

IN THE SUPREME COURT OF THE STATE OF NEVADA

NELSON GREGORY MALLOCH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41806

FILED

MAR 25 2004

ORDER OF AFFIRMANCE

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

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

On September 12, 2002, the district court convicted Malloch, pursuant to a jury verdict, of two counts of assault with a deadly weapon, and one count of failure to stop on the signal of a police officer.¹ The district court sentenced Malloch to serve three consecutive terms of 24 to 60 months in the Nevada State Prison. This court dismissed Malloch's subsequent appeal.² The remittitur issued on January 31, 2003.

On March 27, 2003, Malloch 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

¹An amended judgment of conviction was entered on September 20, 2002, to reflect that Malloch was convicted pursuant to a jury trial.

²Malloch v. State, Docket No. 40213 (Order of Affirmance, January 6, 2003).

district court declined to appoint counsel to represent Malloch or to conduct an evidentiary hearing. On July 2, 2003, the district court denied Malloch's petition. This appeal followed.

In his petition, Malloch first made an allegation of ineffective assistance of trial counsel. 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

Malloch contended that his trial counsel was ineffective for misleading him into believing that there would be further plea negotiations prior to trial. Malloch claimed that his trial counsel informed him that the State offered to dismiss the assault charges if he would plead guilty to felony failure to stop. Malloch asked his trial counsel if he could plead guilty to a gross misdemeanor, rather than a felony, and trial counsel stated that he "would see what he could do." The next time Malloch spoke with his counsel, Malloch stated that he would be willing to plead guilty to felony failure to stop to avoid going to trial. At that time,

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.

however, the State had retracted the offer. Therefore, Malloch was forced to go to trial.

Our review of the record reveals that Malloch refused to accept the plea offer because he wanted to serve time in the county jail. Trial counsel did not guarantee Malloch that future plea negotiations would occur; rather, trial counsel stated that he "would see what he could do." The State, however, declined to negotiate further after Malloch rejected the plea, and subsequently withdrew the offer. Malloch failed to demonstrate that his trial counsel acted unreasonably in this instance. Consequently, Malloch did not establish that his trial counsel was ineffective on this issue.

Next, Malloch 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*."⁵ Appellate counsel is not required to raise every non-frivolous issue on appeal.⁶ "To establish prejudice on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonably probability of success on appeal."⁷

Malloch alleged that his appellate counsel was ineffective for supporting an argument with an outdated version of a statute that had

⁵*Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

⁶*Jones v. Barnes*, 463 U.S. 745 (1983).

⁷*Kirksey*, 112 Nev. at 998, 923 P.2d at 1114.

been amended prior to the commission of Malloch's crimes. Appellate counsel argued on appeal that assault is a specific-intent crime, and an improper jury instruction removed the intent element. Appellate counsel's argument was based on a 1997 interpretation of NRS 200.471—the assault statute.⁸ In 2001, however, NRS 200.471 was amended and the 1997 interpretation on which appellate counsel relied was no longer valid.⁹ Despite appellate counsel's misplaced dependence on a statute that had since been amended, Malloch failed to demonstrate that he was prejudiced by counsel's actions. Malloch did not provide additional arguments or claims that should have been raised on appeal and would have had a reasonable likelihood of success. Therefore, Malloch failed to establish that his appellate counsel was ineffective on this issue.

Lastly, Malloch contended that because he received the maximum sentence on all three convictions, his sentence was cruel and unusual. This claim, however, is outside the scope of a post-conviction petition for a writ of habeas corpus because it could have been raised on direct appeal.¹⁰ Therefore, the district court did not err in denying this claim.


⁸See Powell v. State, 113 Nev. 258, 934 P.2d 224 (1997) (providing that in order to be found guilty of assault pursuant to NRS 200.471, the State had to prove that the defendant had a specific intent to commit a violent injury on each of the victims).


⁹See 2001 Nev. Stat., ch. 216, § 1, at 986-87 (amending the definition of assault to "intentionally placing another person in reasonable apprehension of immediate bodily harm").


¹⁰See NRS 34.810(1)(b)(2).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Malloch is not entitled to relief and that briefing and oral argument are unwarranted.¹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

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

¹¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).