

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN TYRONE RUFFIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

KEVIN TYRONE RUFFIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40055

FILED

No. 41162

JUN 08 2004

JANEITE M BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER DISMISSING IN PART, AFFIRMING IN PART, REVERSING IN
PART, AND REMANDING

These are proper person appeals from orders of the district court denying appellant Kevin Ruffin's motion to modify his sentence and his post-conviction petition for a writ of habeas corpus. We have elected to consolidate these appeals for disposition.¹

On June 13, 2000, the district court convicted Ruffin, pursuant to a jury verdict, of one count of burglary and one count of larceny from the person. The district court adjudicated Ruffin a habitual criminal and sentenced him to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole in 10 years. This court affirmed the conviction on direct appeal.²

¹See NRAP 3(b).

²Ruffin v. State, Docket No. 36360 (Order of Affirmance, November 19, 2001).

Docket No. 40055

On March 13, 2002, Ruffin filed a proper person motion in the district court seeking to modify his sentence. He contended that the district court relied upon uncertified and constitutionally infirm copies of prior judgments of conviction in adjudicating him a habitual criminal. The State opposed the motion. The district court denied the motion, finding that the State had filed certified documents establishing prior judgments of conviction in eleven cases that supported the habitual criminal adjudication. This proper person appeal followed.

Docket No. 41162

On December 15, 2002, with the assistance of counsel, Ruffin filed a post-conviction petition for a writ of habeas corpus in the district court. Ruffin contended, among other things, that his trial counsel was ineffective for not adequately challenging the prior judgments of conviction relied upon by the district court in adjudicating him a habitual criminal, and that his appellate counsel was ineffective for failing to raise any issues on direct appeal concerning his habitual criminal adjudication. The State opposed the petition, contending that it had filed with the district court certified documents showing that Ruffin had thirteen prior felony convictions. On March 24, 2003, the district court denied Ruffin's petition, finding, in part, that the State had presented witnesses and certified documents at Ruffin's sentencing hearing that supported the habitual criminal adjudication. This proper person appeal followed.

DISCUSSION

Upon the docketing of these appeals, this court directed the clerk of the district court to transmit to this court the complete district court records in these matters, including each and every paper, pleading

and other document filed or submitted for filing in the district court proceedings. The records transmitted to this court in response to those directives reveal that at Ruffin's sentencing hearing the State presented the district court with copies of Ruffin's prior judgments of conviction. The records before this court, however, do not contain copies of those prior judgments of conviction. Nor does it appear that these documents are presently part of the records maintained by the clerk of the district court.

The Office of the Clark County Clerk has informed the clerk of this court that it is unable to locate any of these documents and is "at a loss as to what might have happened to these exhibits." The State has informed this court that it can only locate in its internal files some of the prior judgments of conviction originally presented as evidence below. Although the State has submitted copies of the available judgments directly to this court under seal, the documents have not been reviewed or authenticated by appellant or the district court.

Without a complete record containing copies of the prior judgments of conviction admitted into evidence and relied upon by the district court in adjudicating Ruffin a habitual criminal, we are unable to conduct a meaningful review of the district court's orders resolving the claims Ruffin presented below attacking his habitual criminal adjudication.³ Under these circumstances, we have concluded that Ruffin's sentence must be vacated, and this matter must be reversed in part and

³See Lopez v. State, 105 Nev. 68, 84-85, 769 P.2d 1276, 1287 (1989) (recognizing that "meaningful, effective appellate review depends upon the availability of an accurate record covering lower court proceedings relevant to the issues on appeal"); Daniel v. State, 119 Nev. ___, ___, 78 P.3d 890, 897 (2003).

remanded for a new sentencing hearing. The district court shall appoint counsel to represent Ruffin and conduct a new sentencing hearing in which the State, in its discretion, may again seek habitual criminal adjudication.⁴ The district court shall insure that a complete and accurate record is compiled below and that all exhibits, including certified copies of all prior criminal convictions admitted or presented as evidence by the State, are properly marked and included in the record. In light of our conclusions in this respect, we dismiss as moot Ruffin's appeal in Docket No. 40055 from the district court's order denying his motion to modify his sentence.

