

IN THE SUPREME COURT OF THE STATE OF NEVADA

AUSTIN L. SANDS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39918

FILED

JAN 09 2004

JANET E. M. HILGEM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying appellant Austin Sands' post-conviction petition for a writ of habeas corpus.

On May 31, 2000, the district court convicted Sands, pursuant to a jury verdict, of two counts of attempted murder with the use of a deadly weapon, and one count of resisting a public officer. The district court sentenced Sands to serve consecutive and concurrent terms totaling 240 months in the Nevada State Prison with the possibility of parole in 48 months. This court affirmed Sands' conviction on direct appeal, but remanded his appeal to the district court to correct an error in Sands' judgment of conviction.¹

¹Sands v. State, Docket No. 36329 (Order Affirming In Part And Remanding For Correction Of Judgment Of Conviction, November 9, 2001). The district court filed an amended judgment of conviction on October 10, 2000.

On March 21, 2002, Sands filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Sands filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Sands or to conduct an evidentiary hearing. On June 27, 2002, the district court denied Sands' petition. This appeal followed.

In his petition, Sands raised numerous allegations of ineffective assistance of trial counsel. To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that his trial counsel's performance fell below an objective standard of reasonableness, and a reasonable probability that, but for his counsel's errors, the results of the proceedings would have been different.² Both prongs of this test do not need to be considered if the petitioner makes an insufficient showing on either.³

First, Sands contended that his trial counsel was rendered ineffective by a pre-trial district court ruling limiting the theories of defense that he may present to the jury. In this allegation, however, Sands did not contend that his trial counsel's performance fell below an objective standard of reasonableness due to his trial counsel's conduct. Rather, this allegation constituted a legal challenge to the district court's

²See Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984).

³See Strickland, 466 U.S. at 697.

pre-trial ruling, irrespective of Sands' trial counsel's performance. Thus, Sands' contention fell outside of the scope of claims that may be raised in a post-conviction habeas corpus petition.⁴

Even if Sands properly framed this allegation as a claim of ineffective assistance of trial counsel, this court concluded on direct appeal that the district court did not improperly limit Sands' theories of defense. As there was no error in the district court's ruling, Sands' trial counsel's performance could not be ineffective on this basis. Therefore, the district court properly denied Sands relief on this allegation.

Second, Sands contended that his trial counsel was ineffective for failing to file a pre-trial petition for a writ of mandamus based on the district court's ruling limiting his defense. As discussed, this court concluded on direct appeal that the district court did not improperly limit Sands' defense. Thus, his trial counsel could not be ineffective for failing to file a mandamus petition that had no reasonable likelihood of success.⁵ Therefore, the district court properly denied Sands relief on this allegation.

Third, Sands contended that his trial counsel was ineffective for not objecting to the district court's admission of perjured testimony and altered evidence into the record. However, Sands did not support this

⁴See NRS 34.810(1)(b).

⁵See generally, Poulos v. District Court, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); NRS 34.160; NRS 34.170.

allegation with specific facts showing that his conviction was based on perjured testimony, and what evidence had been altered.⁶ Therefore, the district court properly denied Sands relief on these allegations.

Fourth, Sands contended that his trial counsel was ineffective for failing to object to the State's destruction of crime scene evidence. However, Sands did not specify what evidence was allegedly destroyed, how this evidence would have aided his defense, and that his trial counsel was actually aware of these issues.⁷ Therefore, the district court properly denied Sands relief on this allegation.

Finally, Sands contended that his trial counsel was ineffective for failing to inform him of special gag rules imposed upon him and witnesses during trial. Sands failed to provide specific facts to support this allegation.⁸ Even if true, Sands failed to show that he was prejudiced by any failure of his trial counsel with respect to this issue. Therefore, the district court properly denied Sands relief on this allegation.

In his petition, Sands also contended that his appellate counsel was ineffective for refusing to consult with him regarding his direct appeal. Sands further contended that his appellate counsel only raised basic issues on direct appeal and failed to raise other issues in an attempt to save the district court and the State from embarrassment.

⁶See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁷Id.

⁸Id.

A claim of ineffective assistance of appellate counsel is also reviewed under the reasonably effective assistance of counsel test.⁹ Appellate counsel is not required to raise every non-frivolous issue on direct appeal,¹⁰ and is most effective when every conceivable issue is not raised.¹¹ To establish prejudice, the petitioner must show that the omitted issue had a reasonable probability of success on direct appeal.¹²

Sands failed to support his allegations of ineffective assistance of appellate counsel with any specific facts showing that he was entitled to relief, such as when his appellate counsel refused to consult with him, how he was prejudiced by any such refusal, and why any omitted issues had a reasonable probability of success on direct appeal.¹³ Moreover, Sands' allegation that his appellate counsel only filed basic claims on direct appeal was belied by the direct appeal itself, which raised numerous allegations of trial error.¹⁴ Therefore, the district court properly denied Sands relief on these allegations.

⁹See Strickland, 466 U.S. at 687; Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

¹⁰Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

¹¹Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

¹²See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

¹³See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

¹⁴Id. at 503, 686 P.2d at 225.

Sands also raised multiple allegations in his petition independent of his claims of ineffective assistance of counsel. Specifically, Sands contended that he was denied a fair trial due to the district court's pre-trial ruling limiting his theories of defense; the State conducted an unlawful search and seizure of his home, person, and property; and, his sentence was cruel and unusual because he was innocent. Sands attempted to support and expand upon these allegations by re-raising and re-framing them as violations of his First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution. Sands also contended that the State and the district court obstructed justice and conspired against him.

To the extent Sands was raising these allegations independent from his claims of ineffective assistance of counsel, they have been waived.¹⁵ Moreover, and as previously discussed, this court reviewed and denied Sands' arguments concerning the district court ordering limiting his defense theories, the legality of the State's search and seizure, and the sufficiency of the evidence supporting his convictions. Sands' attempt to present "more detailed and precisely focused arguments[s]" concerning these issues does not prevent them from being barred by the doctrine of

¹⁵See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999); NRS 34.810(1)(b).

the law of the case.¹⁶ Therefore, the district court properly denied Sands relief on these allegations.

Having review the record on appeal, and for the reasons set forth above, we conclude that Sands is not entitled to relief, and that briefing and oral argument are unwarranted.¹⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁸

Becker J.
Becker

Agosti J.
Agosti

Gibbons J.
Gibbons

cc: Hon. Lee A. Gates, District Judge
Austin L. Sands
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁶See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

¹⁷See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁸We have considered all proper person documents filed or received in this matter, including Sands' motion for additional time to file an opening brief and to compel the release of case files, and we conclude that the relief requested is not warranted.