

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDRE SHERMAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41726 **FILED**

AUG 13 2004

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

ORDER OF AFFIRMANCE IN PART AND REVERSAL AND REMAND

IN PART

This is a proper person appeal from an order of the district court denying appellant Andre Sherman's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On January 11, 2001, the district court convicted Sherman, pursuant to a jury verdict, of two counts of robbery. The district court sentenced Sherman to serve two consecutive terms of 48 to 150 months in the Nevada State Prison. This court affirmed Sherman's judgment of conviction and sentence on appeal.<sup>1</sup> The remittitur issued on July 2, 2002.

On April 8, 2003, Sherman filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition.<sup>2</sup> Pursuant to NRS 34.750 and 34.770, the

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<sup>1</sup>Sherman v. State, Docket No. 37352 (Order of Affirmance, June 5, 2002).

<sup>2</sup>Contrary to his assertion, Sherman did not have the right to file a reply to the State's response. See NRS 34.750(5).

district court declined to appoint counsel to represent Sherman or to conduct an evidentiary hearing. On July 24, 2003, the district court denied Sherman's petition. This appeal followed.

Sherman raised several claims of ineffective assistance of trial counsel in his petition.<sup>3</sup> To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.<sup>4</sup> A petitioner must further establish that a reasonable probability exists that in the absence of counsel's errors, the results of the proceedings would have been different.<sup>5</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>6</sup>

First, Sherman claimed that his trial counsel was ineffective for failing to raise the issue of his competency to stand trial. Sherman contended that he may suffer from a mental impairment as a result of a car accident, and further, he is uneducated and unfamiliar with the judicial system. A defendant is competent to stand trial if he has adequate "present ability to consult with his lawyer with a reasonable degree of rational understanding" and if "he has a rational as well as

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<sup>3</sup>Sherman additionally alleged ineffective assistance of appellate counsel on a number of the following claims. Consistent with the reasoning discussed below, we conclude that Sherman failed to demonstrate that his appellate counsel was ineffective on these issues.

<sup>4</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>5</sup>Id.

<sup>6</sup>Strickland, 466 U.S. at 697.

factual understanding of the proceedings against him."<sup>7</sup> A hearing is constitutionally and statutorily required if reasonable doubt exists as to the defendant's competency.<sup>8</sup> In the instant case, Sherman failed to provide sufficient factual support for his claim that he may suffer from a mental deficiency.<sup>9</sup> Further, a review of the record reveals that Sherman acted in a rational and coherent manner during the proceedings against him. We conclude that Sherman did not demonstrate that a reasonable doubt existed concerning his competency to stand trial, such that his trial counsel was ineffective on this issue.

Second, Sherman alleged that his trial counsel was ineffective for failing to request a jury instruction stating that the practice of showing suspects singly to victims for the purpose of identification is inherently suggestive. On direct appeal, this court concluded that the jury is able to make credibility determinations concerning the reliability of in-court identifications without such an instruction. Therefore, Sherman failed to demonstrate that he was prejudiced by his trial counsel's failure to request the jury instruction, and the district court did not err in denying this claim.

Third, Sherman contended that his trial counsel was ineffective for failing to present mitigating evidence at his sentencing hearing. Sherman claimed that he informed his trial counsel of his desire

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<sup>7</sup>Melchor-Gloria v. State, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983).

<sup>8</sup>See id. at 180, 660 P.2d at 113; NRS 178.400-440.

<sup>9</sup>See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

to have his family and friends testify, but counsel did not procure their testimony at the hearing. Sherman further alleged that his trial counsel should have presented evidence of his mental deficiency, social background, and lack of education. A review of the record reveals that trial counsel argued that Sherman should receive a lesser sentence due to the insufficient evidence introduced at trial, and the fact that Sherman was not a violent offender. Sherman did not state what testimony his family and friends would have provided, such that the outcome of his sentencing hearing would have been different. Further, he failed to provide specific facts concerning his mental deficiency, lack of education, and social background, or articulate how counsel's failure to present this information during the sentencing hearing prejudiced him.<sup>10</sup> Consequently, Sherman did not establish that his trial counsel was ineffective on this claim.