With respect to the district court's order denying the remaining claims presented in Ruffin's post-conviction petition, however, the record on appeal is sufficient for us to review the district court's decision. In his petition, Ruffin also contended that his trial counsel was ineffective for failing: (1) to file a number of different pre-trial motions, including motions to suppress in-court identification of appellant, to suppress the use of appellant's alias, and to compel discovery of a convenience store security surveillance video; (2) to conduct an adequate pre-trial investigation and call various witnesses to testify; (3) to object to witness testimony relating to an inadmissible security surveillance video taken from the Bellagio Hotel & Casino; (4) to challenge the sufficiency of the evidence and move

⁴This court's prior decisions in Crutcher v. District Court, 111 Nev. 1286, 903 P.2d 823 (1995), and Robertson v. State, 109 Nev. 1086, 863 P.2d 1040 (1993), overruled on other grounds by Krauss v. State, 116 Nev. 307, 998 P.2d 163 (2000), are distinguishable. Here, the State filed a timely notice of intent to seek habitual criminal adjudication and presented the district court with copies of prior judgments of conviction at Ruffin's sentencing hearing. For reasons unknown, however, these documents have been lost or misplaced through no apparent fault of the State.

for a directed verdict; and (5) to object to the use of a reasonable doubt jury instruction containing the phrase "weighty affairs of life," and the use of the phrase "equal and exact justice" in another jury instruction.

We have carefully reviewed each of the above allegations and conclude that Ruffin failed to show that, but for his trial counsel's alleged errors, the results of the trial would have been different.⁵ In reaching this conclusion, we note that sufficient evidence supported Ruffin's conviction.⁶ This evidence included: the testimony of Diana Stubenrauch, the victim, who positively identified Ruffin as being on an elevator with her prior to her wallet disappearing; a security surveillance video corroborating Mrs. Stubenrauch's testimony; the testimony of Dan Smolinski linking Ruffin to the possession and attempted use of Mrs. Stubenrauch's credit card; and considerable other circumstantial evidence.⁷ We also note that this court considered the prejudicial impact of the jury's exposure to testimony concerning the Bellagio security surveillance video on direct appeal and determined that the issue was without merit.⁸ This court has also

⁵See Strickland v. Washington, 466 U.S. 668, 687 (1984); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984).

⁶See Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994).

⁷See McNair v. State, 108 Nev. 53, 61, 825 P.2d 571, 576 (1992) ("Circumstantial evidence alone may sustain a conviction.").

⁸See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

previously held that the challenged jury instructions are constitutionally sound.⁹

To the extent that Ruffin raised the above allegations as separate claims of ineffective assistance of appellate counsel, there is no reasonable likelihood that these claims would have been successful on direct appeal. Thus, we conclude that appellate counsel was not ineffective on these grounds.¹⁰ Ruffin's generalized allegations of ineffective assistance of trial and appellate counsel and cumulative error are similarly without merit.¹¹ In light of the foregoing, we affirm that portion of the district court's order denying the allegations of effective assistance in Ruffin's petition unrelated to the habitual criminal adjudication.¹²

⁹See Middleton v. State, 114 Nev. 1089, 1111-12, 968 P.2d 296, 311-12 (1998); Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998).

¹⁰See Strickland, 466 U.S. at 687; Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).


¹¹See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

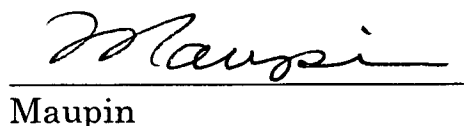
¹²Ruffin filed a supplemental petition in the district court that raised two additional issues. These issues, however, were outside the proper scope of Ruffin's petition and were waived because they were not raised on direct appeal. See NRS 34.810(1)(b); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Therefore, we conclude that the district court properly denied these supplemental issues as well. We also note that the district court partially denied Ruffin's petition on the basis that Ruffin failed to support his allegations with affidavits, evidence, and other documentation required by NRS 34.370. NRS 34.370 is inapplicable to post-conviction habeas corpus petitions and the district court erred to the extent that it relied upon this statute. See NRS 34.720; see also NRS 34.735. We conclude, however, that the district court's error

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Accordingly, we dismiss the appeal in Docket No. 40055 as moot, we vacate the district court's habitual criminal adjudication, and we ORDER the judgment of the district court in Docket No. 41162 AFFIRMED IN PART, REVERSED IN PART AND REMANDED for proceedings consistent with this order.¹³

 _____, C.J.
Shearing

 _____, J.
Rose

 _____, J.
Maupin

... continued

was harmless as these allegations were nonetheless without merit for the reasons set forth above.

¹³We have reviewed all documents that Ruffin 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 Ruffin has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance. We express no view respecting the validity of the district court's prior habitual criminal adjudication. This decision constitutes our final resolution of these matters. Any appeal from the district court's decision on remand shall be docketed as a new and separate matter.

cc: Eighth Judicial District Court, Department 11
Eighth Judicial District Court, Department 16
Kevin Tyrone Ruffin
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk