IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY LEE BIAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40688

FILED

DEC 03 2003

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

ORDER OF AFFIRMANCE

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 March 21, 2000, the district court convicted appellant, pursuant to a jury verdict, of one count of burglary, two counts of robbery with the use of a deadly weapon, and three counts of first degree kidnapping with the use of a deadly weapon. Additionally, the district court adjudicated appellant a habitual criminal. This court reversed appellant's kidnapping convictions on appeal.[1] The district court entered an amended judgment of conviction on January 25, 2002. Appellant was sentenced to serve three concurrent terms of life in the Nevada State Prison with the possibility of parole after ten years.

On September 27, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

[1]Bias v. State, Docket No. 35982 (Order Affirming in Part and Reversing in Part, October 9, 2001).

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 December 16, 2002, the district court denied appellant's petition. This appeal followed.

Appellant raised numerous claims of ineffective assistance of appellate counsel.[2] To establish ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.[3] "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."[4] Appellate counsel is not required to raise every non-frivolous issue on appeal.[5]

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[2]Appellant additionally alleged ineffective assistance of trial counsel based on identical claims. Consistent with the reasoning discussed below, we find that appellant failed to demonstrate that his trial counsel was ineffective on these issues.

[3]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984); Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996) (holding that "[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)").

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

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

First, appellant alleged that appellate counsel was ineffective for failing to challenge errors concerning his adjudication as a habitual criminal. Appellant asserted that: (1) the State failed to notify him that it was seeking to have him adjudicated a habitual criminal, (2) the State did not inform him of the possible penalties he would face if the court adjudicated him a habitual criminal, and (3) the district court erred when it failed to recognize appellant was neither informed that the State was seeking to have him adjudicated a habitual criminal, nor informed of the possible penalties he would face.

The record reveals that appellant was notified on June 21, 1999, that the State intended to enhance his punishment pursuant to NRS 207.010.[6] Appellant was not sentenced until March 15, 2000. Appellant therefore received adequate notice of the State's intention to have him

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[6]NRS 207.010(b) provides that any felon

> who has previously been three times convicted, whether in this state or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony . . . is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison: (1) For life without the possibility of parole; (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or (3) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

adjudicated a habitual criminal,[7] as well as the possible penalties he would face. We conclude that the record belies appellant's allegations and he failed to demonstrate that appellate counsel was ineffective on these issues.[8]

Next, appellant claimed that appellate counsel was ineffective for failing to argue that the district court erred when it conducted a re-sentencing hearing without appellant being present. After this court reversed appellant's three kidnapping convictions on appeal, the district court amended the judgment of conviction and deleted the sentences for those charges in a re-sentencing hearing in which appellant was not present. To find a violation of the right to be present, the defendant must show that he was prejudiced by the absence.[9] No new evidence was presented, and appellant's attorney was in attendance. Appellant failed to

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[7]See NRS 207.016(2).

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

[9]Kirksey, 112 Nev. at 1000, 923 P.2d at 1115 (reciting that

> [t]he right to be present is rooted in the Confrontation Clause and the Due Process Clause of the Federal Constitution. The confrontation aspect arises when the proceeding involves the presentation of evidence. The due process aspect has been recognized only to the extent that a fair and just hearing would be thwarted by the defendant's absence. The right to be present is subject to harmless error analysis (internal citations omitted)).

demonstrate that his defense was prejudiced by his absence. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed that appellate counsel was ineffective for failing to challenge his sentence as cruel and unusual punishment after he was adjudicated a habitual criminal and sentenced to three concurrent life terms. "A sentence that is within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'"[10] This court has consistently afforded the district court wide discretion in its sentencing decision,[11] and will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."[12]

Our review of the record reveals that appellant has failed to demonstrate that his appellate counsel was ineffective for failing to challenge his sentence as cruel and unusual punishment. The applicable statutes are constitutional and the sentence does not exceed the statutory

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[10]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

[11]See Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[12]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

provisions.[13] Appellant's sentence is neither grossly disproportionate, nor does it shock the conscience. In addition to the three convictions relied upon by the district court in adjudicating appellant a habitual criminal, appellant has been convicted of numerous felonies dating back to 1969. Because the sentence imposed does not constitute cruel and unusual punishment, the district court did not err in denying appellant's claim.

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.[14] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[15]

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

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[13]NRS 193.165; NRS 200.380; NRS 207.010(1)(b); NRS 205.060

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

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

cc: Hon. John S. McGroarty, District Judge
Henry Lee Bias
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk