IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY NIXON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39912

FILED

APR 17 2003

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 July 25, 2000, the district court convicted appellant Gary Nixon, pursuant to a jury verdict, of first degree kidnapping and burglary. The district court sentenced Nixon to serve a term of life in the Nevada State Prison with the possibility of parole after five years, and a concurrent sixteen to seventy-two months on the burglary charge. This court affirmed the judgment of conviction.[1]

On May 1, 2002, Nixon filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Nixon or to conduct an evidentiary hearing. On July 12, 2002, the district court denied Nixon's petition. This appeal followed.

In his petition, Nixon raised several 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

[1]Nixon v. State, Docket No. 36655 (Order of Affirmance, November 9, 2001).

03-06556

prejudiced the defense.[2] 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.[3] "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."[4] 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.[5]

First, Nixon claimed that his trial counsel was ineffective for failing to investigate and present an alibi defense. We conclude that based on the evidence presented at trial, even assuming counsel failed to investigate an alibi defense, the result of the trial would not have been different. Additionally, this court has previously found that there was sufficient evidence of Nixon's guilt beyond a reasonable doubt as determined by a rational trier of fact, and further litigation of this issue is barred by the doctrine of the law of the case.[6] Therefore, Nixon failed to establish that counsel was ineffective in this regard.

Second, Nixon claimed that his trial counsel was ineffective because he had an "actual conflict of interest" evidenced by the fact that he "felt compelled to present an intoxication defense." Nixon's claim that counsel presented an intoxication defense is belied by the record.[7] Nixon complained that the father of the kidnap victim testified at the

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

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

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

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

[6]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

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

preliminary hearing that Nixon appeared to be drunk at the time of the incident. This witness was called by the State, not the defense. At trial, the victim's father's testimony did not indicate in any way that Nixon seemed to have been drinking. One of the arresting officers did testify that Nixon smelled of alcohol. To the extent that Nixon claimed that the fact that his counsel advised him to present an intoxication defense indicates a conflict of interest, Nixon failed to show that he was prejudiced. To the extent Nixon argued that the district court erred in denying his motion to substitute counsel, this court considered and rejected this argument on direct appeal and the doctrine of the law of the case prevents further litigation of this issue.[8] Therefore, Nixon failed to show that counsel was ineffective in this regard.

Third, Nixon claimed that counsel was ineffective because he had an "actual conflict of interest" evidenced by the fact that he "felt compelled to . . . include lesser crime instructions." This claim is belied by the record.[9] At a hearing held outside the presence of the jury, Nixon's counsel told the district court that he had advised Nixon that he thought it was in his best interest to give the jury the ability to find him guilty of a lesser charge. The district court questioned Nixon at length as to whether he understood that if the jury did not receive instructions for lesser included crimes its only options were to find him guilty of first degree kidnapping and burglary or not guilty. Nixon said he understood and insisted that he did not want his counsel to propose lesser included offenses. To the extent that Nixon claimed that the fact that his counsel advised him that the defense should propose lesser included offenses indicates a conflict of interest, Nixon failed to show that he was

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[8]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

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

prejudiced. Therefore, Nixon failed to show that counsel was ineffective in this regard.

Nixon also claimed that his appellate counsel was ineffective for failing to "federalize" his direct appeal claims by "rais[ing] any meritorious constitutional issues." 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.[10] Appellate counsel is not required to raise every non-frivolous issue on appeal in order to be effective.[11] This court has noted that appellate counsel is most effective when every conceivable issue is not raised on appeal.[12] To show prejudice, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.[13] Nixon failed to specify, either in his petition or the attached exhibits, which meritorious "issues of a constitutional magnitude" counsel should have raised.[14] Therefore, Nixon failed to establish that counsel was ineffective in this regard.

Next, Nixon claimed that the district court committed reversible error by allowing the State to file an amended criminal complaint. Nixon waived this claim by failing to raise it on direct

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

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

[12]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (citing Jones, 463 U.S. at 752).

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

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

appeal.[15] As a separate and independent ground to deny relief, this claim is without merit. The original complaint charged Nixon with first degree kidnapping "with the intent to keep, imprison, or confine [the victim] from her parents, . . . or with the intent to hold said minor to unlawful service, or perpetrate upon the person of said minor, any unlawful act, to wit: for ransom or reward." Nixon complained that the amended criminal complaint added to the charge "for the purpose of . . . committing sexual assault [or] extortion." The complaint was amended prior to the commencement of the preliminary hearing, and the justice court found that the State produced more than enough evidence to establish probable cause for the purpose of binding Nixon over for trial.[16] Therefore, the district court did not err in denying this claim.

Nixon also claimed that that he was denied a fair trial because the description given in the 911 call to the police did not match Nixon's at the time of his arrest. Nixon waived this claim by failing to raise it on direct appeal.[17] As a separate and independent ground to deny relief, this claim is without merit. The jury heard the tape of the 911 call, the testimony of the arresting officers as to Nixon's appearance at the time he was arrested, and Nixon's testimony.[18] Therefore, the district court did not err in denying this claim.

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[15]See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994).

[16]See Sheriff v. Middleton, 112 Nev. 956, 961, 921 P.2d 282, 285-86 (1996) (quoting Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (citations omitted) ("[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'").

[17]See Franklin, 110 Nev. 750, 877 P.2d 1058.

[18]See Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994) ("[I]t is for the jury to determine the degree of weight, credibility

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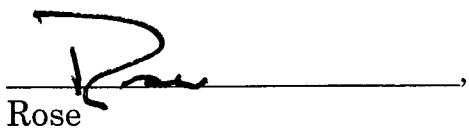
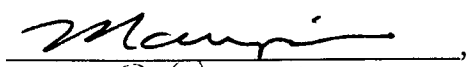
Finally, Nixon claimed that he did not receive a "fair and adequate appellant [sic] review" by this court on direct appeal. The district court does not have jurisdiction to review this court's decisions.[19] Therefore, the district court did not err in denying this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Nixon is not entitled to relief and that briefing and oral argument are unwarranted.[20] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



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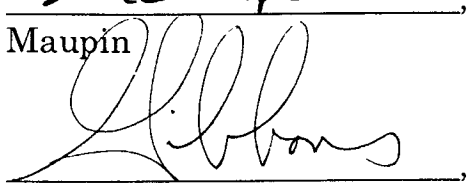

_____, J.
Gibbons

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and credence to give to testimony and other trial evidence, and this court will not overturn such findings absent a showing that no rational juror could have found the existence of the charged offenses beyond a reasonable doubt."); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981) ("[W]here 'there is conflicting testimony presented, it is for the jury to determine what weight and credibility to give to the testimony.'") (quoting Hankins v. State, 91 Nev. 477, 538 P.2d 167, 168 (1975)).

[19]Nev. Const., Art. 6, § 6.

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

cc: Hon. Joseph T. Bonaventure, District Judge
Gary Nixon
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk