

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN CHAPMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39825

FILED

MAY 15 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF 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 April 28, 1999, the district court convicted appellant, pursuant to a jury trial, of three counts of sexual assault on a minor under the age of sixteen and fifteen counts of lewdness with a minor under the age of fourteen. The district court sentenced appellant to serve one term of life in the Nevada State Prison with the possibility of parole and a consecutive term of forty to ninety-six months. The remaining terms were imposed to run concurrently. On May 21, 1999, the district court entered an amended judgment of conviction correcting the terms for the lewdness counts to be terms of thirty-eight months to ninety-six months in the Nevada State Prison. This court affirmed appellant's conviction on direct appeal.¹

On February 25, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹Chapman v. State, 117 Nev. 1, 16 P.3d 432 (2001).

State opposed the petition.² 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 June 4, 2002, the district court denied appellant's petition. This appeal followed.

First, appellant claimed: (1) insufficient probable cause existed to arrest and charge him, (2) he was arrested without a warrant, (3) he was not informed of his Miranda³ rights prior to being interrogated by the police, (4) the district court erred in instructing the jury that they may convict the defendant solely on the basis of the victim's uncorroborated testimony, (5) the district court erred in allowing the State to argue that the jury may speculate on the number of incidents that occurred, (6) the district court erred in allowing the State to argue that the jury may speculate what was in the mind of an eight year old, (7) the district court erred in not allowing prior bad acts of the victim's father to be presented, (8) there was insufficient evidence of guilt, (9) the jury instructions were insufficient and confusing, (10) the district court erred in denying a defense request for discovery material relating to audiotapes kept by the victim's mother and (11) his due process and fair trial rights were violated when the State was allowed to call an expert witness. These claims could have been raised on direct appeal, but were not. Appellant failed to provide specific facts that demonstrated good cause for failing to

²Appellant filed a reply to the State's opposition after the district court orally denied the petition. Thus, appellant's reply was not considered by the district court in resolving his petition, and we decline to consider the response as well. See NRS 34.750 (providing that except for certain enumerated exceptions that no further pleadings may be filed by a habeas corpus petitioner except as ordered by the court).

³Miranda v. Arizona, 384 U.S. 436 (1966).

raise the claims earlier. Thus, he waived them pursuant to NRS 34.810(1)(b).

Second, appellant claimed: (1) the district court erred in denying a defense motion for a psychiatric evaluation of the victim, (2) the district court erred in failing to dismiss the charges against appellant because his Brady⁴ rights were violated when the State failed to collect audiotapes in the possession of the victim's mother, and (3) the district court erred in excluding evidence that the victim's knowledge of sexual matters and male anatomy may have come from other sources. On direct appeal, this court considered and rejected appellant's challenge to the errors set forth above. The doctrine of the law of the case prevents further litigation of these issues and cannot be avoided by a detailed and more precisely focused argument made upon reflection of the prior proceedings.⁵

Next, appellant raised numerous claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that in absence of counsel's errors that the results of the proceedings would have been different.⁶ The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁷

⁴Brady v. Maryland, 373 U.S. 83 (1963).

⁵Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

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

⁷Strickland, 466 U.S. at 697.

First, appellant claimed that his trial counsel was ineffective because the State failed to advise him of his right to counsel during a police interview and because the district court interfered with the discovery process. In order to establish that counsel's performance was deficient, a petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment."⁸ Appellant failed to state how counsel's performance was deficient in these areas. Rather, appellant appeared to raise further claims of State and district court without articulating the errors or omissions made by counsel. Thus, appellant failed to demonstrate that his counsel was ineffective.

Second, appellant claimed that his trial counsel was ineffective for failing to investigate the victim's father's alleged statement that he would have the victim make an accusation of sexual abuse against appellant. Appellant claimed that this statement was made on an audiotape that was at one time in the possession of the victim's mother, but that counsel failed to obtain a copy of the audiotape from the victim's mother. Appellant failed to demonstrate that his counsel's performance was deficient. The record reveals that appellant's counsel did attempt to obtain the audiotapes from the victim's mother but that the victim's mother lost the audiotapes. Appellant extensively cross-examined the victim's father and mother regarding the victim's father's feelings of hatred towards appellant. The victim's father denied that he coached his daughter into making an allegation of sexual abuse against appellant. Appellant failed to indicate what further steps counsel should have taken to present admissible evidence relating to this alleged statement.

⁸Id. at 690.

Therefore, we conclude that appellant failed to demonstrate that his counsel was ineffective in this regard.

Third, appellant claimed that his counsel was ineffective for failing to obtain critical records, tape recordings and other exculpatory material. Appellant failed to demonstrate that his counsel's performance was deficient. As discussed above, appellant's counsel did attempt to obtain the audiotapes from the victim's mother, but the audiotapes were lost. Appellant failed to allege with particularity what further exculpatory evidence counsel failed to obtain.⁹ Therefore, appellant failed to demonstrate that his counsel was ineffective in this regard.

Fourth, appellant claimed that his trial counsel was ineffective for failing to obtain a psychiatric evaluation of the victim. Appellant's counsel did attempt to obtain a psychiatric evaluation of the victim, but the district court denied appellant's motion. This court determined on direct appeal that the denial of appellant's motion for a psychiatric evaluation was not an abuse of discretion. Because the underlying issue has already been considered and rejected by this court, appellant cannot demonstrate that his counsel was ineffective in this regard.¹⁰

Fifth, appellant claimed that his trial counsel was ineffective for failing to request a jury panel that was comprised of a fair cross-section of the community. Appellant failed to demonstrate a prima facie violation of the fair cross-section requirement.¹¹ Thus, appellant failed to demonstrate that his counsel was ineffective in this regard.

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

¹⁰See Hall, 91 Nev. 314, 535 P.2d 797.

¹¹See Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996); see also Duren v. Missouri, 439 U.S. 357 (1979).

Sixth, appellant claimed that his trial counsel was ineffective for failing to request a jury instruction that: (1) informed the jury if the jury believed appellant's story, regardless of the evidence presented at trial, that he was entitled to an acquittal, (2) informed the jury of appellant's alibi defense theory, and (3) informed the jury that a defendant has a right to his own theory of defense and to challenge the State's evidence with that theory of defense. Appellant's counsel presented appellant's theory of defense—that the victim's father had manipulated the victim into making a false allegation—throughout the trial. The jury was properly instructed regarding the presumption of innocence, the State's burden of proof, and the jury's ability to determine the credibility of witnesses. Appellant was not entitled to a jury instruction on jury nullification.¹² Appellant failed to set forth what jury instruction should have been offered to present his alibi defense and how this jury instruction would have altered the outcome of the trial. Therefore, appellant failed to demonstrate that his counsel was ineffective in this regard.

Seventh, appellant claimed that his trial counsel was ineffective for failing to object to jury instruction 9C. Jury instruction 9C read:

Time is not an element of the crime of sexual assault and lewdness with a minor. The State is not required to prove the exact day upon which the crime may have occurred. The State may allege

¹²See generally Graham v. State, 116 Nev. 23, 31, 992 P.2d 255, 260 (2000) (recognizing "lenity" as a separate basis for giving jury instructions on second degree murder to be a form of jury nullification, renouncing this practice and declining "to embark into these troubling jurisprudential waters"); United States v. Powell, 955 F.2d 1206, 1212-13 (9th Cir. 1991) (holding that the Ninth Circuit's precedents did not support a jury nullification jury instruction).

and prove an approximate date on which it believes the crime occurred.

This jury instruction correctly stated the law.¹³ The State did provide an approximate window of time in which the alleged crimes occurred, and the testimony presented at trial fell within that window of time. Thus, appellant's counsel was not ineffective in this regard.

Eighth, appellant claimed that his trial counsel was ineffective for failing to adequately prepare or formulate a defense. Appellant claimed that several of the acts were alleged to have been committed at a certain time and that he had an alibi for these times. Appellant further claimed that his counsel failed to adequately present his theory that the victim's father was a madman who manipulated the victim into making a false accusation against appellant because of his feelings of hatred towards appellant. The record belies appellant's claim that the State alleged a certain date for the charged acts. The charging information stated that the acts occurred between May 1994 and February 1996. The testimony at trial indicated that the crimes occurred between May 1994 and February 1996. Thus, there is no reasonable probability that a different result would have occurred had trial counsel pursued appellant's alleged alibi for specific dates within this window of time. Trial counsel did pursue the appellant's theory of defense regarding the victim's father and elicited testimony that the victim's father was violent, hated appellant and had made an unfounded allegation of sexual abuse against appellant in the divorce proceedings between the victim's father and mother. Appellant failed to indicate what further evidence trial counsel should have discovered to support this theory that would have had a reasonable

¹³See Cunningham v. State, 100 Nev. 396, 683 P.2d 500 (1984).

probability of altering the outcome of the trial. Thus, appellant failed to demonstrate that his counsel was ineffective in this regard.

Ninth, appellant claimed that his trial counsel was ineffective for failing to investigate matters of an exculpatory nature favorable to the defense. Specifically, appellant claimed that his trial counsel should have interviewed the following persons: (1) Douglas Crawford, (2) Ted Shoemaker, (3) LaDeana Camble Morgan, (4) Rochelle Meier, (5) Lisa Brown, (6) Rebecca Burton, (7) Israel Kunin, (8) Ms. McClean, (9) William Phillips, (10) Emmelienne Schreiner, and (11) Mary Mitchell. Appellant failed to demonstrate that information and testimony from the individuals listed would have had a reasonable probability of altering the outcome of the trial. Thus, appellant failed to demonstrate that his counsel was ineffective in this regard.

Finally, appellant claimed that his appellate counsel was ineffective for failing to raise his direct appeal claims as violations of his rights under the United States Constitution. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)."¹⁴ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁵ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹⁶ "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable

¹⁴Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

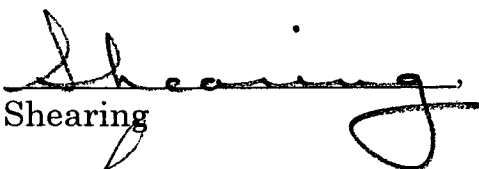
¹⁵Jones v. Barnes, 463 U.S. 745, 751 (1983).


¹⁶Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).


probability of success on appeal.”¹⁷ Appellant failed to demonstrate that his direct appeal issues would have had a reasonable probability of success on appeal even if counsel had raised his claims as violations of his rights under the United States Constitution. Thus, appellant failed to demonstrate that his counsel was ineffective in this regard.

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.¹⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁹


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Michael A. Cherry, District Judge
Melvin Chapman
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁷Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

¹⁸See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁹We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.