

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW ANDREW SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40394

FILED

DEC 10 2003

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

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 April 20, 2000, the district court convicted appellant, pursuant to a jury trial, of one count of burglary while in possession of a firearm, one count of conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, two counts of second degree kidnapping with the use of a deadly weapon, one count of possession of a stolen vehicle, and one count of possession of stolen property. The district court further convicted appellant, pursuant to a guilty plea, of one count of ex-felon in possession of a firearm. The district court sentenced appellant to serve terms totaling four hundred and thirty-two months with minimum parole eligibility after ninety-five months had been served. On direct appeal, this court reversed appellant's convictions for second degree kidnapping with the use of a deadly weapon.¹ The remittitur issued

¹Smith v. State, Docket No. 36144 (Order of Reversal and Remand, December 4, 2001).

January 2, 2002. On March 8, 2002, the district court entered an amended judgment of conviction, striking the two counts of second degree kidnapping with the use of a deadly weapon.

On July 29, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On October 28, 2002, the district court denied appellant's petition. This appeal followed.

Preliminarily, we note that the district court concluded that several of appellant's claims were waived because he had failed to raise them on direct appeal.² However, on the face of the petition, appellant argued that he had good cause to raise these claims because his appellate counsel had failed to raise these claims on direct appeal. Appellant further argued in a reply to the State's opposition that he was raising these claims as claims of ineffective assistance of counsel. A claim of ineffective assistance of counsel is properly raised in a post-conviction petition for a writ of habeas corpus.³ Thus, we conclude that the district court improperly determined that these claims were waived, and we will consider appellant's claims under the umbrella of ineffective assistance of counsel.

In his petition, appellant raised several claims of ineffective assistance of trial and appellate counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a

²See NRS 34.810(1)(b).

³Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that there is a reasonable probability that the outcome of the proceedings would have been different.⁴

First, appellant contended that his counsel that represented him at trial and on appeal was ineffective for failing to argue that his conviction for robbery with the use of a deadly weapon, possession of stolen property and possession of a stolen vehicle violated double jeopardy and due process. Appellant claimed that he was improperly convicted of theft crimes—two counts of robbery—and possession crimes relating to the items taken in the robbery.

This court uses the test set forth in Blockburger v. United States⁵ to determine whether separate offenses exist for double jeopardy purposes.⁶ "[I]f the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses."⁷ Additionally, even when separate offenses for a single act do not violate double jeopardy, this court "will reverse redundant convictions that do not

⁴See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁵284 U.S. 299 (1932).

⁶Barton v. State, 117 Nev. 686, 692, 694, 30 P.3d 1103, 1107-08 (2001).

⁷Id. at 692, 30 P.3d. at 1107.

comport with legislative intent."⁸ "The issue . . . is whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions."⁹ This court has specifically held that the legislature did not intend to "compound the punishment for larceny, robbery or embezzlement by permitting convictions for the receipt or possession of stolen property against the one who took the property in the first instance."¹⁰ The gravamen of both offenses would appear to involve the same act as this court has recognized that robbery necessarily includes possession of stolen property.¹¹

The district court denied appellant's challenge to the robbery and possession counts on the ground that appellant had waived the challenge by failing to raise the challenge on direct appeal.¹² However, as discussed earlier, appellant properly raised this claim as a claim of ineffective assistance of counsel. Because appellant's claim of ineffectiveness of counsel was not belied by the record and because of the

⁸Salazar v. State, 119 Nev. ___, ___, 70 P.3d 749, 751 (2003) (internal quotations and citations omitted).

⁹Id. (quoting State of Nev. v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)).

¹⁰Point v. State, 102 Nev. 143, 147, 717 P.2d 38, 41 (1986); see also Stowe v. State, 109 Nev. 743, 746, 857 P.2d 15, 17 (1993) (recognizing that "a person cannot be convicted of a theft crime and possessing or receiving the property stolen in the commission of that theft crime").

¹¹Stowe, 109 Nev. at 746, 857 P.2d at 17 (In distinguishing the offense of burglary from larceny and robbery the court wrote, "Unlike larceny or robbery, burglary does not necessarily include possessing stolen property.").

¹²See NRS 34.810(1)(b).

proscription against redundant punishments, there is a reasonable probability that the outcome of the prior proceedings would have been different if counsel had raised this claim earlier. Thus, this court directed the State to show cause why this court should not reverse the district court's finding on this claim and remand the matter for further proceedings. The State conceded that this claim should be remanded to the district court for further consideration of whether appellant's counsel was ineffective for failing to challenge the possession counts.¹³ Accordingly, we reverse the district court's order in part and remand for further consideration of whether appellant's counsel was ineffective for failing to challenge the possession counts.

Second, appellant claimed that his counsel at trial and on appeal was ineffective for failing to argue that appellant's constitutional rights were violated by application of the deadly weapon enhancement to both robbery counts. Appellant asserted that an enhancement for each count of robbery was inappropriate because the robbery counts involved one house and one married couple. Appellant relied upon this court's holding in Raby v. State¹⁴ annulling five convictions for the use of a deadly weapon. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. The deadly weapon enhancement for each count of robbery was appropriate and did not violate his

¹³The State further argued that appellant's claim lacked merit because the offenses did not violate double jeopardy or the proscription against redundant convictions. We decline to reach the merits of these arguments at this time because these arguments were not presented to the district court.

¹⁴92 Nev. 30, 544 P.2d 895 (1976).

constitutional rights. The robbery counts involved different victims, and the facts in the record indicate that appellant used the deadly weapon to effectuate the robbery of both victims.¹⁵ Appellant's reliance on Raby is misplaced. Raby involved the deadly weapon enhancement being charged as a separate offense. In Raby, this court recognized that the use of a deadly weapon in the commission of a crime is not a separate offense.¹⁶ However, Raby recognized that multiple primary offenses may be enhanced pursuant to NRS 193.165.¹⁷ The deadly weapon enhancements were not charged as separate offenses in the instant case. Thus, appellant failed to demonstrate that his counsel was ineffective for failing to challenge the application of the deadly weapon enhancement to both robbery counts.

Third, appellant claimed that his counsel at trial and on appeal was ineffective for failing to challenge restitution. Appellant claimed that his counsel should have argued that: (1) restitution was improperly awarded to the insurance company in violation of due process, equal protection and the proscription against excessive fines; (2) there was a discrepancy in the amount of the restitution; and (3) the words "joint and several liability" in the judgment of conviction were vague. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. The judgment of conviction did not specifically order that restitution was to be paid to the insurance company. The fact that the victims were reimbursed by their insurance company does not reduce

¹⁵See NRS 193.165.

¹⁶92 Nev. at 32, 544 P.2d at 896.

¹⁷Id.

appellant's obligation to pay restitution to the victims.¹⁸ Thus, appellant failed to demonstrate that restitution violated due process, equal protection or the proscription against excessive fines. Appellant's claim that there was a discrepancy in the amount of restitution is not supported by the record. The record indicates that the restitution amount was based upon the amount of the insurance settlement and the cost of the unrecovered items not covered by the insurance policy. Finally, the wording, "joint and several liability" is not vague. Therefore, appellant failed to demonstrate that his counsel was ineffective for failing to challenge restitution.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that insufficient evidence was presented to support the conspiracy count. Appellant also argued that the conspiracy count violated double jeopardy and equal protection. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Sufficient evidence was presented to support the conspiracy conviction.¹⁹ The record indicates that appellant and a second man, acting together, robbed the victims. Appellant held the victims at gunpoint while the second man gathered and removed the stolen items from the house. Appellant and the second man had conversations during the robbery about whether or not they should tape up the victims or beat the victims. Appellant and the second man left the victims' residence in the victims' car. A conviction for conspiracy to commit robbery and robbery does not violate double jeopardy as each crime requires proof of an

¹⁸See Martinez v. State, 115 Nev. 9, 12, 974 P.2d 133, 135 (1999).

¹⁹See Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980).

element that the other does not.²⁰ Appellant failed to demonstrate that his equal protections rights were violated.²¹ Therefore, appellant failed to demonstrate that his appellate counsel was ineffective for failing to challenge the conspiracy count.

Finally, appellant contended that he was constructively denied his constitutional right to the effective assistance of appellate counsel on direct appeal because he was not permitted to raise a claim of ineffective assistance of trial counsel on direct appeal. We have held that claims of ineffective assistance of counsel are properly raised in the first instance in a post-conviction petition for a writ of habeas corpus,²² and that there is no constitutional or statutory right to the appointment of counsel in a post-conviction proceeding.²³ Appellant failed to provide any argument that would cause this court to depart from these well-settled laws. Therefore, we conclude that appellant failed to demonstrate that he was constructively denied the effectiveness of counsel on direct appeal.

²⁰See Barton, 117 Nev. at 692, 694, 30 P.3d at 1107-08; NRS 199.480; NRS 200.380(1).

²¹See Cairns v. Sheriff, 89 Nev. 113, 115, 508 P.2d 1015, 1017 (1973) ("The matter of the prosecution of any criminal case is within the entire control of the district attorney, NRS 173.045, NRS 252.110, and the fact that not every law violator has been prosecuted is of no concern to appellant, in the absence of an allegation and proof that he is a member of a class being prosecuted solely because of race, religion, color or the like, or that he alone is the only person who has been prosecuted under the statute.").

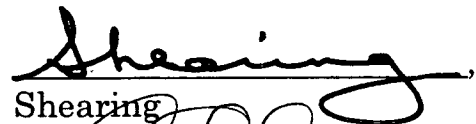
²²See Feazell, 111 Nev. at 1449, 906 P.2d at 729.


²³See McKague v. State, 112 Nev. 159, 164, 912 P.2d 255, 257-58 (1996); see also NRS 34.750(1).

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.²⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Becker


_____, J.
Shearing


_____, J.
Gibbons

cc: Hon. Sally L. Loehrer, District Judge
Matthew Andrew Smith
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

²⁴See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).