

IN THE SUPREME COURT OF THE STATE OF NEVADA

LANALSIKOV LOWE A/K/A
LAMAISIKOU LOWE A/K/A JOHNNY
QUEST,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41812

FILED

MAY 27 2004

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

ORDER OF AFFIRMANCE

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

On November 17, 2000, the district court convicted Lowe, pursuant to a jury verdict, of one count of sexual assault, one count of robbery, and two counts of misdemeanor battery. The district court sentenced Lowe to serve a term of life in the Nevada State Prison with the possibility of parole after 10 years for the sexual assault count, and a consecutive 72 to 180 months in the Nevada State Prison for the robbery count. Lowe was additionally sentenced to serve two concurrent terms of six months in the Clark County Detention Center for the battery counts, to be served concurrently with his other prison terms. On appeal, this court reversed and remanded Lowe's sexual assault conviction, concluding that the district court erred in prohibiting Lowe's counsel from cross-

examining the victim concerning a prior sexual act. The remittitur issued on June 4, 2002.¹

On May 1, 2003, Lowe filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Lowe filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Lowe or to conduct an evidentiary hearing. On July 14, 2003, the district court denied Lowe's petition. This appeal followed.

In his petition, Lowe raised several claims of ineffective assistance of trial counsel. 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.² A petitioner must further establish that 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 can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁴

¹Lowe's re-trial for the sexual assault charge is currently scheduled for September 2004.

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

³Id.

⁴Strickland, 466 U.S. at 697.

First, Lowe claimed that his trial counsel was ineffective for providing the State with confidential information that was used against Lowe prior to trial. Lowe failed to support this claim with specific facts concerning the confidential information his trial counsel allegedly shared, or sufficiently articulate how trial counsel was ineffective on this issue.⁵ As such, the district court did not err in denying this claim.

Second, Lowe contended that his trial counsel was ineffective for failing to request a jury instruction on the crime of unlawful taking of a vehicle as a lesser included offense of robbery. This court has determined that an offense is a lesser included offense only if "the elements of the lesser offense are an entirely included subset of the elements of the charged offense."⁶ In the instant case, Lowe was charged with robbery, which is the taking of personal property from another "against his will, by means of force or violence or fear of injury."⁷ A person is guilty of the crime of unlawful taking of a vehicle if he drives away the vehicle of another without the consent of the owner.⁸ The elements of unlawful taking of a vehicle are not an entirely included subset of the elements of robbery because the former requires the taking of a vehicle, whereas the

⁵See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁶Barton v. State, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001) (citing Schmuck v. United States, 489 U.S. 705, 716 (1989)); see also Peck v. State, 116 Nev. 840, 844, 7 P.3d 470, 472-73 (2000).

⁷NRS 200.380(1).

⁸NRS 205.2715(1).

latter does not. Therefore, a jury instruction concerning the unlawful taking of a vehicle would have been inappropriate.⁹ Further, on direct appeal this court concluded that there was overwhelming evidence to support Lowe's robbery conviction. For these reasons, Lowe did not establish that his trial counsel acted unreasonably in failing to request such a jury instruction, and the district court did not err in denying this claim.

Third, Lowe alleged that his trial counsel was ineffective for failing to move for a mistrial after the district court refused to allow cross-examination of the victim concerning a prior sexual act. Lowe failed to demonstrate that his counsel was ineffective on this issue. Lowe did not establish that the district court would likely have granted a mistrial based on the district court's own refusal to allow a certain line of cross-examination, such that his trial counsel acted unreasonably in failing to request one. Moreover, this court reversed Lowe's conviction for sexual assault based on the district court's failure to allow cross-examination of the victim concerning a prior sexual act. Lowe therefore cannot demonstrate he was ultimately prejudiced by any failure of trial counsel in this area. Consequently, we affirm the order of the district court with respect to this claim.

Lowe next alleged that his appellate counsel was ineffective. To establish ineffective assistance of appellate counsel, a petitioner must

⁹We further note that the State specifically charged Lowe with the robbery of both a vehicle and a cell phone.

demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.¹⁰ "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."¹¹ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹²

First, Lowe claimed that his appellate counsel was ineffective for failing to "federalize" his direct appeal issues in order to preserve them for federal appellate review. Lowe failed to demonstrate that the results of his direct appeal would have been different if counsel had "federalized" the issues. Thus, Lowe did not establish that appellate counsel was ineffective on this claim.

Second, Lowe contended that his appellate counsel was ineffective for failing to file a petition for rehearing. Lowe supported this claim by arguing that this court did not provide any legal authority to support its conclusion that sufficient evidence existed to support Lowe's robbery conviction. Lowe failed to demonstrate that this court overlooked or misapprehended a material issue of law or fact, such that a rehearing was warranted.¹³ Lowe's contention that this court did not rely on legal

¹⁰See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

¹¹Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

¹²Jones v. Barnes, 463 U.S. 745, 751 (1983).

¹³See NRAP 40(c).

authority in upholding his robbery conviction is entirely without merit. Thus, Lowe did not demonstrate that the outcome of his appeal would have been altered if his appellate counsel had requested a rehearing, and the district court did not err in denying this claim.

Lowe next claimed that there was insufficient evidence adduced at trial to support his robbery conviction. Lowe further contended that the State failed to prove every element of the crimes of which he was convicted beyond a reasonable doubt. A review of the record reveals that this court already considered and rejected a claim on direct appeal that there was insufficient evidence to support Lowe's convictions. The doctrine of the law of the case prevents further litigation of this issue and "cannot be avoided by a more detailed and precisely focused argument."¹⁴ As such, we affirm the order of the district court with respect to these claims.


Finally, Lowe alleged that the prosecutor committed misconduct in prosecuting him for robbery despite the lack of evidence against him. This claim is outside the scope of a post-conviction petition for a writ of habeas corpus.¹⁵ Moreover, as a separate and independent ground to deny relief, this claim is without merit. This court concluded on direct appeal that sufficient evidence existed from which a jury could find Lowe guilty of robbery. Therefore, the district court did not err in denying this claim.


¹⁴Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

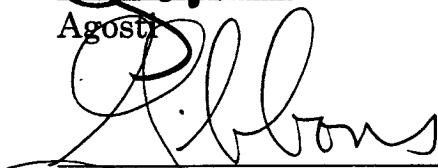
¹⁵See NRS 34.810(1)(b)(2).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Lowe is not entitled to relief and that briefing and oral argument are unwarranted.¹⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁷


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Valorie Vega, District Judge
Lanalsikov Lowe
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁷We have reviewed all documents that Lowe 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 Lowe 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.