

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK A. ROMERO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40402

FILED

AUG 19 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

On August 8, 1997, the district court convicted appellant, pursuant to a jury verdict, of one count of trafficking in a controlled substance (high level), one count of possession of a controlled substance, and one count of trafficking in a controlled substance (mid level) in district court case number C132556. The district court sentenced appellant to serve a term of twenty-five years for high level trafficking. The remaining terms were imposed to run concurrently. On that same date, the district court convicted appellant, pursuant to a jury verdict, of one count of possession of a stolen vehicle and three counts of possession of stolen property in district court C132742—this case was consolidated with C132556. The district court sentenced appellant to serve terms of five years for each count, to be served concurrently to one another and concurrently to the sentence in district court case number C132556. A

judgment of conviction was entered in each case. This court affirmed the judgments of conviction on direct appeal.¹

On September 18, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in each district court case. On October 13, 2000, appellant filed a supplement to the petition. 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 conduct an evidentiary hearing. On October 21, 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 the results of the proceedings would have been different absent counsel's performance.² The court need not consider both prongs of the test if the petitioner makes an insufficient showing on either prong.³

First, appellant claimed that his trial counsel was ineffective for failing to file a pretrial motion to suppress the evidence based on an alleged illegal search and seizure. Appellant failed to demonstrate that

¹Romero v. State, Docket Nos. 30762, 30779 (Order of Affirmance, December 15, 2000).

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

³See Strickland, 466 U.S. at 697.

his trial counsel's performance was deficient in this regard or that he was prejudiced. Although trial counsel did not file a motion to suppress the evidence prior to trial, trial counsel did move to suppress the evidence during the trial. Appellant failed to demonstrate a reasonable probability that the results of the proceedings would have been different if trial counsel had filed the motion before the trial had begun. Thus, we conclude that the district court did not err in determining that this claim lacked merit.

Second, appellant claimed that his trial counsel was ineffective for failing to file a pretrial petition for a writ of habeas corpus challenging the criminal complaint. Appellant claimed that the criminal complaint was flawed because of an alleged illegal search, alleged Miranda⁴ violations, and an involuntary confession. Appellant failed to demonstrate that his trial counsel's performance was deficient. A challenge to the legality of the search or statements made may not be raised in a pretrial petition for a writ of habeas corpus.⁵ Thus, we conclude that the district court did not err in determining that this claim lacked merit.

Third, appellant claimed that his trial counsel was ineffective for failing to file an opposition to the State's motion to consolidate the district court cases. Appellant claimed that the cases involved unrelated allegations and conduct. Appellant failed to demonstrate that his trial

⁴Miranda v. Arizona, 384 U.S. 436 (1966).

⁵See Cook v. State, 85 Nev. 692, 462 P.2d 523 (1969); Prescott v. State, 85 Nev. 448, 456 P.2d 450 (1969); see also NRS 174.105(1).

counsel's performance was deficient or that he was prejudiced. The joinder of two criminal informations for trial is left to the discretion of the district court.⁶ In the instant case, appellant failed to demonstrate that joinder was an abuse of discretion, and thus, he failed to demonstrate that the results of the proceedings would have been different if counsel had opposed the State's motion to consolidate. It appears that the only reason for two different district court cases was due to the division of labor within the Las Vegas Metropolitan Police Department—the narcotics unit was responsible for the charges relating to the drugs and the theft detail was responsible for the charges relating to the stolen items. All of the items, drugs and stolen goods, were the result of one investigation and a single search at one location. Thus, we conclude that the district court did not err in determining that this claim lacked merit.

Fourth, appellant claimed that his trial counsel was ineffective for failing to conduct a minimal investigation and locate defense witnesses. Specifically, appellant claimed that his trial counsel should have located Richard Martinez and a man named Raymond. Appellant failed to demonstrate that he was prejudiced. Appellant failed to provide specific facts relating to the potential testimony of these two witnesses such that there is a reasonable probability that the results of the proceedings would have been different. Thus, we conclude that the district court did not err in determining that this claim lacked merit.

⁶See NRS 174.155; Lovell v. State, 92 Nev. 128, 546 P.2d 1301 (1976).

Fifth, appellant claimed that his trial counsel was ineffective for failing to prepare an adequate defense to the charges. Appellant claimed that trial counsel was uninterested in meeting with appellant prior to trial and had no meaningful phone conversations. Appellant failed to demonstrate that he was prejudiced. Trial counsel challenged the prosecution's case in two ways. First, trial counsel challenged the legality of the search and seizure and suggested that the evidence was planted by the police. Second, trial counsel argued that the drugs and stolen items were not appellant's, but rather were in the possession of Richard Martinez. Appellant failed to indicate what further defenses trial counsel should have presented such that there is a reasonable probability that the results of the proceedings would have been different. Thus, we conclude that the district court did not err in determining that this claim lacked merit.

Sixth, appellant claimed that his trial counsel failed to represent appellant in regard to the preparation of the presentence investigation report. Appellant failed to demonstrate that he was prejudiced. Appellant failed to indicate what actions counsel should have taken such that there is a reasonable probability of a different outcome. Thus, we conclude that the district court did not err in determining that this claim lacked merit.

Seventh, appellant claimed that his trial counsel was ineffective for failing to present mitigating evidence at the sentencing hearing. Appellant claimed that his trial counsel should have presented family and friends to testify about appellant's good character. Appellant failed to demonstrate that he was prejudiced. Appellant received the

minimum sentence permitted by statute; thus, appellant failed to demonstrate that there was a reasonable probability that the results of the proceedings would have been different.⁷ Thus, we conclude that the district court did not err in determining that this claim lacked merit.

