

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL LEONARDO CASTRO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40141

FILED

SEP 18 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 March 20, 2000, the district court convicted appellant, pursuant to a jury verdict, of two counts of sexual assault.¹ The district court sentenced appellant to serve concurrent terms of ten to twenty-five years in the Nevada State Prison. This court affirmed appellant's judgment of conviction on direct appeal.² The remittitur issued on July 30, 2001.

On June 10, 2002, appellant 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 appellant or to

¹On February 1, 2001, the district court entered an amended judgment of conviction.

²Castro v. State, Docket No. 35940 (Order of Affirmance, May 21, 2001).

conduct an evidentiary hearing. On August 1, 2002, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised several 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.³ The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁴

First, appellant claimed that his trial counsel was ineffective for stipulating to the fact that spermatozoa were found in the instant case. Appellant failed to demonstrate that the stipulation was unreasonable or that the results of the proceedings would have been different if trial counsel had not stipulated to the finding of spermatozoa. The record reveals that spermatozoa were found, but that the amount was insufficient to allow for DNA testing. Therefore, we conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Second, appellant claimed that his trial counsel was ineffective for failing to have the spermatozoa tested by an independent laboratory. Appellant appeared to argue that the spermatozoa could have belonged to a number of different sexual partners. Appellant failed to demonstrate that his counsel's failure to have the spermatozoa

³See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴See Strickland, 466 U.S. at 697.

independently tested was unreasonable. The record indicates that an insufficient amount of spermatozoa was available for DNA testing. The victim further testified that appellant did not ejaculate and that she showered after the sexual assault. Appellant's claim that the spermatozoa could have belonged to different sexual partners is unsupported by any specific facts and appears to be based upon speculation. Appellant further failed to demonstrate in the present case that independent testing would have resulted in a different outcome. Therefore, we conclude that appellant failed to demonstrate that his counsel was ineffective in this regard.

Third, appellant claimed that his trial counsel was ineffective for failing to investigate the fact that the victim did not have any defensive wounds or show signs of trauma despite the fact that the victim testified that she struggled with appellant for five minutes. Appellant failed to demonstrate that his trial counsel's performance was unreasonable. Trial counsel cross-examined the nurse that performed the rape kit on the victim about the physical findings. The nurse testified that the examination did not reveal any physical signs of trauma, other than a bite mark to the victim's neck. Appellant failed to indicate what further investigation should have been performed by trial counsel and how further investigation would have changed the results of the proceedings. Therefore, we conclude that appellant failed to demonstrate that his counsel was ineffective in this regard.

Fourth, appellant claimed that his trial counsel failed to investigate multiple conflicting statements made by the victim. Appellant claimed that trial counsel should have impeached the victim with her inconsistent statements made at the preliminary hearing and at trial

regarding whether she screamed during the sexual assault. Appellant failed to demonstrate that the results of the proceedings would have been different if trial counsel had impeached the victim with her prior inconsistent statement. Trial counsel cross-examined the victim about various inconsistencies in her statements. Appellant failed to demonstrate that a further attempt to impeach the victim about inconsistencies in her statements would have made a difference to the outcome of the trial. Therefore, we conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Fifth, appellant claimed that his trial counsel was ineffective for failing to investigate the elements of the offense and the evidence of the crime. Appellant claimed that if his trial counsel had conducted further investigation the district attorney would not have been able to prove the charges. Appellant failed to support this claim with sufficient specific facts that if true would have entitled him to relief.⁵ Therefore, we conclude that appellant failed to demonstrate that his counsel was ineffective in this regard.

Sixth, appellant claimed that his trial counsel was ineffective for stipulating to the introduction of statements made by Sharon Allen. Appellant claimed that had he been allowed to confront Sharon Allen that he would have been able to elicit facts that the victim did not exhibit traits typical of a sexual assault victim. Appellant failed to demonstrate that his trial counsel was unreasonable for stipulating to Allen's statements or that he was prejudiced. Appellant's claim that he would have been able to elicit facts that the victim did not exhibit traits typical of a sexual assault

⁵See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

victim is speculative and unsupported by any specific facts. Allen's statements presented at trial were not exculpatory, and appellant failed to demonstrate that further questioning would have elicited any exculpatory information from Allen. Therefore, we conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

Seventh, appellant claimed that his trial counsel failed to present witnesses or any mitigating factors for the court's consideration at sentencing. Appellant claimed that he would have presented family and friends that would have testified to appellant's high moral standards, work ethic and family style. Appellant failed to demonstrate that he was prejudiced by counsel's failure to present witnesses or mitigating factors at sentencing. The district court imposed the least punitive sentence permissible in the instant case.⁶ Appellant was sentenced to serve a term of ten to twenty-five years for each sexual assault. The district court imposed the terms to run concurrently for each count and concurrently with another district court case. Appellant failed to indicate how witnesses or mitigating factors would have altered the outcome of the proceedings. Thus, appellant failed to demonstrate that his counsel was ineffective in this regard.

Eighth, appellant claimed that his trial counsel was ineffective at sentencing for failing to correct errors in the presentence investigation report. Appellant failed to support this claim with any facts.⁷ Therefore, we conclude that appellant failed to demonstrate that his counsel was ineffective in this regard.

⁶See NRS 200.366(2)(b).

⁷See Hargrove, 100 Nev. 498, 686 P.2d 222.

Next, 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)."⁸ Appellate counsel is not required to raise every non-frivolous issue on appeal.⁹ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹⁰ "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."¹¹ 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.

Next, appellant claimed that: (1) the prosecutor committed misconduct during the course of the trial; (2) the district court erred in allowing Officer Smith to testify about the victim's statements under the *Res Gestae* doctrine; (3) the district court erred in allowing Officer Smith to testify that the victim did not appear to be under the influence of alcohol or drugs; (4) insufficient evidence was presented at trial; and (5)

⁸Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

⁹Jones v. Barnes, 463 U.S. 745, 751 (1983).

¹⁰Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).


¹¹Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

his right to a fair trial was violated. This court considered and rejected these issues on direct appeal. The doctrine of the law of the case prevents further litigation of these issues.¹²

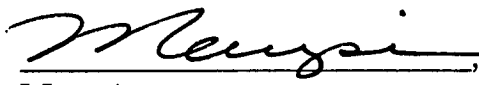
Finally, appellant claimed that his conviction violated Double Jeopardy. Appellant claimed that he should not have been convicted for two counts of sexual assault arising from a single incident. Appellant waived this claim by failing to raise it on direct appeal and failed to demonstrate good cause for his failure to do so.¹³

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.¹⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Leavitt


_____, J.
Maupin

¹²Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

¹³NRS 34.810(1)(b).

¹⁴See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. John S. McGroarty, District Judge
Daniel Leonardo Castro
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk