IN THE SUPREME COURT OF THE STATE OF NEVADA

TY THOMAS,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
MICHAEL BUDGE,
Respondent.

No. 40591

FILED

APR 0 8 2004

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Ty Thomas' post-conviction petition for a writ of habeas corpus.

On July 20, 2001, Thomas was convicted, pursuant to a jury verdict, of five counts of robbery (counts I-V), and one count each of robbery of a person 65 years of age or older (count VI) and attempted robbery (count VII). The district court sentenced Thomas to serve five consecutive prison terms of 48-120 months for counts I-V, a consecutive prison term of 48-120 months with an equal and consecutive prison term for the elderly enhancement[1] for count VI, and a consecutive prison term of 16-72 months for count VII. The district court also ordered Thomas to pay $2,199.00 in restitution. Thomas pursued a direct appeal, and this court affirmed the judgment of conviction and sentence.[2] The remittitur issued on January 29, 2002.

On April 5, 2002, Thomas filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Thomas, and counsel filed a supplemental

[1]See NRS 193.167(1)(f).

[2]See Thomas v. State, Docket Nos. 38289 & 38349 (January 3, 2002, Order of Affirmance).

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petition. The State opposed the petition. The district court did not conduct an evidentiary hearing, and on October 31, 2002, entered an order denying Thomas' habeas petition. This timely appeal followed.

Thomas contends that the district court erred in finding that he did not receive ineffective assistance of trial and appellate counsel. To state a claim of ineffective assistance of trial 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 counsel's errors were so severe that there was a reasonable probability that the outcome would have been different.[3] Appellate counsel is not required to raise every nonfrivolous issue; thus, to establish prejudice based on the deficient performance of counsel on appeal, a petitioner must show that any omitted appellate issues would have had a reasonable probability of success on appeal.[4] The court need not consider both prongs of the Strickland test if the petitioner fails to make a showing on either prong.[5] A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong.[6]

First, Thomas contends that trial counsel was ineffective for failing to file a timely motion to suppress evidence,[7] and that appellate counsel was ineffective for failing to raise this issue in Thomas' direct

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

[4]Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

[5]Strickland, 466 U.S. at 697.

[6]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[7]See NRS 174.125(3).

appeal. Immediately prior to the start of Thomas' trial, the district court heard argument pertaining to the merits of the motion to suppress evidence, and ultimately denied Thomas' motion. Thomas argues that the motion to suppress was denied solely on procedural grounds and not on the merits, and therefore, counsel was ineffective. We disagree with Thomas' contention.

The district court orally denied the motion without stating reasons for the record, and we cannot discern from the order subsequently filed by the district court whether the motion was denied on the merits, on procedural grounds, or both. Regardless, Thomas cannot demonstrate that he was prejudiced. In order to demonstrate that trial counsel was ineffective for failing to file a motion to suppress, or, as in the instant case, for failing to file a timely motion, a petitioner must demonstrate that the motion would have been meritorious, and that there was a reasonable likelihood that the exclusion of the evidence would have changed the result of the proceeding.[8] Here, Thomas cannot demonstrate that his motion to suppress would have been meritorious. Although Thomas alleges that he was unlawfully detained in violation of NRS 171.123 (60-minute time-limit rule),[9] the evidence in question was seized pursuant to a search warrant, and at no point in the proceedings below or on appeal has Thomas challenged the validity of the search warrant.[10] Therefore,

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[8]See Doyle v. State, 116 Nev. 148, 154, 995 P.2d 465, 469 (2000) (citing Kirksey, 112 Nev. at 990, 923 P.2d at 1109).

[9]But cf. State v. McKellips, 118 Nev. 465, 49 P.3d 655 (2002) (holding that detention ripens into a lawful arrest when supported by probable cause).

[10]See generally Garrettson v. State, 114 Nev. 1064, 1068, 967 P.2d 428, 430 (1998) (holding that "a defendant is not entitled to an evidentiary hearing to examine the validity of a search warrant unless he or she can

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Thomas has failed to support his claim with the required specific facts, which, if true, would have entitled him to relief.[11] Accordingly, because Thomas has failed to demonstrate a meritorious issue could have been presented either at trial or on appeal, we conclude that the district court did not err in determining that his counsel were not ineffective in this regard.

Second, Thomas contends that trial counsel was ineffective for failing to "raise the issue of petitioner's hearing loss." Thomas also argues that his right to due process was violated by the district court's failure to sua sponte inquire into the matter because he was therefore unable to hear testimony and assist counsel during the trial. Thomas claims that this court should reverse his conviction, or, alternatively, remand his case to the district court for an evidentiary hearing on the subject of his hearing loss. We conclude that Thomas is not entitled to relief.

Initially, we note that Thomas' argument that the district court should have inquired into the matter of his hearing loss sua sponte ought to have been raised in his direct appeal and is therefore waived.[12] Additionally, Thomas has failed to allege with any specificity how he might have been prejudiced by his hearing difficulties, and instead, claims that he can only produce evidence to support his allegation via an

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. . . *continued*
make a preliminary showing and an offer of proof that there were intentional or reckless material falsehoods in the affidavit") (citing Franks v. Delaware, 438 U.S. 154, 155 (1978)).

[11]Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[12]NRS 34.810; Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

evidentiary hearing.[13] Thomas has not identified any passages from the trial transcript where he would have been better equipped to assist counsel in his defense had he been able to hear better. Also, Thomas has failed to articulate how the result of the trial might have been different had he been able to hear without difficulty. Accordingly, we conclude that the district court did not err in rejecting Thomas' claims pertaining to his alleged hearing loss without conducting an evidentiary hearing.

Finally, having considered Thomas' contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Shearing

_____, J.
Rose

_____, J.
Maupin

cc: Hon. Steven R. Kosach, District Judge
John J. Kadlic
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[13]Mann v. State, 118 Nev. 351, 353, 46 P.3d 1228, 1231 (2002) ("A petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief."); Hargrove, 100 Nev. 498, 686 P.2d 222.