Next, appellant claimed that the State withheld material exculpatory evidence. Appellant claimed that the State withheld evidence that Carmin Martinez approached the District Attorney's Office before trial to provide information that her father, Richard Martinez, was responsible for the drugs and stolen items found in the house. This claim could have been raised on direct appeal, and appellant failed to demonstrate good cause and prejudice for his failure to do so.⁸ Specifically, appellant failed to indicate when or how he learned of the alleged information about Carmin Martinez. Moreover, as a separate and independent ground to deny relief, appellant failed to demonstrate that there is a reasonable probability that the results of the proceedings would have been different had this information been available to the defense.⁹ Another witness, Kelly McMillan attempted to offer substantially similar testimony but her testimony was ruled inadmissible hearsay. Appellant failed to demonstrate that the potential testimony of Carmin would not

⁷See 1983 Nev. Stat., ch. 111, § 1, at 287 (providing for a life sentence or a definite term of not less than 25 years for high level trafficking).

⁸See NRS 34.810(1)(b)(2).

⁹See Brady v. Maryland, 373 U.S. 83 (1963); Steese v. State, 114 Nev. 479, 492, 960 P.2d 321, 330 (1998).

have suffered from the same defect.¹⁰ Further, Officer Robison testified that appellant told him that the third person who lived in the house, Martinez, was not involved. The evidence against appellant was substantial. The record reveals that appellant waived his Miranda rights, consented to a search of his residence and directed the police to the locations of the drugs found in his residence and the stolen items and drugs found in the garage. Finally, appellant failed to demonstrate that this evidence was not otherwise available through a diligent investigation.¹¹ Thus, we conclude that the district court did not err in determining that this claim lacked merit.

Appellant raised an additional claim that the State withheld material exculpatory evidence. Appellant claimed that the State withheld evidence that Joseph Sharpe was arrested on charges related to this case and that the charges were dismissed as a result of a deal. A substantially similar claim was considered and rejected by this court on direct appeal. The doctrine of the law of the case prevents further litigation of this issue and cannot be avoided by a more precisely detailed argument.¹² Moreover, as noted by this court in rejecting a similar claim on direct appeal, this claim is purely speculative and there is no support in the record for this assertion. Two witnesses testified that Sharpe was never given any

¹⁰Appellant failed to allege with sufficient specificity what Carmin would have testified to and the basis for the Carmin's knowledge such that it would not violate the rules of hearsay.

¹¹See Steese, 114 Nev. at 495, 960 P.2d at 331.

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

promises or deals. Thus, we conclude that the district court did not err in determining that this claim lacked merit.

Next, appellant claimed that his sentence was illegal because the court stated that he would have to serve the statutory minimum of twenty-five years for high level trafficking when the statute permitted for a minimum of ten years.¹³ Appellant's sentence is facially legal. NRS 453.3385(3), at the time appellant committed his crime, provided for a statutory minimum sentence of twenty-five years or a life sentence for high level trafficking.¹⁴ The 1995 amendment reducing the statutory minimum sentence to ten years was inapplicable because it only applied to crimes committed after July 1, 1995, and appellant's crime was committed May 29, 1995.¹⁵ Thus, we conclude that the district court did not err in determining that this claim lacked merit.¹⁶

Next, appellant claimed that the district court failed to suppress fraudulent copies of the written consent forms admitted at trial and signed by appellant and Sharpe. Appellant also raised a number of claims relating to an illegal search, alleged Miranda violations, and an alleged involuntary confession. These claims could have been raised on

¹³This court has addressed the merits of this claim because a motion to correct an illegal sentence can be raised at any time. See NRS 176.555.

¹⁴1983 Nev. Stat., ch. 111, § 1, at 287.

¹⁵1995 Nev. Stat., ch. 443, §§ 296, 393, at 1288, 1340.

¹⁶Appellant also claimed that an error in the judgment of conviction relating to the statute for trafficking caused his sentence to be illegal. The error in the judgment of conviction was merely a typographical error and did not render his sentence illegal in any fashion.

direct appeal, and appellant failed to demonstrate good cause and prejudice for his failure to do so.¹⁷ Therefore, appellant waived these claims.

Finally, the district court's order, prepared by the State, addressed claims of ineffective assistance of appellate counsel that were purportedly raised in a second supplement to the petition. However, it appeared that the supplement was never filed in the district court. In response to an order from this court, the State informed this court that the second supplement was not filed in the district court and that the certificate of service indicated that it was served on the warden at the High Desert State Prison, the Clark County District Attorney's Office and the Attorney General's Office. Thus, the documents before this court indicate that appellant failed to properly submit his second supplement to the district court for filing.¹⁸ This court cannot review claims that were never properly submitted to the district court for consideration. Accordingly, the district court's decision denying the additional claims raised in the second supplement was a nullity because the claims were not

¹⁷See NRS 34.810(1)(b)(2).

¹⁸In fact, appellant was required to receive permission to file the second supplement. See NRS 34.750(5) ("No further pleadings may be filed except as ordered by the court.").

actually before the district court.¹⁹ This court declines appellant's invitation to expand the record to include the second supplement.²⁰

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.²¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²²

Becker _____, J.
Becker

Agosti _____, J.
Agosti

Gibbons _____, J.
Gibbons

¹⁹The State indicates that in the future it will refrain from responding to documents not actually filed in the district court.

²⁰Appellant may file his additional claims in a successive petition for a writ of habeas corpus. However, appellant will be required to demonstrate good cause and prejudice for his failure to raise the claims in the first petition. See NRS 34.810(2), (3).

²¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²²On April 2, 2003, and on December 4, 2003, this court received appellant's proper person motions for status check. In light of this court's disposition, the relief requested in these motions is moot.

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