IN THE SUPREME COURT OF THE STATE OF NEVADA

KINGSTON WONEGIE RANGE, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 40687
KINGSTON WONEGIE RANGE, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 41363

FILED

NOV 0 7 2003

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

ORDER OF AFFIRMANCE

Docket No. 40687 and Docket No. 41363 are proper person appeals from orders of the district court denying appellant's post-conviction petitions for writs of habeas corpus. We elect to consolidate these appeals for disposition.[1]

On June 9, 2000, the district court convicted appellant, pursuant to a jury verdict, of two counts of sexual assault and one count of false imprisonment. The district court sentenced appellant to serve terms of life in the Nevada State Prison, with the possibility of parole after ten years, for the two sexual assault counts, and one year in the Clark County Detention Center for the false imprisonment count. All sentences were

[1]See NRAP 3(b).

imposed to run concurrently. This court dismissed appellant's appeal from his judgment of conviction and sentence.[2] The remittitur issued on September 5, 2001.

Docket No. 40687

On August 23, 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 conduct an evidentiary hearing.[3] On December 4, 2002, the district court denied appellant's petition. This appeal followed.

Appellant raised numerous 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 the absence of counsel's errors, the results of the proceedings would have been different.[4] The

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[2]Range v. State, Docket No. 36346 (Order of Affirmance, August 10, 2001).

[3]We conclude that the district court did not err in denying appellant's request for the appointment of counsel to assist him in supplementing his post-conviction petition. See NRS 34.750.

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

court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.[5]

First, appellant claimed that trial counsel was ineffective for failing to question the victim about drug usage. The record reveals that trial counsel sought to question the victim about a positive drug test, but the trial judge would not allow this line of questioning. Appellant failed to allege what further steps counsel should have taken in this regard. Additionally, appellant does not state how questioning the victim about the drug test would have aided his defense such that the outcome of the trial would have been altered. Therefore, appellant failed to demonstrate that his counsel was ineffective on this issue.

Second, appellant claimed that trial counsel was ineffective for failing to question the victim about a previous domestic violence incident against her that did not involve the appellant. Additionally, appellant asserts that trial counsel was ineffective for not subpoenaing the alleged perpetrator of this previous battery. Appellant failed to demonstrate how this information would have had a reasonable probability of altering the outcome of the trial. Appellant did not demonstrate that the prior report was false. Therefore, we conclude that his trial counsel was not ineffective on this issue.

Third, appellant claimed that trial counsel was ineffective for failing to question the victim about appellant's desire for a divorce from

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

her. Appellant contends that the victim fabricated the charges at issue so that he would not leave her. There is no reasonable probability that a different result would have occurred had trial counsel questioned the victim about a possible divorce. In addition to the victim's testimony concerning events, there was corroborating medical evidence that a sexual assault occurred. Therefore, appellant failed to demonstrate that his counsel was ineffective on this issue.

Fourth, appellant claimed that trial council was ineffective for failing to object to jury instruction number 34, the Allen charge.[6] Our review of the record, however, reveals that trial counsel did object to jury instruction number 34, but the trial judge overruled this objection. We

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[6]See Allen v. U.S., 164 U.S. 492 (1896); Wilkins v. State, 96 Nev. 367, 373-74 n.2, 609 P.2d 309, 313 n.2 (1980). Jury instruction number 34 was as follows: "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each agree thereto. Your verdict must be unanimous as to each count. It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. You are not partisans. You are judges – judges of the facts. Your sole interest is to ascertain the truth from the evidence of the case."

conclude that appellant's allegation was belied by the record and his trial counsel was not ineffective on this issue.[7]

Finally, appellant made general claims that his trial counsel was ineffective for: (1) failing to adequately prepare for trial, (2) failing to conduct an adequate investigation of the events at issue, (3) failing to call witnesses at trial, (4) failing to litigate issues properly, (5) failing to preserve critical issues for review, (6) failing to raise exculpatory evidence in the hands of the prosecution, and (7) abandoning all defenses. Appellant failed to support these claims with specific facts and articulate how counsel's performance was deficient in these areas.[8] Therefore, we conclude that the district court did not err in denying these claims.

Appellant also raised a claim of ineffective assistance of appellate counsel. "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)."[9] Appellate counsel is not required to raise every non-frivolous issue on appeal.[10] "To establish prejudice based on the deficient assistance of appellate counsel, the

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[7]See Hargrove v. State, 100 Nev. 458, 503, 686 P.2d 222, 225 (1984).

[8]See id.

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

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

defendant must show that the omitted issue would have a reasonable probability of success on appeal."[11]

First, appellant claimed that appellate counsel was ineffective for failing to challenge the use of jury instruction number 34, the Allen charge.[12] This court has specifically approved the use of the Allen charge.[13] Therefore, we conclude that appellant failed to demonstrate that his appellate counsel was ineffective on this issue.

Next, appellant claimed that he was "denied the effective assistance of Appellate counsel guaranteed by the Sixth Amendment right pursuant to the United States Constitution." Appellant failed to state how appellate counsel's performance was deficient and did not support this allegation with specific facts.[14] Thus, the district court did not err in denying this claim.

Because we conclude that the district court did not err in denying appellant's petition for the reasons discussed above, we affirm the order of the district court.

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

[12]Wilkins, 96 Nev. at 373-74 n.2, 609 P.2d at 313 n.2.

[13]Id.

[14]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Docket No. 41363

On February 18, 2003, appellant filed a second 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 conduct an evidentiary hearing. On April 29, 2003, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than one year after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.[15] Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.[16] Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.[17]

In an attempt to excuse his procedural defects, appellant argued that the district court clerk did not file his reply to the State's opposition to his August 2002 petition for writ of habeas corpus until after the petition was heard and denied. We conclude that appellant failed to demonstrate good cause for his procedural defects. Appellant does not have a statutory right to file a reply to the State's response.[18] Therefore,

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[15]See NRS 34.726(1).

[16]See NRS 34.810(1)(b)(2), (2).

[17]See NRS 34.726(1); NRS 34.810(1)(b), (3).

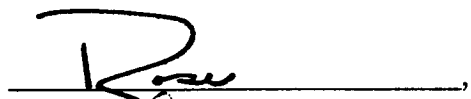
[18]See NRS 34.745.

we conclude that the district court did not err in denying appellant's petition and we affirm the order of the district court.

Conclusion

Having reviewed the records 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.[19] Accordingly, we

ORDER the judgments of the district court AFFIRMED.[20]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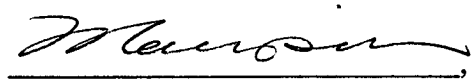
Rose


_____, J.
Leavitt


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

[20]We have considered all proper person documents filed or received in these matters, and we conclude that the relief requested is not warranted.

cc: Hon. John S. McGroarty, District Judge
Kingston Wonegie Range
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk