IN THE SUPREME COURT OF THE STATE OF NEVADA

VAL JEROME EALEY A/K/A IRWIN WILLIAMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39629

FILED

MAR 21 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
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 November 9, 1999, the district court convicted appellant Val Jerome Ealey, pursuant to a jury verdict, of possession of a controlled substance with intent to sell, and transporting a controlled substance. The district court sentenced Ealey to serve a term of twelve to thirty-four months for possession with intent to sell, and a consecutive term of twelve to forty-eight months for transporting in the Nevada State Prison. This court affirmed Ealey's conviction.[1]

[1]Ealey v. State, Docket No. 35203 (Order of Affirmance, October 30, 2000).



03-05289

On October 29, 2001, Ealey filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, and Ealey filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Ealey or to conduct an evidentiary hearing. On June 4, 2002, the district court denied Ealey's petition.[2] This appeal followed.[3]

In his petition, Ealey raised seven 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.[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

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[2]In addition, the district court issued an order denying this petition on April 17, 2002, and an amended order denying this petition on May 15, 2002.

[3]To the extent that Ealey seeks to appeal the district court's denial of his motion for rehearing on the denial of his petition, that order is unappealable. See Phelps v. State, 111Nev. 1021, 900 P.2d 344 (1995).

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

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

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]

First, Ealey claimed that counsel was ineffective for failing to allow him to testify at the preliminary hearing and for failing to present any evidence at the preliminary hearing. The State provided more than enough evidence to establish probable cause for the purpose of binding Ealey over for trial.[8] Therefore, Ealey failed to show a reasonable probability that had counsel presented any evidence, the result would have been different.

Second, Ealey claimed that counsel was ineffective for failing to investigate. Specifically, Ealey argued that counsel should have investigated: (1) the policies of the San Bernardino California Sheriff's Department regarding "suspected contraband" at the airport; (2) the

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[6]Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691).

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

[8]See Sheriff v. Middleton, 112 Nev. 956, 961, 921 P.2d 282, 286 (1996) (quoting Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) ("[P]robable cause to bind a defendant over for trial 'may be based on 'slight,' even 'marginal' evidence because it does not involve a determination of guilt or innocence of an accused.'").

identification policies for passengers at California airports in July 1995; and (3) whether there were surveillance cameras at the airport at Ontario, California on July 5, 1995. Detectives Brinker and Greenwell from the narcotics division of the Los Angeles Police Department (LAPD) testified regarding the procedure they followed when suspected contraband passed through the Ontario airport. Detective Brinker testified that at that time identification was not required of passengers and that he was not aware of any security cameras at the airport. Detective Greenwell testified that he saw Ealey get on the flight to Las Vegas. Therefore, Ealey failed to show a reasonable probability that further investigation into this matter would have changed the result of the trial.

Third, Ealey claimed that counsel was ineffective for failing to conduct interviews. Specifically, Ealey argued that counsel should have interviewed: (1) "airport personnel," Irwin Williams and Judy Taylor, who would have corroborated Ealey's alibi defense; and (2) State's witnesses, Detectives Brinker, Tampio, Huggins, Briscoe and Greenwell, in order to impeach their perjured testimony. Ealey failed to state in what capacity or at what airport the "airport personnel" were employed, and how they would have supported his alibi defense.[9] Ealey's claim that all of the

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

detectives involved in the case perjured themselves is unsupported by any specific factual allegation.[10] Therefore, Ealey failed to show a reasonable probability that had counsel conducted these interviews the result of the trial would have been different.

Fourth, Ealey claimed that counsel was ineffective for failing to file a motion in limine to preclude the introduction of Ealey's prior convictions. According to Ealey, this denied him his "right to testify in his defense and have alibi witnesses to come forth at trial and verify his story." This claim is belied by the record.[11] Counsel made an oral motion in limine to exclude the State's use of Ealey's prior conviction to impeach him if he testified. The district court denied the motion. To the extent that Ealey's intent was to claim that counsel should have made the motion sooner, he failed to show a reasonable probability that had counsel done so, the result of the trial would have been different.

