

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD MULITAUOPELE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41339

FILED

MAR 23 2004

ORDER OF AFFIRMANCE

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

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

On February 15, 2000, the district court convicted Mulitauopele, pursuant to a jury verdict, of two counts each of conspiracy to commit robbery, burglary while in possession of a firearm, and robbery with the use of a deadly weapon, and one count of first-degree kidnapping with the use of a deadly weapon. The district court sentenced Mulitauopele to serve a period totaling two consecutive terms of life in the Nevada State Prison with the possibility of parole after five years, and an additional consecutive term of 12 to 36 months. This court dismissed Mulitauopele's appeal from his judgment of conviction and sentence.¹ The remittitur issued on December 3, 2001.

On September 10, 2002, Mulitauopele 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, the district court

¹Mulitauopele v. State, Docket No. 35809 (Order of Affirmance, November 5, 2001).

declined to appoint counsel to represent Mulitauopele. On March 6, 2003, the district court conducted an evidentiary hearing on Mulitauopele's claims.² The district court denied Mulitauopele's petition on March 26, 2003, and this appeal followed.

In his petition, Mulitauopele first contended that his trial 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 there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.³ The court need not consider both prongs of the test if the petitioner makes an insufficient showing on either prong.⁴ Further, the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁵

First, Mulitauopele contended that his trial counsel was ineffective for failing to challenge the victim's eyewitness identification of

²This court has held that a petitioner's statutory rights are violated when the district court improperly expands the record with the use of an affidavit refuting claims presented in a petition without conducting an evidentiary hearing. See Mann v. State, 118 Nev. ___, 46 P.3d 1228 (2002). Here, the district court expanded the record by accepting an affidavit from defense counsel prior to conducting an evidentiary hearing. The error was harmless, however, in light of the fact that the district court held a hearing on Mulitauopele's petition.

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

⁴Strickland, 466 U.S. at 697.

⁵Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

him shortly after the crime. Mulitauopele claimed that this tainted the victim's later identification of him at trial. Although a pre-trial confrontation between the suspect and victim at the scene of the crime is inherently suggestive, it can be justified by countervailing policy concerns.⁶ Mulitauopele's identification by the victim preceded formal charges, and consequently the issue is whether "the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that [Mulitauopele] was denied due process of law."⁷ Mulitauopele's trial counsel testified during the evidentiary hearing that he questioned the victim and police concerning the pre-trial identification of Mulitauopele, and did not believe there was a basis to suppress the identification. Mulitauopele did not provide any facts to support his claim that the victim's eyewitness identification of him was unnecessarily suggestive. The district court's factual determination that this claim lacked merit is supported by substantial evidence and is not clearly wrong.⁸ Thus, the district court did not err in denying this claim.

Second, Mulitauopele claimed that his trial counsel was ineffective for failing to obtain testimony from Shawn Rivera at trial. Rivera was a co-defendant in the case, and Mulitauopele contended that Rivera would have testified that Rivera and another co-defendant acted alone in committing the crimes and Mulitauopele was not involved. At the evidentiary hearing, Mulitauopele's trial counsel testified that Rivera

⁶Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979).

⁷Stovall v. Deno, 388 U.S. 293, 301-02 (1967).

⁸See Riley, 110 Nev. at 647, 878 P.2d at 278.

would have exercised his privilege against self-incrimination and refused to testify at Mulitauopele's trial because Rivera was facing the same charges. Additionally, Rivera made a confession to police in which he implicated Mulitauopele, and trial counsel was concerned that Rivera would testify consistent with his confession, or the confession would be used to impeach Rivera's testimony. We conclude that Mulitauopele did not establish that his trial counsel acted unreasonably on this issue, and the district court did not err in denying the claim.

Third, Mulitauopele alleged that his trial counsel was ineffective for failing to have his girlfriend testify that Mulitauopele was with her at the time the crimes were committed. Mulitauopele further argued that trial counsel should have obtained testimony from his neighbors that he was at home during the time the crimes were committed. Mulitauopele's trial counsel testified that there was no indication that there was an alibi defense possible in this case, and he did not want to subject Mulitauopele's girlfriend or neighbors to possible charges of perjury. We also note that Mulitauopele did not provide any specific facts concerning his claim that he had a viable alibi defense. Consequently, we conclude that Mulitauopele did not establish that his trial counsel acted unreasonably in this situation, and we affirm the district court's order with respect to this claim.

Fourth, Mulitauopele claimed that his trial counsel was ineffective for failing to argue that his fingerprints were not found at the scene of the crime. Our review of the record reveals that trial counsel argued extensively that Mulitauopele's fingerprints were not found at the scene. Therefore, Mulitauopele did not establish that his trial counsel was ineffective, and the district court did not err in denying this claim.

Fifth, Mulitauopele contended that his trial counsel was ineffective for failing to argue to the jury that the victim described the suspect as clean-shaven, but Mulitauopele was arrested only hours later with a full beard. The record reveals that the victim was not fluent in English. The police officer who questioned the victim after the incident testified that it was possible that the victim was confused when asked whether the suspect was clean-shaven. Further, the police officer could not read the victim's voluntary statement because it was written in Hebrew. We conclude that Mulitauopele failed to demonstrate that he was prejudiced by trial counsel's failure to make this argument to the jury, and the district court did not err in denying the claim.

Sixth, Mulitauopele alleged that his trial counsel was ineffective for failing to argue that the victims were robbed of \$485, but the suspects were arrested a short time later with only \$195. Trial counsel testified at the evidentiary hearing that Mulitauopele and the other co-defendants went to a casino between the first and second robberies. Trial counsel testified that because the money could have been spent at the casino, he did not believe this argument would aid Mulitauopele's defense. We conclude that Mulitauopele failed to demonstrate that he was prejudiced, such that the outcome of the trial would have been different if counsel had made this argument. Therefore, we affirm the order of the district court with respect to this claim.

Seventh, Mulitauopele claimed that his trial counsel was ineffective for failing to request a line-up. Mulitauopele's trial counsel testified that in twenty years of practicing criminal defense, he has never requested a line-up for fear of the witness identifying his client. Further, if the witness does not identify his client, it is very unlikely that the State

would decline to prosecute the case. Trial counsel's failure to request a line-up amounted to a tactical decision. A reasonable tactical choice is entitled to deference.⁹ We therefore conclude that Mulitauopele failed to demonstrate that his trial counsel was ineffective, and the district court did not err in denying this claim.

Mulitauopele next contended 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*."¹⁰ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹¹ "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonably probability of success on appeal."¹²

Mulitauopele claimed that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence with respect to each of his convictions. Our review of the record reveals that on direct appeal, appellate counsel challenged the sufficiency of the evidence to support Mulitauopele's kidnapping conviction. This court determined that sufficient evidence was adduced at trial to find Mulitauopele guilty of kidnapping. We further conclude that sufficient evidence existed from which a rational jury could find Mulitauopele guilty of the remaining

⁹Id. at 653, 878 P.2d at 281-82.

¹⁰Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).


¹¹Jones v. Barnes, 463 U.S. 745, 751 (1983).

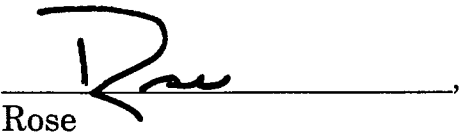
¹²Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

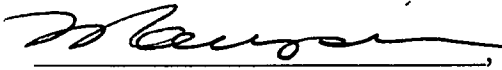
charges beyond a reasonable doubt.¹³ Evidence was presented at trial that on two separate occasions over the course of one night, Mulitauopele was involved in a conspiracy to take money and other belongings from a taxicab driver. Consequently, Mulitauopele did not demonstrate that his appellate counsel was ineffective for failing to appeal the sufficiency of the evidence.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Mulitauopele is not entitled to relief and that briefing and oral argument are unwarranted.¹⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Shearing, C.J.


Rose, J.


Maupin, J.

cc: Hon. Donald M. Mosley, District Judge
Ronald Mulitauopele
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹³See Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

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