.

²⁷See Jackson, Jr. v. State, Docket No 35924 (Order of Affirmance, April 30, 2001).

²⁸See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

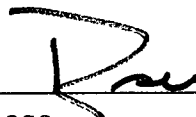
decision to admit or exclude evidence of a prior conviction is "within the district court's sound discretion, and [this court] will respect the lower court's determination when, as here, it is not 'manifestly wrong.'"²⁹ Cross-examination of a defendant who testifies in his own defense as to the number and names of prior crimes is permissible for impeachment purposes.³⁰ The defense opened the door to this evidence during direct examination by discussing a prior conviction. Appellant testified during the defense's direct case that he had been convicted of one prior felony – sexual assault. On cross-examination the State elicited from appellant the information that in addition to the sexual assault appellant had also been convicted of a felony offense of robbery and a felony offense of rape. The State produced a certified copy of the judgment of conviction and it was admitted. Finally, appellant did not object to the State's cross-examination nor the admission of the judgment of conviction. Therefore, appellant failed to demonstrate that this issue would have had a reasonable probability of success on appeal, and the district court did not err in denying this claim.

²⁹See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985) modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996) (quoting Brown v. State, 81 Nev. 397, 400, 404 P.2d 428, 430 (1965)).

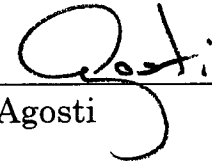
³⁰See Anglin v. State, 86 Nev. 70, 72, 464 P.2d 504, 505 (1970) (disapproved of on other grounds by Dressler v. State, 107 Nev. 686, 819 P.2d 1288 (1991)).

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.³¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.³²


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

cc: Hon. John S. McGroarty, District Judge
Attorney General/Carson City
Clark County District Attorney
Ralph Foster Jackson, Jr.
Clark County Clerk

³¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

³²We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.