IN THE SUPREME COURT OF THE STATE OF NEVADA

MARCO A. SANCHEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 33604

FILED

MAY 30 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
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 October 7 1997, the district court convicted appellant, pursuant to a jury verdict, of conspiracy to commit robbery (count I), burglary while in possession of a firearm (count II), first degree kidnapping with the use of a deadly weapon (count III), robbery with the use of a deadly weapon (count IV), and grand larceny auto (count V). The district court sentenced appellant to serve the following terms in the Nevada State Prison: for count I, a maximum term of 60 months with a minimum parole eligibility in 13 months, to be served concurrently to count III; for count II, a maximum term of 156 months with a minimum parole eligibility in 35 months, to be served consecutively to count III; for count III, two consecutive terms of 15 years with a minimum parole eligibility in 5 years; for count IV, two consecutive terms of 156 months

with a minimum parole eligibility in 35 months, to be served consecutively to count III.[1] This court dismissed appellant's direct appeal.[2]

On October 7, 1998, 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. On December 17, 1998, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that his counsel was ineffective. 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 counsel's errors were so severe that they rendered the jury's verdict unreliable.[3] The court need not consider both prongs of the Strickland test if the petitioner fails to make a showing on either prong.[4]

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[1]The district court did not sentence appellant on count V (grand larceny auto) because the State conceded that, in this case, the grand larceny conviction merged with the robbery conviction for purposes of sentencing.

[2]Sanchez v. State, Docket No. 31291 (Order Dismissing Appeal, April 20, 1998).

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

[4]See Strickland, 466 U.S. at 697.

First, appellant claimed that his counsel was ineffective for failing to adequately investigate and present evidence that demonstrated that the alleged paycheck stub of the victim was not found in appellant's pocket but was found in the victim's abandoned vehicle that appellant was convicted of stealing. Specifically, appellant claimed that the testimony of Officer Linebarger, who arrested appellant, and the testimony of crime scene analyst Dan Ford, regarding the victim's paycheck stub conflicted and that this conflicting evidence should have been highlighted to the jury. We conclude that the district court did not err in denying this claim. This allegedly conflicting evidence was presented to the jury. At trial, Officer Linebarger testified that he searched appellant pursuant to a search incident to his arrest and in appellant's pocket the officer found a paycheck stub and an earnings statement in the victim's name along with United States currency. Crime scene analyst Dan Ford testified at trial that he arrived at the scene after appellant had been arrested and observed in the abandoned car a paycheck stub with the victim's name on it and money. The victim in this case testified that one of the three people that entered his garage and house ripped the victim's pocket and took the contents of the pocket which included money and possibly his paycheck.[5] Appellant failed to demonstrate how further investigation of the placement of the paycheck or how further testimony regarding this evidence would have changed the result of the trial. Thus, counsel was not ineffective in this regard.

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[5]The victim testified that the last time that he saw his paycheck was when he put it in his pocket.

Second, appellant claimed that his counsel was ineffective for failing to object to the prosecutor's improper closing argument and for failing to request a "curative" instruction regarding the closing argument. Specifically, the prosecutor stated during rebuttal argument, "[t]here is no evidence in this case, there is no evidence that Marco Sanchez (appellant) just got into the car or was picked up. There is no evidence in this case." Appellant claimed that by this statement the prosecutor shifted the burden of proof and commented on the failure of the defendant to present evidence. We conclude that the district court did not err in denying this claim. The prosecutor did not shift the burden of proof and was not commenting on defendant's failure to present evidence.[6] This statement was in response to defense's argument that appellant was not present and did not commit the crimes at the victim's house, but was only later picked up in the victim's stolen vehicle by the other perpetrators. The statement was merely a deduction or conclusion from the facts in evidence, which does not amount to prosecutorial misconduct and does not call for a "curative" instruction.[7] Thus, counsel was not ineffective in this regard.

Third, appellant claimed that his counsel was ineffective for failing to inform the court that the jury saw him shackled and in jail garb and for failing to request that a factual inquiry be conducted to determine whether appellant was prejudiced during his jury trial because the jury

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[6]See Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1998); see also Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997).

[7]See Parker, 109 Nev. at 392, 849 P.2d at 1068.

saw him shackled and in jail garb during an afternoon recess. We conclude that the district court did not err in denying this claim. There is no evidence in the record that the jury saw appellant shackled and in jail garb. When witnesses made in-court identifications they all described appellant to be wearing a gray and/or olive suit. Thus, appellant was not ineffective in this regard.[8]

Next, appellant claimed that his appellate counsel was ineffective. "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] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on direct appeal.[11] "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."[12]

First, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that petitioner was

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[8]See Strickland, 466 U.S. 668; see also Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

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

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

[11]See Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

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

prejudiced in his defense when the prosecutor failed to make known to defense of the State's intent to call crime scene analyst Dan Ford as a witness until after the trial had begun. We conclude that the district court did not err in denying this claim. The prosecutor stated in her opening statement that Dan Ford would be testifying and also stated what he would be testifying about. When the prosecutor called Ford as a witness, the defense objected because they had no prior notice of Ford being called as a witness. The judge overruled the objection and allowed the State to call Ford as a witness but only after the defense had an opportunity to speak with Ford before he testified. The State agreed. Ford testified at trial as to the photographs he took at the scene and as to the evidence found in the stolen automobile. The defense adequately cross-examined Ford. Appellant failed to demonstrate that this claim would have had a reasonable probability of success on appeal; thus, counsel was not ineffective in this regard.

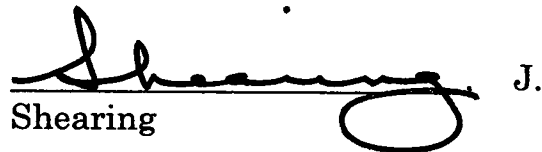
Second, appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor placed improper argument before the jury during closing argument which shifted the burden of proof to the defense and amounted to a comment on the failure of the defendant to present evidence. Specifically, the prosecutor stated, "[t]here is no evidence in this case, there is no evidence that Marco Sanchez (appellant) just got into the car or was picked up. There is no evidence in this case." We conclude that the district court did not err in denying this claim. As previously stated, the statement was merely a deduction or conclusion from the facts in evidence, which does not amount to prosecutorial misconduct. Appellant failed to demonstrate that this

claim would have had a reasonable probability of success on appeal; thus, counsel was not ineffective in this regard.

Lastly, appellant claimed that he was denied the right to a fair trial and appeal due to the accumulation of errors complained of in his petition. We conclude that the district court did not err in denying this claim. As stated previously, appellant's trial counsel and his appellate counsel were not ineffective. Thus, appellant is not entitled to relief.

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.[13] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[14]


_____, J.
Shearing

_____, J.
Rose

_____, J.
Becker

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

[14]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. Michael L. Douglas, District Judge
Attorney General/Carson City
Clark County District Attorney
Marco A. Sanchez
Clark County Clerk