

IN THE SUPREME COURT OF THE STATE OF NEVADA

HOWARD LEE WHITE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39835

FILED

NOV 21 2003

ORDER OF AFFIRMANCE

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

This is an appeal from the district court's denial of a post-conviction petition for a writ of habeas corpus. The district court convicted Howard Lee White, pursuant to a jury verdict, of battery causing substantial bodily harm, burglary, and attempted robbery with use of a deadly weapon. The district court then sentenced White to serve a life sentence in the Nevada State Prison without the possibility of parole. On direct appeal, this court affirmed White's conviction and sentence.

Thereafter, White filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel, who filed a supplement to the petition. The district court conducted an evidentiary hearing, and after the evidentiary hearing, the district court denied White's petition. This appeal followed.

On appeal, White argues that his appellate counsel was ineffective for failing to challenge: (1) the district court's decision to allow White to proceed in proper person; (2) the district court's removal of White's original trial counsel, Samuel T. Bull; (3) the district court's order denying White's motion to recuse the district court judge for bias; and (4) White's habitual criminal adjudication. White also argues that his standby counsel was ineffective for failing to interview witnesses. Because

all of White's arguments lack merit, we affirm the district court's order dismissing the post-conviction petition for a writ of habeas corpus.

We review a claim of ineffective assistance of counsel independently.¹ To prevail, White must show that: (1) counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness, and (2) such deficiencies prejudiced White and the ultimate outcome of his trial.² If White fails to establish one of the two prongs, we need not consider the other.³ Judicial review of a lawyer's representation is highly deferential, and thus, White must overcome the presumption that a challenged action might be considered sound strategy.⁴

First, White claims that his appellate counsel was ineffective for failing to raise the issue of whether the district court adequately canvassed him before allowing him to represent himself. A criminal defendant has a constitutional right to self-representation and may waive assistance of counsel.⁵ Waiver of the right to counsel must be made "knowingly and intelligently."⁶ "[T]o withstand constitutional scrutiny, the judge need only be convinced that the defendant made his decision

¹See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

²See Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

³See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996)(citing Strickland, 466 U.S. at 697).

⁴State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998).

⁵See Furbay v. State, 116 Nev. 481, 485, 998 P.2d 553, 556 (2000).

⁶Harris v. State, 113 Nev. 799, 801, 942 P.2d 151, 153 (1997).

with a clear comprehension of the attendant risks.”⁷ This court gives deference to a district court judge’s determination that the defendant understood the dangers of self-representation and waived his right to counsel with a full understanding of the disadvantages and risks.⁸

Here, the district court conducted a Faretta⁹ canvass during which White answered all the questions appropriately. The record also indicates that White was aware of the dangers of self-representation, but he nevertheless knowingly, intelligently, and voluntarily waived his right to be represented by counsel. Because the district court adequately canvassed White before allowing him to continue in proper person, we conclude that White did not show that appellate counsel’s failure to challenge the canvass on direct appeal fell below an objective standard of reasonableness and that counsel was ineffective in this regard.

Second, White argues that since he had a right to choose his counsel, the district court’s removal of Samuel T. Bull as his counsel was erroneous, and that appellate counsel was ineffective for failing to raise this issue. Although White testified at his post-conviction hearing that he wanted Bull to continue to represent him at trial even if that meant delaying the trial, Bull was removed only after he stipulated to his own removal. Bull indicated in his affidavit that he was not mentally or physically prepared to try White’s case and that he considered himself ineffective as an attorney. Thus, the district court did not interfere with White’s choice to have Bull as his counsel, as it was Bull’s choice to remove

⁷Tanksley v. State, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1997).

⁸Harris, 113 Nev. at 801, 942 P.2d at 153.

⁹Faretta v. California, 422 U.S. 806 (1975).

himself as White's trial counsel. Accordingly, we conclude that appellate counsel's decision not to raise this issue on direct appeal did not fall below an objective standard of reasonableness given that such an argument would have lacked merit.

Third, White claims that his appellate counsel should have challenged the district court's order denying White's motion to recuse the district court judge for bias. Appellate counsel did raise this issue on appeal and we rejected it, concluding that the district court judge properly denied White's motion because it was untimely. Therefore, White's argument is barred under the doctrine of the law of the case.¹⁰

Fourth, White claims that appellate counsel was ineffective for failing to challenge the habitual criminal adjudication on direct appeal. However, we decided this issue on White's direct appeal, and thus, this argument is barred under the doctrine of the law of the case.¹¹

Fifth, White argues that appellate counsel should have raised a double jeopardy challenge to the habitual criminal adjudication. He contends that the district court erroneously used his prior convictions, which had already been used to adjudicate him a habitual criminal in another matter, to adjudicate him a habitual criminal in this matter. In Carr v. State,¹² we rejected such an argument and explained that the habitual criminal statute "does not recharge a defendant with a substantive crime; it merely allows an averment of a fact that goes to

¹⁰See Leslie v. Warden, 118 Nev. ___, ___, 59 P.3d 440, 447-48 (2002).

¹¹Id.

¹²96 Nev. 936, 940, 620 P.2d 869, 871 (1980).

punishment.”¹³ Thus, we conclude that appellate counsel’s decision not to raise the double jeopardy argument did not fall below an objective standard of reasonableness since we previously rejected this issue and counsel is not required to raise frivolous claims on direct appeal.¹⁴

Finally, White argues that his stand-by counsel was ineffective for failing to deliver witnesses to court and failing to interview certain defense witnesses. When an accused invokes the right to self-representation, the “State may . . . appoint a ‘standby counsel’ to aid the accused,” but it is not required to do so.¹⁵ “The right to effective assistance of counsel . . . does not arise if the counsel was appointed pursuant to the court’s discretion.”¹⁶ Therefore, we conclude that because White did not have a right to stand-by counsel, he did not have a right to effective assistance of stand-by counsel, and this claim is without merit.

¹³Id. (citing Hollander v. State, 82 Nev. 345, 353, 418 P.2d 802, 806 (1966)).

¹⁴Kirksey, 112 Nev. at 998, 923 P.2d at 1113.


¹⁵Faretta v. California, 422 U.S. 806, 834 n.46 (1975).

¹⁶Crump v. Warden, 113 Nev. 293, 303 n. 5, 934 P.2d 247, 253 n.5 (1997) (emphasis in original).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Leavitt


_____, J.
Maupin

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk