

IN THE SUPREME COURT OF THE STATE OF NEVADA

DARRYL EVERETT HARPER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39275

FILED

NOV 22 2002

ORDER OF AFFIRMANCE

JANET M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
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.

On November 14, 2001, the district court convicted appellant, pursuant to a jury verdict, of possession of a controlled substance with intent to sell.¹ The district court sentenced appellant to serve a term of twelve to thirty-two months in the Nevada Department of Corrections. Appellant's conviction was affirmed by this court on direct appeal.²

On January 3, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition.³ Pursuant to NRS 34.750 and 34.770, the

¹The original judgment of conviction was amended on February 6, 2002 to state that appellant was convicted pursuant to a jury verdict.

²Harper v. State, Docket No. 38792 (Order of Affirmance, March 12, 2002).

³Appellant filed his first habeas petition on September 11, 2001, prior to being sentenced. On November 5, 2001, the State filed a response opposing this petition on the grounds that it was improperly before the court at that time, and on the merits. Appellant was then sentenced and subsequently filed a second habeas petition raising the same issue.

district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On March 4, 2002, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received 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.⁴ 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.⁵ "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."⁶ 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.⁷

Appellant claimed that counsel was ineffective for failing to challenge the "perjured" testimony of witness for the State Johnny Delgado. Mr. Delgado was a security guard at the El Cortez Hotel Casino. Appellant had previously been "86'd" from the El Cortez. Appellant stated in his petition that Mr. Delgado's testimony concerning the events which led to appellant being "86'd" differed at trial from his testimony at the

⁴Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁵Strickland, 466 U.S. at 694.

⁶Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691) abrogation on other grounds recognized by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

⁷Strickland, 466 U.S. at 697.


preliminary hearing. Appellant also stated that Mr. Delgado's testimony at trial and at the preliminary hearing differed from Mr. Delgado's written report of the incident. For this reason, appellant argued, Mr. Delgado "lied throughout the whole court proceeding," and counsel was ineffective for failing to cross-examine Mr. Delgado regarding these discrepancies. This argument is without merit for several reasons. First, appellant failed to show that because Mr. Delgado's testimony contained discrepancies he committed perjury. Second, due to the fact that appellant was known to Mr. Delgado as someone who had been "86'd" from the El Cortez for selling drugs, the decision not to emphasize this was a reasonable tactical decision.⁸ Finally, appellant failed to demonstrate that had counsel cross-examined Mr. Delgado regarding this matter, the result of the trial would have been different. A second security guard corroborated Mr. Delgado's testimony concerning the incident for which appellant was charged in this matter, and the jury saw a videotape of the search of appellant by El Cortez security which uncovered the drugs in question.⁹ Therefore, appellant failed to show that counsel was ineffective in this regard, and the district court did not err in denying this claim.


⁸See Howard, 106 Nev. at 722, 800 P.2d at 180 (citing Strickland, 466 U.S. at 691) abrogation on other grounds recognized by Harte, 116 Nev. 1054, 13 P.3d 420.


⁹See Ford v. State, 105 Nev. 850, 852, 784 P.2d 951, 952 (1989) (citing Strickland, 466 U.S. at 697) ("overwhelming evidence of guilt is relevant to the question of whether a client had ineffective counsel").

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.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General/Carson City
Clark County District Attorney
Darryl Everett Harper
Clark County Clerk

¹⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).