

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL GEORGE SIMS,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondent.

No. 39700

FILED

OCT 29 2002

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court dismissing appellant Michael George Sims' post-conviction petition for a writ of habeas corpus.

On December 24, 1998, Sims was convicted, pursuant to a jury verdict, of one count of possession or control of a dangerous weapon by an incarcerated person, a category B felony in violation of NRS 212.185. The district court adjudicated Sims as a habitual criminal and sentenced him to serve a prison term of 60-150 months, with the term to run consecutively to his present term of incarceration. Sims' direct appeal from the judgment of conviction was dismissed by this court.¹

On March 24, 2000, Sims filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court appointed counsel to represent Sims, and counsel filed an amended habeas petition. The State opposed the amended petition. On May 13, 2002, after conducting an evidentiary

¹Sims v. State, Docket No. 33597 (Order Dismissing Appeal, April 16, 1999).

hearing, the district court dismissed Sims' petition. This timely appeal followed.

In the petition, Sims presented several claims of ineffective assistance of counsel. On appeal, and in violation of NRAP 28(e) and NRAP 28A(a)(3), Sims merely incorporates by reference the original and amended habeas petitions filed in the district court without any additional argument. Sims contended that counsel were ineffective in: (1) not following through with the plea agreement, and instead filing a motion to dismiss² without notifying him; (2) failing to file a pretrial habeas petition challenging the jurisdiction of the justice court;³ (3) violating the attorney-client privilege by employing an inmate to assist him without Sims' consent; (4) failing to conduct an investigation into his mental competency and have him examined by an expert; (5) failing to conduct any pretrial investigation or legal research; (6) failing to file motions on his behalf; (7) successfully moving to have the original charges dismissed, thus angering the Chief Deputy Attorney General and provoking him to seek habitual criminal adjudication; (8) failing to request a continuance in order to be better prepared for trial; (9) failing to discuss alternative defenses with him; and (10) failing to raise meritorious claims on direct appeal.

To state a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so

²The motion to dismiss the original complaint filed against Sims was granted by the district court.

³See State v. Sims, Docket No. 31236 (Order Dismissing Appeal, February 24, 1998) (holding that refileing charges against Sims in the justice court was valid as a matter of law).

severe that they rendered the jury's verdict unreliable.⁴ The tactical decisions of counsel are "virtually unchallengeable absent extraordinary circumstances."⁵ The district court found that counsel were not ineffective, and that there was overwhelming evidence of Sims' guilt. The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁶

Sims has not presented any argument on appeal regarding the ineffectiveness of counsel; instead, Sims only cites to the habeas petitions filed in the district court. Sims has not alleged, let alone demonstrated, that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, Sims has not alleged or demonstrated that the district court erred as a matter of law.⁷ Therefore, we conclude that the district court did not err in rejecting Sims' claims of ineffective assistance of counsel.

Sims also raised several claims in his petition and again on appeal that he should have pursued in his direct appeal. Sims contended that: (1) the justice court and district court lacked jurisdiction to consider the second filed complaint;⁸ (2) he was without the assistance of counsel

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

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

⁶See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

⁷See id.

⁸Sims also raised this claim in his direct appeal; therefore, the law of the case doctrine prohibits further litigation of this matter. See McNelton v. State, 115 Nev. 396, 415, 990 P.2d 1263, 1275 (1999).

during critical stages in the criminal proceedings below; (3) he was improperly placed twice in jeopardy for the same offense by virtue of the State's prosecution and the prison's disciplinary hearing; (4) the State abused its discretion by subjecting him to selective and vindictive prosecution; (5) he was denied his right to counsel at a prison disciplinary hearing; and (6) he was charged with a crime that does not constitute a public offense.⁹

The district court addressed and rejected these claims based on the merits. We note, however, that a court must dismiss a habeas petition if it presents claims that could have been presented in an earlier proceeding unless the court finds both good cause for failing to present the claims earlier and actual prejudice to the petitioner.¹⁰ This court may excuse the failure to show cause where the prejudice from a failure to consider the claim amounts to a "fundamental miscarriage of justice."¹¹ Sims failed to demonstrate good cause for not raising those claims on direct appeal, and he has failed to demonstrate that he is the victim of a fundamental miscarriage of justice.¹² We therefore conclude that Sims has waived these claims.

⁹Sims' argument was slightly modified on appeal. He argued in his petition below that his offense was not punishable under Nevada law pursuant to Witter v. State, 112 Nev. 908, 921, 921 P.2d 886, 895 (1996), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). But see Fore v. State, 118 Nev. ___, 45 P.3d 404 (2002).


¹⁰See NRS 34.810(1)(b)(2); NRS 34.810(3).

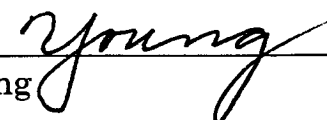
¹¹Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

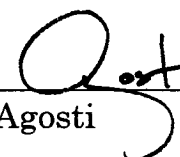
¹²Cf. Murray v. Carrier, 477 U.S. 478, 496 (1986) (holding that a federal habeas court may grant the writ in the absence of a showing of cause for the procedural default "where a constitutional violation has probably resulted in the conviction of one who is actually innocent").

Having considered Sims' contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.¹³


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

cc: Hon. Richard Wagner, District Judge
Belanger & Plimpton
Attorney General/Carson City
Pershing County District Attorney
Pershing County Clerk

¹³Although this court has elected to file the fast track statement submitted, we note that it does not comply with the arrangement and form requirements of the Nevada Rules of Appellate Procedure. "Briefs or memoranda of law filed in district courts shall not be incorporated by reference in briefs submitted to the Supreme Court." See NRAP 28(e); see also NRAP 28A(a)(3). In this case, counsel for appellant incorporated by reference the original and amended habeas petitions filed in the district court in support of his argument that trial and appellate counsel were ineffective. Counsel is cautioned that failure to comply with the requirements for fast track statements in the future may result in the brief being returned, unfiled, to be correctly prepared. See NRAP 32(c). Failure to comply may also result in the imposition of sanctions by this court. NRAP 3C(n).