IN THE SUPREME COURT OF THE STATE OF NEVADA

DARREN DEMETRAS HARRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39266

FILED

FEB 24 2003

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

On January 5, 2000, the district court convicted appellant, Darren Demetras Harris, pursuant to a jury verdict, of sexual assault.[1] The district court sentenced appellant to serve a term of ten to twenty-five years in the Nevada State Prison. This court affirmed Harris's conviction.[2] The remittitur was issued November 21, 2000.

On November 6, 2001, Harris filed a motion for an extension of time to file a petition for a writ of habeas corpus. The State opposed the motion. The district court held a hearing on the motion and granted Harris an extension until January 10, 2002.

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[1]An amended judgment of conviction was filed on March 21, 2000, to reflect that fact that Harris was convicted pursuant to a jury verdict rather than a guilty plea. A second amended judgment of conviction was filed on October 26, 2000, to add lifetime supervision.

[2]Harris v. State, Docket No. 35498 (Order of Affirmance, October 24, 2000).

On November 27, 2001, Harris 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 Harris or to conduct an evidentiary hearing.[3] On May 7, 2002, the district court denied Harris's petition. This appeal followed.

Initially, we note that the district court abused its discretion in granting Harris's motion for extension of time to file the petition. There are statutory limitations on the availability of a post-conviction petition for a writ of habeas corpus.[4] There is no statutory provision for a motion to extend the time for filing. NRS 34.726(1) provides that unless good

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[3]The February 8, 2002 reporter's transcript shows that the district court received and reviewed an affidavit in response to Harris' claims of ineffective assistance of counsel. It is unclear whether this is the same affidavit, dated January 3, 2002 and filed January 7, 2002, contained in the record on appeal. Regardless, this court has recently held that a petitioner's statutory rights are violated when the district court improperly expands the record with the use of an affidavit in lieu of conducting an evidentiary hearing when an evidentiary hearing is required. Mann v. State, 118 Nev. ___, 46 P.3d 1228 (2002). Although we conclude that the district court erred to the extent that it considered the response submitted by Harris' former counsel, Harris was not prejudiced by the error because he was not entitled to an evidentiary hearing on the claims that he raised in the petition.

[4]See Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989) (citing Grego v. Sheriff, 94 Nev. 48, 574 P.2d 275 (1978) ("The legislature may . . . impose a reasonable regulation on the writ of habeas corpus, so long as the traditional efficacy of the writ is not impaired.").

cause is shown for delay, a petition challenging the validity of a judgment of conviction must be filed within one year after this court issues its remittitur from a direct appeal. Pursuant to NRS 34.726(1), Harris's petition was filed six days late. Nevertheless, we conclude that the granting of the motion to extend, though improper, constitutes good cause to excuse Harris's delay in filing his petition.

Having reviewed the record on appeal, we conclude that the district court did not err in denying Harris's petition.

In his petition, Harris raised five claims of ineffective assistance of trial counsel.[5] 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.[6] 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.[7] "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."[8] A court may

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[5]To the extent that Harris raised these claims independently of his assertions of ineffective assistance of counsel, these claims were waived by Harris's failure to raise them on direct appeal. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994).

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

[7]Strickland, 466 U.S. at 694.

[8]Howard 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)).

consider the two test elements in any order and need not consider both prongs if an insufficient showing is made on either one.[9]

First, Harris claimed that counsel was ineffective for his handling of a situation involving "misconduct" and "jury tampering" by the victim's mother, for failing to object to the hearsay testimony of the victim's husband, and failing to object to the victim's testimony concerning Harris's prior drug use. This court previously addressed these issues in its order affirming Harris's conviction. Harris 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."[10]

Second, Harris claimed that counsel was ineffective for "agreeing to the amended information." NRS 173.095(1) provides that "[t]he court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Harris contended that the amended information violated NRS 173.095 because it constituted a new arraignment, and therefore prejudiced his substantial rights. This claim is without merit. The amended information did not alter the charge of sexual assault pursuant to NRS 200.364 and NRS 200.366. The original information stated that Harris had committed the sexual assault by inserting his penis into the vagina of the victim against her will. To that, the amended information added, tracking the

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

[10]Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

language of NRS 200.366(1), "or under conditions in which Defendant knew, or should have known, that the [victim] was mentally or physically incapable of resisting or understanding the nature of Defendant's conduct." Therefore, the filing of an amended information did not constitute a new arraignment, and counsel was not ineffective for failing to object.

Third, Harris claimed that counsel was ineffective because, when Harris insisted on testifying against the advice of counsel, counsel "only asked a few questions." Harris failed to specify what additional questions counsel should have asked.[11] This claim is also belied by the record.[12] Counsel's questions to Harris fully explored the defense theory that Harris and the victim had consensual sex. Therefore, Harris failed to show that counsel was ineffective in this regard.

Fourth, Harris claimed that counsel was ineffective for "refusing to subpoena witnesses [Harris] asked for." Specifically, Harris contended that counsel should have called an unnamed person who would have testified as to how the victim "acted towards" Harris at a store; Harris's mother; and "Nadine, a masseuse" would have testified that Harris's penis was "too big to claim to be asleep while a sex act is being done to you and get up right afterward." Harris did not provide any specific factual information regarding how the victim "acted towards" him once in a store, how that information would have helped the defense, or

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

[12]See id.

the name of this person.[13] Harris did not specify what his mother would have testified to and how that testimony would have benefited the defense.[14] Finally, Harris did not demonstrate a reasonable probability that the outcome of the trial would have been different if the jury had heard testimony regarding the size of his penis.[15] Therefore, Harris failed to show that counsel was ineffective in this regard.

Fifth, Harris claimed that counsel was ineffective for "agree[ing] to everything the State wanted" and failing to inform Harris of "important developments in the course of the prosecution." Harris did not state specifically what counsel agreed to or which important developments he failed to inform Harris of.[16] Therefore, Harris failed to show that counsel was ineffective in this regard.

Harris also raised two 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.[17] Appellate counsel is not required to raise every non-frivolous issue on appeal in

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[13]See id.

[14]See id.

[15]See Strickland, 466 U.S. at 694.

[16]See Hargrove, 100 Nev. 498, 686 P.2d 222.

[17]Strickland, 466 U.S. at 687.

order to be effective.[18] This court has noted that appellate counsel is most effective when every conceivable issue is not raised on appeal.[19] To show prejudice, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.[20]

First, Harris claimed that counsel was ineffective for failing to apprise Harris of the fact that he would be representing Harris on appeal rather than a public defender. This claim is belied by the record.[21] At the sentencing hearing, at which Harris was present, the district court denied counsel's motion to withdraw from the case and have a public defender appointed to represent Harris on appeal. Therefore, Harris failed to show that counsel was ineffective in this regard.

Second, Harris claimed that counsel was ineffective for raising issues that he "knew before hand" would be rejected on appeal due to "the direct or indirect action or nonaction of his own incompetence." Harris failed to provide any factual basis for how counsel "knew" that the issues raised on appeal would be rejected, or what issues might have been more successful.[22] Therefore, Harris failed to show that counsel was ineffective in this regard.

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[18]Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

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

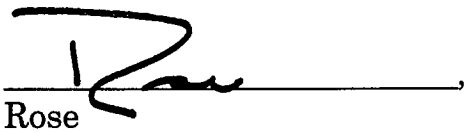
[20]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

[21]See Hargrove, 100 Nev. 498, 686 P.2d 222.

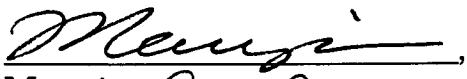
[22]See id.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Harris is not entitled to relief and that briefing and oral argument are unwarranted.[23] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[24]



_____, J.
Rose



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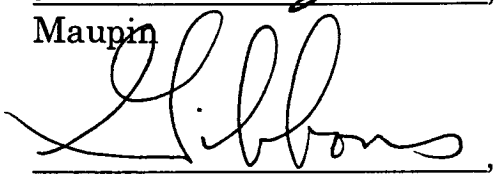
Maupin



_____, J.
Gibbons

cc: Hon. Donald M. Mosley, District Judge
Darren Demetras Harris
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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

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