Fifth, Ealey claimed that counsel was ineffective for failing to prepare and file a timely alibi defense. Specifically, Ealey argued that counsel should have prepared a defense strategy based on the theory that Ealey was not the person who checked the luggage into the Ontario,

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[10]See id.

[11]See id.

California airport and then flew to Las Vegas, Nevada. Ealey was observed by the LAPD checking the bags in question and boarding a flight to Las Vegas. Ealey was stopped at the gate in Las Vegas. Ealey told the Las Vegas detectives his name was Irwin Williams, and he was carrying an airline ticket with that name. Stapled to the ticket were the claim checks for the bags that the LAPD had observed Ealey checking in Los Angeles. Ealey did not show that, in light of the overwhelming evidence against him, that the jury's verdict would have been different had counsel employed this trial strategy.[12]

Sixth, Ealey claimed that counsel was ineffective for failing to cross-examine State's witnesses, Detectives Brinker, Tampio, Huggins, Briscoe, and Greenwell. This claim is belied by the record.[13] Counsel cross-examined these witnesses. To the extent that Ealey intended to claim that counsel's cross-examination was insufficient, he failed to state in what way.[14] Therefore, Ealey failed to establish that counsel was ineffective in this regard.

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

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

[14]See id.

Seventh, Ealey claimed that counsel was ineffective for failing to file an adequate motion to suppress, and failing to prepare special jury instructions. This court addressed the underlying issues in the context of Ealey's direct appeal. Ealey cannot avoid the doctrine of the law of case "by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."[15] Therefore, Ealey failed to demonstrate that counsel was ineffective in this regard.

Ealey also raised seven 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.[16] Appellate counsel is not required to raise every non-frivolous issue on appeal in order to be effective.[17] This court has noted that appellate counsel is most effective when every conceivable issue is not raised on appeal.[18] To show

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

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

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

[18]Ford, 105 Nev. at 853, 784 P.2d at 953 (citing Jones, 463 U.S. at 752).

prejudice, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.[19]

First, Ealey claimed that counsel was ineffective for failing to argue that the district court abused its discretion by allowing a "lay witness," Las Vegas Metropolitan Police Department Detective Briscoe to offer an expert opinion regarding whether the documents in Ealey's briefcase were "owe sheets." This claim is belied by the record.[20] Detective Briscoe did not offer an expert opinion, but testified as a lay witness. Therefore, Ealey failed to show that this issue would have had a reasonable probability of success on appeal.

Second, Ealey claimed that counsel was ineffective for failing to argue that the district court abused its discretion in allowing the hearsay testimony of Detective Briscoe. During the detective's testimony, counsel made several objections, arguing that the testimony was hearsay. The district court admonished the jury that the testimony was not to be considered for the truth of what was said to the detective, but only for the effect it had upon his actions. The jury is presumed to follow

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

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

instructions.[21] Therefore, Ealey failed to show that this issue would have had a reasonable probability of success on appeal.

Third, Ealey claimed that counsel was ineffective for failing to argue that State's witnesses, Detectives Tampio, Brinder, Briscoe, Huggins, and Greenwell perjured themselves. As discussed, there is no support for Ealey's claim that the detectives perjured themselves.[22] Therefore, Ealey failed to show that this issue would have had a reasonable probability of success on appeal.

Fourth, Ealey claimed that counsel was ineffective for failing to argue that the prosecutor committed misconduct during her closing argument by misrepresenting the evidence, and by making the following statements: (1) "[t]here is never any case that could be proved beyond any possible doubt;" (2) that evidence is "like a puzzle being put together," and the jury should "look at the entire picture, not just one specific piece of that puzzle;" (3) "But don't be confused. Reasonable doubt isn't some magical empirical concept. It's used in every courtroom in the United States, every single day, in every criminal case. It's the same standard we use for petit larceny, for burglary, for robbery and for murder; used all the

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[21]See Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997).

