

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONNY COOPER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40004

FILED

MAR 03 2003

ORDER OF AFFIRMANCE

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

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

On February 27, 2001, appellant Donny Cooper was convicted, pursuant to a nolo contendere plea, of attempted lewdness with a child under the age of 14 years. The district court sentenced Cooper to serve a prison term of 38 to 96 months. Cooper appealed, and this court affirmed his conviction.¹

On March 29, 2002, Cooper filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition, and Cooper filed a reply to the State's opposition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent Cooper or to conduct an evidentiary hearing. On August 6, 2002, the district court denied Cooper's petition.

In the petition, Cooper raised claims of ineffective assistance of appellate counsel. Claims of ineffective assistance of appellate counsel are analyzed under the two-part test set forth in Strickland v.

¹Cooper v. State, Docket No. 37614 (Order of Affirmance, November 1, 2001).

Washington.² To state a claim sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) the petitioner was prejudiced by the deficient conduct.³ Where the claim involves the performance of appellate counsel, the prejudice prong requires that the petitioner demonstrate that an omitted issue would have had a reasonable probability of success on appeal.⁴

Cooper contended that his appellate counsel was ineffective because he failed to raise Cooper's direct appeal claims as a violation of federal or constitutional law in order to properly preserve them for federal appellate review.⁵ Specifically, Cooper alleged that his appellate counsel should have claimed Cooper's rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution were violated at the sentencing hearing because the State's expert used

²466 U.S. 668 (1984) (trial counsel); see also Smith v. Robbins, 528 U.S. 259, 285 (2000) (appellate counsel); accord Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

³Strickland, 466 U.S. at 697.

⁴Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

⁵Cooper also claimed that his appellate counsel "failed or refused to raise other claims . . . that he promised to raise." We conclude that the district court did not err in rejecting this claim because it failed for lack of specificity. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Indeed, in the petition, Cooper failed to identify the additional issues appellate counsel promised to raise and failed to allege that those issues would have had a reasonable likelihood of success on appeal.

diagnostic tools that were not generally accepted as being within the standard of care for the evaluation of sex offenders.⁶

Even assuming appellate counsel was unreasonable for failing to raise this claim under the rubric of federal law or constitutional violations, Cooper has failed to demonstrate a reasonable probability of success on appeal. Cooper's claim that the State's medical expert used an improper diagnostic tool⁷ has already been considered by this court, applying Nevada law, and rejected in Cooper's direct appeal. In rejecting Cooper's claim, this court noted that the State's expert did not rely solely on the allegedly improper diagnostic tool and had provided the district court with a thorough explanation of the benefits and limitations of the diagnostic tests used in the evaluation.⁸ In the petition, Cooper failed to demonstrate that this issue would have had a reasonable likelihood of success had appellate counsel raised this claim as a violation of federal or constitutional law. Accordingly, the district court did not err in finding

⁶In the petition, Cooper also stated that "if he would have known that counsel could abdicate his duties and responsibilities in a 'Fast Track' [statement], he would have instead, chosen a direct appeal." We note, however, that Cooper did not have the choice to opt out of the fast track appellate system. All criminal defendants who appeal from a judgment of conviction, with the assistance of counsel, who did not receive a sentence of death or life imprisonment are subject to the fast track criminal appellate process unless this court orders otherwise. See NRAP 3C(a)(1) & (2); see also NRAP 3C(j)(1).

⁷In the order of affirmance, this court noted that the State's expert used three different diagnostic tools – the Vermont Assessment of Sex Offender Risk, the Rapid Risk Assessment of Sexual Offender Recidivism, and the Static 99. Cooper v. State, Docket No. 37614, at 3.

⁸Id.

that Cooper was not prejudiced by his appellate counsel's failure to raise this claim.

In the petition, Cooper also alleged that his appellate counsel was ineffective for failing to challenge the district court's unwillingness to admit live testimony, at the sentencing hearing, from Cooper's medical experts. We conclude that the district court did not err in rejecting Cooper's claim that his appellate counsel was ineffective for failing to raise this issue because it had no reasonable likelihood of success on appeal. Indeed, the record of the sentencing hearing reveals that the district court continued the proceedings numerous times to allow Cooper's medical experts adequate time to submit written reports, and those reports were eventually considered by the district court before imposition of sentence. Further, at sentencing, Cooper's trial counsel emphasized the recommendation of Cooper's medical experts that Cooper should receive probation and detailed the rigorous nature of Cooper's planned voluntary treatment program.⁹ In light of the fact that the district court considered the opinions of Cooper's medical experts, Cooper failed to demonstrate how the district court's refusal to allow live witness testimony from those same experts would have warranted a new sentencing proceeding¹⁰ based on a violation of his rights to due process and equal protection pursuant to


⁹Cooper had agreed to receive regular shots of Lubrin, a form of chemical castration, and attend sex offender and alcoholics anonymous support groups. Additionally, Cooper would receive medication for memory loss and dementia, which were diagnosed by his medical expert.


¹⁰We note that the district court's decision not to grant Cooper probation was likely based, in part, on the nature of Cooper's crime and the fact that Cooper had sexually assaulted another boy while awaiting sentencing for the instant offense.

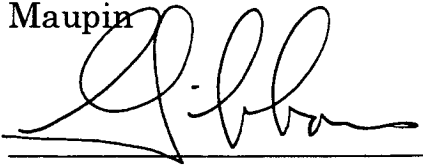
Nevada, federal or constitutional law. Accordingly, the district court did not err in finding that Cooper was not prejudiced by his appellate counsel's failure to raise this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant Cooper is not entitled to relief and that briefing and oral argument are unwarranted.¹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹²


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

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

¹¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹²We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.