IN THE SUPREME COURT OF THE STATE OF NEVADA

CLAY R. BEAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40576

FILED

OCT 21 2003

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant Clay Bear's post-conviction petition for a writ of habeas corpus.

On September 22, 1999, the district court convicted Bear, pursuant to a jury verdict, of one count of conspiracy to commit robbery (count I), one count of robbery with the use of a deadly weapon (count II), one count of attempted robbery with the use of a deadly weapon (count III), and one count of assault with the use of a deadly weapon (count IV). The district court sentenced Bear to serve a total of 624 months in the Nevada State Prison with the possibility of parole in 140 months. Bear filed a direct appeal from his judgment of conviction. This court issued an order affirming Bear's conviction on direct appeal.[1]

On May 28, 2002, Bear 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 Bear or to conduct an

[1]Bear v. State, Docket No. 35021 (Order of Affirmance, August 10, 2001).

evidentiary hearing. On November 12, 2002, the district court issued an order denying Bear's petition. This appeal followed.

In his petition, Bear contended that he received ineffective assistance of trial counsel on three separate grounds. 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 counsel's errors, the results of the proceedings would have been different.[2] Both prongs of the test do not need to be considered if the petitioner makes an insufficient showing on either prong.[3]

First, Bear contended that his trial counsel was ineffective for failing to effectively cross-examine the victim during trial about tattoos on Bear's arms. Our review of the record, however, reveals that Bear's trial counsel asked the victim on cross-examination, "Could you see any markings, distinctive markings on the person wearing the white shirt?" The victim replied, "I don't recall any, because after I saw the knife it was kind of like where my direction of focus was, on the knife." Bear does not state how further cross-examination would have aided his defense, such that it would have altered the outcome of his trial. Therefore, we conclude that Bear's allegation was belied by the record,[4] and his trial counsel was not ineffective on this issue.

---

[2]See Strickland v. Washington, 466 U.S. 668, 686-87, 694 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

[3]See Strickland, 466 U.S. at 697.

[4]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Second, Bear contended that his trial counsel was ineffective for failing to object to the State's use of a victim impact statement at trial. However, the record does not indicate that a victim impact statement was ever introduced into evidence during Bear's trial, or at his sentencing hearing. Although the State refers to statements made by the victim at the sentencing hearing, these statements were included in Bear's pre-sentence investigation report, which was already before the district court.[5] Therefore, we conclude that Bear's allegation is belied by the record,[6] and that he cannot show any prejudice by his counsel's performance.

Third, Bear contended that his trial counsel was ineffective for failing to object to the State's introduction of a knife into evidence that he allegedly used in the commission of the crime on the basis that the State failed to establish a proper chain of custody. This court has stated that "[i]t is not necessary to negate all possibilities of substitution or tampering with an exhibit, nor to trace its custody by placing each custodian upon the stand."[7] Rather, a proper a chain of custody is established where it is "reasonably certain that no tampering or substitution took place, and the doubt, if any, goes to the weight of the evidence."[8]

Our review of the record reveals that the knife was positively identified by the victim during trial as the knife used by Bear to commit the crimes. A Las Vegas Metropolitan Police Officer also testified at trial

---

[5]See NRS 176.135.

[6]See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

[7]Socrce v. State, 88 Nev. 350, 352, 497 P.2d 902, 903 (1972).

[8]Id. at 352-53, 497 P.2d at 903.

that the knife was given to him by another officer who informed him that the knife was retrieved during the arrest of Bear and two other suspects. Before the knife was admitted into evidence, Bear's trial counsel specifically stated that there was "[n]o objection." Given the above considerations, any objection by Bear's trial counsel to the admission of the knife into evidence on the basis of an insufficient chain of custody would not have likely succeeded, or affected the outcome of Bear's trial. Therefore, we conclude that Bear's trial counsel's performance was not unreasonable and did not result in any prejudice to him.

In his petition, Bear also contended that he received ineffective assistance of appellate counsel on four separate grounds. 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] Rather, appellate counsel will be most effective when every conceivable issue is not raised on direct appeal.[11] "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."[12]

First, Bear contended that his appellate counsel was ineffective for failing to appeal the "custodial nature" of the victim's identification of him. The test for whether an identification of a defendant

---

[9]See Strickland, 466 U.S. at 686-87; Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

[10]Jones v. Barnes, 463 U.S. 745, 751 (1983).

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

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

is proper is whether "considering all the circumstances, 'the confrontation . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that . . . [the defendant] was denied due process of law.'"[13] Although a suspect positioned in front of a police vehicle with lights shining on him may be unnecessarily suggestive, the key question to ask is "whether the identification was reliable."[14] "The factors to be weighed against the corrupting effect of the suggestive procedure . . . include the witness' opportunity to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of . . . [her] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."[15]

Here, the victim had a clear opportunity to view Bear during the commission of the crime, as he personally confronted her face-to-face, standing about two feet away. About one hour later that night, the victim positively identified Bear while he was being detained and police vehicle lights were shown on him. The victim testified during trial that, at the time of her original identification, she had no doubt that Bear was one of her assailants. The victim also positively identified Bear as one of her assailants during the trial. We conclude that these factors indicate that the victim's identification of Bear was reliable,[16] and that this issue would not have had any reasonable likelihood of success on appeal. Therefore,

---

[13]Gehrke v. State, 96 Nev. 581, 583-84, 613 P.2d 1028, 1029 (1980) (quoting Stovall v. Denno, 388 U.S. 293, 301-02 (1967)).

[14]Gehrke, 96 Nev. at 584, 613 P.2d at 1030.

[15]Id.

[16]See id.

we conclude that Bear's trial counsel was not ineffective for failing to appeal this issue.

Second, Bear contended that his appellate counsel was ineffective for failing to appeal the State's use of inadmissible hearsay evidence at trial. However, Bear does not identify with any specific, articulable facts what this evidence was, when it was admitted at trial, and why this evidence was inadmissible hearsay. Therefore, we conclude that Bear's allegation was properly denied by the district court.[17]

Third, Bear contended that his appellate counsel was ineffective for failing to appeal various instances of alleged prosecutorial misconduct. Again, however, Bear fails to support his allegations with specific facts and, therefore, we conclude that this claim was also properly denied by the district court.[18]

Finally, Bear contended that his appellate counsel was ineffective for failing to file a petition for rehearing from this court's order affirming Bear's judgment of conviction on direct appeal on the issue of double jeopardy. This court reviewed this issue on direct appeal and issued an order holding that Bear's double jeopardy argument was without merit. Bear fails to specify what law or material fact this court overlooked or misapprehended in its decision that would have supported a petition for rehearing.[19] Therefore, we conclude that Bear's appellate counsel was not ineffective on this issue.

---

[17]See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

[18]See id.

[19]See NRAP 40(1).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Bear is not entitled to relief and that briefing and oral argument are unwarranted.[20] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. Donald M. Mosley, District Judge
Clay R. Bear
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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