

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN GARCIA DIAZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41469

FILED

AUG 24 2004

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying Juan Garcia Diaz's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On September 6, 2000, the district court, pursuant to a jury verdict, convicted Diaz of first degree kidnapping, battery with intent to commit a crime (robbery and sexual assault), two counts of sexual assault with substantial bodily harm, robbery, and attempted grand larceny. The district court sentenced Diaz to a term of life in prison with the possibility of parole after five years for kidnapping, a prison term of twenty-four to seventy-two months for battery, two consecutive terms of life in prison with the possibility of parole after fifteen years for sexual assault, a prison term of sixty to one hundred eighty months for robbery, and a prison term of twenty-four to sixty months for attempted grand larceny. All prison terms were ordered to be served consecutively to each other. Diaz

appealed and this court affirmed his judgment of conviction and sentence.¹ The remittitur issued on December 13, 2001.

On August 12, 2002, Diaz filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a response. The district court did not appoint counsel, but on May 16, 2003, conducted an evidentiary hearing. The district court subsequently denied Diaz's petition on June 26, 2003. This appeal followed.

In his petition, Diaz raised many claims of ineffective assistance of trial and appellate counsel. To state a claim of ineffective assistance of trial counsel, Diaz must set forth specific facts that demonstrate that his trial counsel's performance fell below an objective standard of reasonableness and that the defective performance prejudiced Diaz, *i.e.*, that there was a reasonable probability that the result of the trial would have been different had counsel acted reasonably.² "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington."³ Appellate counsel is not required to raise every nonfrivolous issue on appeal.⁴ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.⁵ To establish prejudice based on the deficient assistance of

¹See Diaz v. State, Docket No. 36754 (Order of Affirmance, November 16, 2001).

²See Strickland v. Washington, 466 U.S. 668 (1984).

³Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

⁴See Jones v. Barnes, 463 U.S. 745 (1983).

⁵See Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

appellate counsel, Diaz must demonstrate that the omitted issue would have had a reasonable probability of success on appeal.⁶

Diaz raised many claims of ineffective assistance of trial counsel that he failed to support with any specific factual allegations that if true would have entitled him to relief.⁷ Specifically, he claimed that his trial counsel was ineffective for failing to: effectively test the credibility of the victim, invoke the rule of exclusion, raise any theory of defense, investigate and review his case, take depositions of the victim and witnesses, hold the State to its burden of proof beyond a reasonable doubt, conduct an adequate judicial inquiry into Diaz's competence to stand trial, properly represent Diaz, and provide Diaz a fair trial. Diaz also faults his counsel for allowing him "to make a prejudicial statement of guilt to the sentencing court via letter." Because Diaz failed to support these claims with sufficient factual allegations, he failed to show that his trial counsel was ineffective.⁸ Therefore, the district court did not err in denying these claims.

Diaz raised additional claims of ineffective assistance of trial counsel for which he also failed to provide sufficient factual allegations in his petition, but subsequently supported with minimal facts at the evidentiary hearing. Nevertheless, in regard to these claims, he failed to demonstrate that his trial counsel's actions were unreasonable or prejudiced him.⁹ First, he claimed that trial counsel failed to file a motion

⁶See Kirksey, 112 Nev. 980, 998, 923 P.2d 1102, 1114.

⁷See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

⁸See id.; see also Strickland, 466 U.S. 668.

⁹See Strickland, 466 U.S. 668.

to suppress the latent fingerprints found at the scene of the crime and the videotape of the crime scene showing Diaz playing slot machines and then leaving the area of the crime. These motions would not have been meritorious because Diaz admitted to his presence at the scene of the crime; therefore, Diaz was not prejudiced by his trial counsel's actions.¹⁰ We conclude that the district court did not err in determining that trial counsel was not ineffective in this regard.

Second, Diaz claimed that his trial counsel was ineffective for allowing Diaz to waive his preliminary hearing, misleading him during the waiver, and for failing to challenge the State's amended criminal complaint. At the evidentiary hearing, Diaz stated that he waived his preliminary hearing because he was incompetent and did not understand; however, he later admitted that he waived the preliminary hearing because he did not want the victim to have to testify and because he wanted to negotiate the case. Trial counsel testified that he allowed Diaz to waive the preliminary hearing as a strategic move since both he and Diaz wanted to negotiate the case. Diaz failed to demonstrate how he was prejudiced by his trial counsel's actions.¹¹ In addition, Diaz failed to demonstrate how his trial counsel misled him during the waiver of the preliminary hearing. Lastly, trial counsel testified at the evidentiary hearing that there was no basis to challenge the amended complaint, and Diaz failed to show such a basis. Thus, the district court did not err in denying these claims.