Fourth Sherman claimed that his trial counsel was ineffective for failing to file a motion seeking disclosure of exculpatory evidence. Specifically, Sherman contended that the State possessed a videotape from a surveillance camera at the scene of the crime which proved his innocence. While Sherman was being transported to the county jail, a police officer allegedly showed Sherman the videotape, but would not allow him to view its contents.

Our preliminary review of the record revealed that the district court may have erroneously denied this claim without first conducting an evidentiary hearing. Sherman is entitled to an evidentiary hearing if he

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<sup>10</sup>Id.

raises a claim, which if true, would entitle him to relief, and if his claim is not belied by the record.<sup>11</sup> In this case, it appeared that Sherman's claim that his trial counsel failed to seek disclosure of an exculpatory videotape was not belied by the record and would, if true, entitle him to relief. On May 25, 2004, we ordered the State to show cause why we should not remand this matter to the district court for an evidentiary hearing on this claim. The State responded to our order on June 28, 2004, and argues that Sherman's allegation concerning the exculpatory videotape was unsupported by specific facts. However, we conclude that Sherman provided sufficient facts to warrant an evidentiary hearing on this claim. Accordingly, we reverse the district court's order in part and remand for an evidentiary hearing to determine whether Sherman's trial counsel was ineffective for failing to seek disclosure of an allegedly exculpatory surveillance videotape.

Sherman additionally raised several claims of ineffective assistance of appellate counsel. To establish ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.<sup>12</sup> "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

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<sup>11</sup>Id. at 503, 686 P.2d at 225.

<sup>12</sup>See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

on appeal."<sup>13</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>14</sup>

Sherman first contended that his appellate counsel was ineffective for failing to raise his direct appeal claims as violations of the federal constitution. Sherman claimed that this prejudiced his ability to raise these claims in federal court. Sherman did not demonstrate that the result of his direct appeal would have been different if counsel had raised each of the issues as a violation of the United States Constitution. Thus, he failed to establish that his appellate counsel was ineffective on this issue.

Second, Sherman claimed that his appellate counsel was ineffective for failing to raise the issue of cumulative error on appeal. The cumulative effect of harmless errors may violate a defendant's right to a fair trial.<sup>15</sup> We conclude that because Sherman failed to demonstrate that errors occurred at his trial, he necessarily failed to demonstrate that a claim of cumulative error would have likely succeeded on appeal. Therefore, Sherman did not establish that his appellate counsel was ineffective in this regard.

Sherman next claimed that: (1) the district court erred in denying his motion to suppress the victim's unnecessarily suggestive identification, (2) the police did not have probable cause to believe that he

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<sup>13</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>14</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>15</sup>Byford v. State, 116 Nev. 215, 241-42, 994 P.2d 700, 717 (2000).

was involved in the robberies and should not have detained him, (3) the victims' identification of him was the fruit of an unlawful detention, and (4) the district court erred in denying his motion to dismiss for lack of providing exculpatory evidence. This court considered and rejected these issues on direct appeal. The doctrine of the law of the case prevents further litigation of these issues and "cannot be avoided by a more detailed and precisely focused argument."<sup>16</sup> Accordingly, the district court did not err in denying these claims.

Lastly, Sherman raised allegations that: (1) the district court erred in denying his request that the State turn over the surveillance camera videotape, (2) the prosecutor committed misconduct by refusing to turn over the surveillance camera videotape, and (3) the prosecutor and trial court committed cumulative error. These issues are outside the scope of a post-conviction petition for a writ of habeas corpus and Sherman did not demonstrate good cause for failing to raise them earlier.<sup>17</sup> Thus, the district court did not err in denying these claims.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.<sup>18</sup> Accordingly, we

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<sup>16</sup>Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

<sup>17</sup>See NRS 34.810(1)(b).

<sup>18</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.<sup>19</sup>

Becker, J.  
Becker

Agosti, J.  
Agosti

Gibbons, J.  
Gibbons

cc: Hon. Joseph T. Bonaventure, District Judge  
Andre Sherman  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>19</sup>We have reviewed all documents that Sherman has submitted in proper person to the clerk of this court in this matter, and we conclude that he is only entitled to the relief described herein. To the extent that Sherman 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. This order constitutes our final disposition of this appeal. Any subsequent appeal from an order of the district court denying Sherman's ineffective assistance of counsel claim shall be docketed as a new matter.