

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JOSEPH SILVA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40943

**FILED**

JUL 8 2004

WANNETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

In 1995, the district court, pursuant to a jury verdict, convicted Silva of murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and burglary. Silva appealed, and this court reversed his conviction because he was denied his right to cross-examination under the Confrontation Clause.<sup>1</sup> On May 16, 2000, the district court, pursuant to a jury verdict, again convicted Silva of murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and burglary, and sentenced him to two consecutive terms of life in prison with the possibility of parole for murder with a deadly weapon, two consecutive prison terms of ten years for robbery with a deadly weapon, to be served concurrently to the murder, and a prison term of eight years for

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<sup>1</sup>See Silva v. State, 113 Nev. 1365, 951 P.2d 591 (1997).

burglary, to be served concurrently to the robbery.<sup>2</sup> This court affirmed Silva's judgment of conviction and sentence on appeal.<sup>3</sup> The remittitur issued on July 2, 2002.

On December 18, 2002, Silva filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed an answer, and Silva filed a reply. The district court did not appoint counsel or conduct an evidentiary hearing. On March 10, 2003, the district court denied Silva's petition.

In his petition, Silva claimed that his appointed standby counsel at trial rendered ineffective assistance. We conclude that the district court did not err in denying this claim. Because Silva waived his right to counsel and chose to represent himself, he did not have a constitutional right to standby counsel.<sup>4</sup> Because he had no constitutional right to standby counsel, he had no right to the effective assistance of standby counsel.<sup>5</sup> Moreover, Silva failed to demonstrate that his right to

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<sup>2</sup>At Silva's second trial, he chose and the court properly allowed him to represent himself. See Silva v. State, Docket No. 36306 (Order of Affirmance, June 5, 2002).

<sup>3</sup>See id.

<sup>4</sup>See Harris v. State, 113 Nev. 799, 804, 942 P.2d 151, 155 (1997) (holding that a defendant does not have a right to advisory counsel).

<sup>5</sup>See generally McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996) (holding that a post-conviction petitioner who has no constitutional or statutory right to the appointment of counsel has no right to the effective assistance of post-conviction counsel).

self-representation was compromised by standby counsel's assistance during the trial.<sup>6</sup>

Next, Silva claimed that his appellate counsel rendered ineffective assistance. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington."<sup>7</sup> Appellate counsel is not required to raise every nonfrivolous issue on appeal.<sup>8</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>9</sup> To establish prejudice based on the deficient assistance of appellate counsel, Silva must demonstrate that the omitted issue would have had a reasonable probability of success on appeal.<sup>10</sup>

Silva claimed that his appellate counsel had a conflict of interest because counsel also represented Silva's sister in a civil action. Silva claimed that this conflict caused his counsel to render ineffective assistance because Silva's sister fired counsel and counsel then sabotaged Silva's appeal. We conclude that the district court did not err in denying

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<sup>6</sup>See McKaskle v. Wiggins, 465 U.S. 168 (1984).

<sup>7</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996) (citation omitted).

<sup>8</sup>See Jones v. Barnes, 463 U.S. 745 (1983).

<sup>9</sup>See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

<sup>10</sup>See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

this claim. Silva failed to support this claim with sufficient factual allegations.<sup>11</sup>

Silva also claimed that this court caused his appellate counsel to have another conflict of interest because we set a 15-day time limit for Silva's counsel to file an opening brief or face sanctions. Silva claimed that this time constraint "served as an 'external impediment' to counsel providing a reasonably expected, professional level of competent representation" because the opening brief was "hurriedly assembled, relies upon conclusory allegations, and makes illogical conclusions with no supporting facts," does not quote transcripts, and was unpersuasive. Silva also claimed that his counsel failed to "federalize" the issues on appeal. We conclude that the district court did not err in denying these claims. Silva failed to articulate how this court's 15-day time limit to file an opening brief caused a conflict of interest. Moreover, counsel is not required to raise every nonfrivolous issue on appeal.<sup>12</sup>

Next, Silva claimed that his appellate counsel's failure to file a petition for en banc reconsideration was deficient because this court, in denying one of Silva's direct appeal claims, incorrectly stated that Silva failed to object to the testimony of two witnesses. We conclude that the district court did not err in denying this claim. Even assuming, without deciding, that this court made an incorrect statement regarding this one issue in its order of affirmance, Silva failed to demonstrate how he was

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<sup>11</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984); see also Strickland v. Washington, 466 U.S. 668 (1984).

<sup>12</sup>See Jones, 463 U.S. 745.

prejudiced by his appellate counsel's failure to file for en banc reconsideration.<sup>13</sup>

Next, Silva claimed that appellate counsel was ineffective because he failed to assert that the district court committed plain error by failing to give an alibi instruction. We conclude that the district court did not err in denying this claim.

An instruction in a criminal case need only be given sua sponte when its absence would be 'patently prejudicial' to the defendant. . . . Alibi evidence is of obvious import to the jury, and needs no further explanation such as that embodied in a typical alibi instruction. . . . [T]he absence of a specific alibi instruction is not 'patently prejudicial,' and. . . a trial court has no duty to deliver an alibi instruction sua sponte.<sup>14</sup>

However, the district court should give an alibi instruction if the defendant requests it and the evidence supports it.<sup>15</sup> Because the district court is not required to give an alibi instruction sua sponte, Silva cannot demonstrate that this claim would have had a likelihood of success on appeal. Moreover, Silva failed to articulate whether he requested such an instruction or what his alibi instruction would have stated. Therefore, Silva failed to demonstrate that his appellate counsel was ineffective for failing to raise this issue on direct appeal.<sup>16</sup>

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<sup>13</sup>See Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

<sup>14</sup>Williams v. State, 99 Nev. 797, 798, 671 P.2d 635, 636 (1983) (citations omitted).

<sup>15</sup>See Duckett v. State, 104 Nev. 6, 9, 752 P.2d 752, 754 (1988).

<sup>16</sup>See Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

Next, Silva claimed that appellate counsel failed to assert that there was insufficient evidence to support the deadly weapon enhancement and that Silva was actually innocent of the enhancement. He claimed that the deadly weapon, the knife, was a "necessary element" of the murder because without the knife the murder would not have occurred. He therefore theorized that pursuant to NRS 193.165(3), the enhancement provision of NRS 193.165(1) and (2) should not have been applied to his case. The district court did not err in denying this claim. Silva's reasoning is flawed. When a deadly weapon is used during the commission of a crime, "the use of a deadly weapon" does not create a separate offense but an additional penalty for the primary crime.<sup>17</sup> Subsections (1) and (2) of NRS 193.165 do not apply if a deadly weapon is a necessary element of a crime.<sup>18</sup> A deadly weapon is not a necessary element of murder.<sup>19</sup> The State can prove murder without the use of a deadly weapon. Thus, appellate counsel was not ineffective for failing to raise this issue on direct appeal because it did not have a reasonable probability of success on appeal.<sup>20</sup> Moreover, on direct appeal this court

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<sup>17</sup>See NRS 193.165(2).

<sup>18</sup>See NRS 193.165(3).

<sup>19</sup>See NRS 200.010 (defining murder as "the unlawful killing of a human being, with malice aforethought, either express or implied, or caused by a controlled substance" and providing that the "unlawful killing may be effected by any of the various means by which death may be occasioned").

<sup>20</sup>See Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

concluded that Silva's claim that there was insufficient evidence to support the deadly weapon enhancement lacked merit.<sup>21</sup>

Next, Silva claimed that his appellate counsel failed to properly argue that Silva's 14th amendment right to due process was violated because Silva was denied cross-examination of his accomplice due to hearsay testimony by two witnesses. Silva has failed to set forth how this issue has any merit.<sup>22</sup> Moreover, on appeal, this court ruled that "any alleged hearsay and confrontation clause errors were harmless."<sup>23</sup> Therefore, Silva could not demonstrate that he was prejudiced by counsel's direct appeal argument regarding this issue.<sup>24</sup>

Silva also claimed that appellate counsel denied him his due process rights by failing to argue that the trial court denied Silva's request for a continuance to locate a favorable witness. We conclude that the district court did not err in denying this issue. The decision to grant or deny a motion to continue rests with the sound discretion of the district court and will not be disturbed on appeal absent an abuse of that

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<sup>21</sup>See Silva v. State, Docket No. 36306 (Order of Affirmance, June 5, 2000); see also Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975) (stating that the law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same and cannot be avoided by a more detailed and precisely focused argument).

<sup>22</sup>See Hargrove, 100 Nev. 498, 686 P.2d 222.

<sup>23</sup>See Silva v. State, Docket No. 36306 (Order of Affirmance, June 5, 2002).

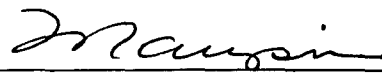
<sup>24</sup>See Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

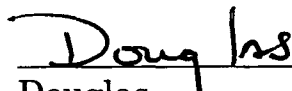
discretion.<sup>25</sup> Silva failed to show that the district court abused its discretion in denying his motion to continue.<sup>26</sup> Therefore, Silva failed to demonstrate that this claim had a likelihood of success on appeal.<sup>27</sup>

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Silva is not entitled to relief and that briefing and oral argument are unwarranted.<sup>28</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>29</sup>

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

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

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

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<sup>25</sup>See McCabe v. State, 98 Nev. 604, 607, 655 P.2d 536, 537 (1982).

<sup>26</sup>See Hargrove, 100 Nev. 498, 686 P.2d 222.

<sup>27</sup>See Kirksey, 112 Nev. at 998, 923 P.2d at 1113-14.

<sup>28</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>29</sup>We have reviewed all documents that Silva has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Silva has attempted to present claims or facts in those submissions that were not previously presented in the proceedings below, we have declined to consider them in the first instance.



cc: Hon. John S. McGroarty, District Judge  
Michael Joseph Silva  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk