

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMY EARL DOWNS A/K/A JIMMIE  
EARL DOWNS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40917

FILED

SEP 29 2004

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying Jimmy Earl Downs's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On December 10, 1999, the district court, pursuant to a jury verdict, convicted Downs of burglary, grand larceny, and robbery. The district court sentenced Downs to 16 to 72 months in prison for burglary, a consecutive term of 16 to 72 months for grand larceny, and a consecutive term of 26 to 120 months for robbery. Downs appealed, and this court affirmed his judgment of conviction and sentence.<sup>1</sup> The remittitur issued on February 22, 2002.

On November 8, 2002, Downs filed a proper person post-conviction petition for a writ of habeas corpus in the district court. He

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<sup>1</sup>Downs v. State, Docket No. 35460 (Order of Affirmance, August 10, 2001).

subsequently filed a supplement to his petition. On March 24, 2003, the district court denied Downs's petition. This appeal followed.

In his petition, Downs raised many claims 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."<sup>2</sup> Appellate counsel is not required to raise every nonfrivolous issue on appeal.<sup>3</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>4</sup> To establish prejudice based on the deficient assistance of appellate counsel, Downs must demonstrate that the omitted issue would have had a reasonable probability of success on appeal.<sup>5</sup>

First, Downs claimed that his appellate counsel was ineffective for failing to challenge the grand jury indictment after the justice court dismissed the earlier complaint because of the State's inability to proceed with the preliminary hearing due to a clerical error in subpoenaing witnesses. We conclude that the district court did not err in denying this claim. Appellate counsel challenged the grand jury indictment on direct appeal, and this court concluded that the record on appeal did not support the contention that the State's failure to subpoena

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<sup>2</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996); see also Strickland v. Washington, 466 U.S. 668 (1984).

<sup>3</sup>See Jones v. Barnes, 463 U.S. 745 (1983).

<sup>4</sup>See Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

<sup>5</sup>See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

witnesses and failure to proceed with the preliminary hearing amounted to conscious indifference or willful failure. Therefore, we concluded that it was not improper for the State to seek a subsequent grand jury indictment against Downs.

Second, Downs claimed that his appellate counsel was ineffective for failing to challenge the State's failure to hold a preliminary hearing within 15 days of the initial arraignment as mandated by NRS 171.196(2). Downs failed to support this claim with sufficient factual allegations demonstrating that he was prejudiced by his appellate counsel's actions.<sup>6</sup> Moreover, on the date set for the preliminary hearing, the justice court dismissed the complaint, and a grand jury subsequently indicted Downs finding probable cause existed to believe that the offenses had been committed and that Downs committed them.<sup>7</sup> Therefore, a preliminary hearing was not necessary, and NRS 171.196(2) was not violated.

Downs failed to support the next five claims with sufficient factual allegations demonstrating that his appellate counsel acted unreasonably or that he was prejudiced by his appellate counsel's actions.<sup>8</sup>

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<sup>6</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

<sup>7</sup>See NRS 172.155(1); see also Seim v. State, 95 Nev. 89, 98, 590 P.2d 1152, 1157 (1979) ("The grand jury is permitted to return an indictment only when the evidence establishes probable cause to believe that an offense has been committed and that the defendant has committed it.").

<sup>8</sup>See Hargrove, 100 Nev. 498, 686 P.2d 222; see also Kirksey v. State, 112 Nev. at 998, 923 P.2d at 1113-14.

Downs claimed that his appellate counsel was ineffective for failing to challenge: the district court's denial of his pretrial motion to dismiss the indictment, the district court's denial of his pretrial motion to dismiss the robbery charge, the district court's denial of his pretrial petition for a writ of habeas corpus, the district court's denial of his motion for judgment of acquittal, and the district court's denial of his motion for a new trial. We conclude that the district court did not err in denying these claims.

Next, Downs claimed that his appellate counsel was ineffective for failing to challenge the robbery jury instruction on direct appeal because the instruction did not comply with NRS 200.380. Specifically, Downs claimed that the instruction eliminated the mandatory language of the statute that the "degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property."<sup>9</sup> He argued that this allowed the jury to find robbery even in the event of accidental force. We conclude that the district court did not err in denying this claim. The robbery jury instruction given at Downs's trial was sufficient. It stated all of the elements of robbery and that the degree of force was immaterial. It also stated that robbery requires an unlawful taking "by means of" force or fear and such force or fear "must be used to" accomplish the taking. This language clearly informed the jury that the force involved must be intentional. Therefore, appellate counsel

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<sup>9</sup>NRS 200.380.

was not ineffective for failing to raise this claim on direct appeal because it did not have a reasonable probability of success on appeal.<sup>10</sup>

Finally, Downs claimed that his appellate counsel was ineffective for failing to assert that the State failed to preserve or gather fingerprint evidence material to his case. In Daniels v. State,<sup>11</sup> this court adopted a two-part test to determine whether an injustice has resulted from the State's failure to gather evidence. The defense must first show that the evidence was material, meaning that had the evidence been available to the defense, the result of the trial would have been different.<sup>12</sup> If the evidence is determined to be material, "then the court must determine whether the failure to gather the evidence was the result of mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case."<sup>13</sup> Downs has failed to show that the result of the trial would have been different had the evidence been available to the defense. The victim, a parking lot attendant, found Downs in a vehicle in the parking lot clutching a briefcase in his arms. Upon her addressing Downs, he exited the vehicle, pushed the victim, and ran. She immediately gave an accurate description of Downs to the police and to various others, and Downs was later found in a nearby casino bathroom rummaging through the briefcase and with some of the contents of the briefcase in his pockets.

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<sup>10</sup>See Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

<sup>11</sup>114 Nev. 261, 956 P.2d 111 (1998).


<sup>12</sup>Id. at 267-68, 956 P.2d at 115.

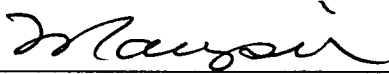
<sup>13</sup>Id. at 267, 956 P.2d at 115.

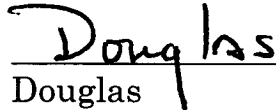
Therefore, fingerprint evidence alone would not have changed the result of the trial. Because Downs has failed to demonstrate that the fingerprint evidence was material, we decline to reach the second part of the test, and we conclude that appellate counsel was not ineffective for failing to raise this issue because it did not have a likelihood of success on appeal.<sup>14</sup>

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Downs is not entitled to relief and that briefing and oral argument are unwarranted.<sup>15</sup> We therefore

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. John S. McGroarty, District Judge  
Jimmy Earl Downs  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>14</sup>See Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

<sup>15</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).