¹⁰See Kirksey, 112 Nev. at 990, 923 P.2d at 1109; see also Strickland, 466 U.S. 668.

¹¹See Strickland, 466 U.S. 668.

Third, Diaz claimed that his trial counsel failed to challenge the admission into evidence of a diagram of a female body. He claimed that this diagram was highly prejudicial because every person's body is different and it was not right to compare the female body in the diagram to the victim's. It was stated at the evidentiary hearing that this diagram was used to show the location of the injuries of the victim; thus, there was no basis to challenge its admission. Diaz failed to show that his trial counsel's actions were unreasonable or prejudicial.¹² Therefore, the district court did not err in denying this claim.

Fourth, Diaz claimed that his trial counsel was ineffective for failing to object to prosecutorial misconduct. Diaz claimed that even though the State stipulated that Diaz's prior crime would not be brought up at trial, it was. Diaz failed to support this claim with sufficient specific factual allegations that if true would have entitled him to relief.¹³ Therefore, the district court did not err in denying this claim.

Fifth, Diaz claimed that his trial counsel was ineffective because he did not withdraw as counsel even though he and Diaz had a conflict of interest. Diaz's allegation that all he and trial counsel did was argue failed to demonstrate that an actual conflict of interest existed. Therefore, the district court did not err in denying this claim.

Sixth, Diaz claimed that his trial counsel acted ineffectively because he failed to challenge the "unjustified limitation by the judge of his right to cross examine key witnesses." He claimed that the judge "cut off" counsel during the cross-examination of the victim after she testified

¹²See id.

¹³See Hargrove, 100 Nev. 498, 686 P.2d 222.

that she did not suffer prolonged pain from her injuries caused by Diaz. At the evidentiary hearing, trial counsel stated that the district court did not "cut him off" but that he ended his cross-examination because that testimony was favorable to Diaz. Therefore, the district court did not err in denying this claim because Diaz failed to show that his trial counsel was ineffective in this regard.¹⁴

Seventh, Diaz claimed that his trial counsel was ineffective for failing to have the jury instructed that Diaz could not be convicted of both an offense and a lesser included offense. Specifically, Diaz claimed that because he was convicted of two counts of sexual assault and battery with the intent to commit a crime (robbery and sexual assault), the sexual assaults should have merged into one crime. We conclude that the district court did not err in denying this claim. At trial, it was proved that Diaz committed two acts of sexual assault because he digitally penetrated the victim's vagina as well as had actual intercourse with the victim. In addition, it was proved that he battered the victim to get her to have intercourse with him. Trial counsel testified at the evidentiary hearing that the facts regarding these crimes were separate, distinct, and sufficient to support each conviction. Trial counsel also testified that he argued to the judge that these offenses should merge; however, the district court judge disagreed. Diaz failed to demonstrate that his trial counsel's actions were unreasonable or that he was prejudiced by his trial counsel's actions.¹⁵

¹⁴See Strickland, 466 U.S. 668.

¹⁵See id.

Eighth, Diaz claimed that his trial counsel was ineffective for failing to present mitigating evidence at sentencing such as character witnesses and a letter written by police officers at the jail where Diaz was incarcerated before his trial regarding Diaz's work in various programs at the jail, which he claims could have possibly resulted in concurrent instead of consecutive sentences. We conclude that the district court did not err in denying this claim. Diaz failed to list what character witnesses he wanted his trial counsel to present and what they would have testified to. In addition, Diaz failed to present this letter to the sentencing judge, nor did he attach it to his petition or present it at the evidentiary hearing. Finally, whether this letter would have influenced the sentencing judge to sentence Diaz to concurrent instead of consecutive sentences is speculative. Therefore, Diaz failed to demonstrate that his trial counsel was ineffective in this regard.¹⁶

Finally, Diaz raised one claim at the evidentiary hearing that he did not raise in his petition. He claimed that his trial counsel was ineffective for failing to advise Diaz that he should have pleaded guilty instead of going to trial. We conclude that the district court did not err in denying this claim. The ultimate decision to plead guilty or not guilty rests with the defendant.¹⁷ Diaz has failed to show that his trial counsel forced him to plead not guilty or that his advice was unreasonable.¹⁸ Therefore, the district court did not err in denying this claim.

¹⁶See id.

¹⁷See Parker v. State, 100 Nev. 264, 265, 679 P.2d 1271, 1272 (1984).

¹⁸See Strickland, 466 U.S. 668.

Next, Diaz raised claims of ineffective assistance of appellate counsel. Diaz failed to support two of these claims with sufficient factual allegations that would entitle him to relief: appellate counsel failed to "properly file a direct appeal with his interests and concerns regarding trial results," and Diaz and his appellate counsel had a conflict of interest because all they did was argue. Therefore, the district court did not err in denying these claims.¹⁹

Next, Diaz claimed that his appellate counsel was ineffective for failing to raise the issue that there was "insufficient evidence to support conviction of substantial bodily harm." We conclude that the district court did not err in denying this claim. NRS 0.060 defines substantial bodily harm as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or . . . [p]rolonged physical pain."²⁰ At trial, it was shown that the victim suffered injuries to her throat, vagina, and urethra. She testified that she had bruising on her arms and legs that remained painful for almost two months, the injuries to her throat caused her severe pain making it difficult to swallow saliva or food, she could not speak for three weeks, her voice has been altered, and her throat still occasionally felt swollen. She also testified that because of the injuries to her vagina she bled for three days after the assault and that it was painful to go to the bathroom for almost a month due to the injuries to her urethra. Thus, sufficient evidence existed to support the jury's finding that the sexual

¹⁹See id.

²⁰See NRS 0.060.

assault was accompanied by substantial bodily harm. Therefore, this claim would not have had a reasonable probability of success on appeal.²¹

Diaz also claimed that his appellate counsel was ineffective for failing to assert that there was insufficient evidence to support his conviction of first degree kidnapping. We conclude that the district court did not err in denying this claim. Appellate counsel did raise this claim on direct appeal.²²

Next, Diaz made claims of ineffective assistance of appellate counsel that he failed to support with any factual allegations. He claimed that appellate counsel was ineffective for failing to assert that: "without substantial bodily harm first degree kidnapping does not increase the danger"; first degree kidnapping was essential to sexual assault; Diaz should not have been convicted of the lesser included offense as well as the greater; the trial court erred when it sentenced Diaz to consecutive sentences because his sentences should have merged under the greater offense; Diaz's sentence is illegal and an abuse of discretion where only one criminal act occurred; his conviction for battery is invalid; his sexual assault convictions should be counted as one crime for sentencing purposes; and all of Diaz's convictions should have merged into "one criminal episode" for sentencing purposes. Because Diaz failed to support these claims with any factual allegations, we conclude that the district court did not err in denying these claims.²³

²¹See Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

²²See Diaz v. State, Docket No. 36754 (Order of Affirmance, November 16, 2001).


²³See Hargrove, 100 Nev. 498, 686 P.2d 222.


Next, Diaz raised many claims that should have been raised on direct appeal. These claims include: the justice court failed to conduct a hearing to determine Diaz's competence to waive the preliminary hearing; the trial court failed to inquire about Diaz's competence; prosecutorial misconduct violated Diaz's rights; the district court denied him a fair trial by refusing to grant his motion to dismiss counsel and by allowing the prosecutors to orally oppose the motion; the trial court improperly admitted a highly prejudicial diagram of a female body into evidence and allowed the prosecution to compare the diagram with the victim's injuries; insufficient evidence was presented to support the convictions; Diaz's sentence and conviction violate double jeopardy; Diaz's conviction for sexual assault with substantial bodily harm was "to be counted as one crime for sentencing purposes"; Diaz's sentence is invalid "due to the admission of material, unreliable evidence concerning Petitioner's counts of sexual assault with substantial bodily harm"; the district court denied Diaz his due process rights when it forced Diaz to represent himself, hire an attorney, or keep counsel who Diaz had a conflict with, and then "continued to reappoint the same public defender . . . after the conflict of interest became apparent"; and the trial judge interfered with his right to cross-examine a key witness. These claims are waived because Diaz failed to demonstrate good cause for failing to raise them earlier and actual prejudice.²⁴ Therefore, we conclude that the district court did not err in denying these claims.

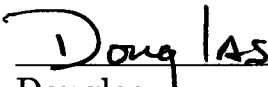
²⁴See NRS 34.810(1)(b)(2), (3).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Diaz is not entitled to relief and that briefing and oral argument are unwarranted.²⁵ We therefore

ORDER the judgment of the district court AFFIRMED.²⁶


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

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

²⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²⁶We have reviewed all documents that Diaz 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 Diaz 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.