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

time;" and (4) "He's got almost 40 pounds of marijuana. That's not personal use ladies and gentlemen." We conclude that Ealey failed to demonstrate the prosecutor misrepresented the evidence. Next, we note that the defense failed to object to all but the last comment. Moreover, our review of the record reveals the prosecutor's comments were not patently prejudicial. Accordingly, we decline to review the alleged misconduct to which the defense failed to object.[23] As to the remaining allegation of prosecutorial misconduct, we conclude that even assuming the remark was error, it was harmless.[24] Following the objection, the district court reminded the jury that the attorneys could not give their opinions about the case, but could state what they believed the evidence showed, and that the jury did not have to agree with the attorney's assessment. Therefore, Ealey failed to show that this issue would have had a reasonable probability of success on appeal.

Fifth, Ealey claimed that counsel was ineffective for failing to argue that because the venire from which the jury was chosen contained only one African-American, it did not adequately represent a fair cross-

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[23]See Libby v. State, 109 Nev. 905, 911, 859, P.2d 1050, 1054 (1993) ("This court may review errors which are patently prejudicial, however, regardless of counsel's failure to object.").

[24]See Garner v. State, 78 Nev. 366, 374-75, 374 P.2d 525, 530 (1962).

section of the community. Ealey failed to demonstrate that the alleged underrepresentation was due to systematic exclusion of African-Americans in the jury selection process.[25] Therefore, Ealey failed to show that this issue would have had a reasonable probability of success on appeal.

Sixth, Ealey claimed that counsel was ineffective for failing to argue that being charged for both possession of a controlled substance with intent to sell and transporting a controlled substance was a violation of the prohibition against double jeopardy. A defendant may not be convicted of two offenses premised on the same facts unless each offense "'requires proof of a fact which the other does not.'"[26] Ealey was convicted of possession of a controlled substance with intent to sell pursuant to NRS

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[25]See Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 275 (1996) ("The defendant bears the burden of demonstrating a prima facie violation of the fair-cross-section requirement. To demonstrate a prima facie violation, the defendant must show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.") (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)).

[26]See Barton v. State, 117 Nev. 686, ___, 30 P.3d 1103, 1108 (2001); Blockburger v. United States, 284 U.S. 299, 304 (1932).

453.337, and transporting a controlled substance pursuant to NRS 453.321. At the time of Ealey's conviction, NRS 453.337(1) provided in relevant part that "[e]xcept as otherwise authorized by the provisions of NRS 453.011 to 453.552 inclusive, it is unlawful for a person to possess for the purpose of sale . . . any controlled substance classified in schedule I or II."[27] NRS 453.321(1)(a) provided that "[e]xcept as authorized by the provisions of NRS 453.011 to 453.552, inclusive, it is unlawful for a person to import, transport, sell, exchange, barter, supply, prescribe, dispense, give away or administer a controlled or counterfeit substance."[28] Each offense requires proof of a fact the other does not; specifically possession with the intent to sell, and transporting. Therefore, Ealey failed to show that this issue would have had a reasonable probability of success on appeal.

Seventh, Ealey claimed that counsel was ineffective for failing to argue that trial counsel was ineffective. Claims of ineffective assistance of counsel are appropriately raised in a post-conviction proceeding.[29]

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[27]1997 Nev. Stat., ch. 256, § 4 at 904.

[28]1999 Nev. Stat. ch. 517, § 3 at 2637 (emphasis added).

[29]See Feazell v. State, 111 Nev. 1146, 1149, 906 P.2d 727, 729 (1995).

Therefore, Ealey failed to establish that counsel was ineffective in this regard.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Ealey is not entitled to relief and that briefing and oral argument are unwarranted.[30] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[31]

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Michael L. Douglas, District Judge
Val Jerome Ealey
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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

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