

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEREK ALVIN MCCALL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41875

FILED

MAY 20 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 appellant Derek McCall's post-conviction petition for a writ of habeas corpus.

On October 15, 1999, the district court convicted McCall, pursuant to a jury verdict, of three counts of burglary and one count each of attempted burglary, robbery with the use of a deadly weapon, and first-degree kidnapping with the use of a deadly weapon. Additionally, McCall was adjudicated a habitual criminal. This court reversed McCall's deadly weapon enhancements, and denied subsequent petitions for rehearing and en banc reconsideration.¹ McCall was sentenced to five consecutive terms of life in the Nevada State Prison without the possibility of parole and an

¹McCall v. State, Docket No. 35172 (Order of Affirmance, July 10, 2002); McCall v. State, Docket No. 35172 (Order Denying Rehearing, Correcting Prior Order of Affirmance, and Remanding with Instructions to Vacate Deadly Weapon Enhancements, October 9, 2002); McCall v. State, Docket No. 35172 (Order Denying En Banc Reconsideration, October 30, 2002).

additional consecutive term of 72 to 180 months.² The remittitur issued on November 5, 2002.

On April 30, 2003, McCall filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. McCall filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent McCall or to conduct an evidentiary hearing. On August 19, 2003, the district court denied McCall's petition.³ This appeal followed.

In his petition, McCall alleged that his appellate counsel was ineffective.⁴ To establish ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the faulty performance prejudiced the defense.⁵ "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted

²An amended judgment of conviction was entered on January 2, 2003.

³The district court entered specific findings of fact and conclusions of law on October 6, 2003.

⁴To the extent that McCall raised the following issues independently from his ineffective assistance of counsel claims, we conclude that they are waived. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

⁵See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996) (holding that "[a] claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington").

issue would have a reasonable probability of success on appeal."⁶ Appellate counsel is not required to raise every non-frivolous issue on appeal.⁷

First, McCall contended that his appellate counsel was ineffective for failing to challenge jury instruction 14, which discussed the elements of first-degree kidnapping.⁸ McCall claimed that this instruction impermissibly shifted the burden of proof by omitting the fact that the State must prove that McCall was the actual person who committed the kidnapping.

We conclude that McCall did not adequately articulate how jury instruction 14 impermissibly shifted the burden of proof. McCall was the only defendant in the case, and he did not specify another individual

⁶Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

⁷Jones v. Barnes, 463 U.S. 745 (1983).

⁸Jury instruction 14 was as follows:

The crime of Kidnapping in the First Degree, as charged in this case is a specific intent crime. A specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the state must prove that the defendant knowingly did the act which the law forbids, purposely intending to violate the law.

An act is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The intention or purpose for which the victim was held against her will is a question of fact to be determined by your consideration of the evidence. The intention may be inferred from the defendant's conduct and all other circumstances.

that jury instruction 14 could have been referencing. Further, jury instruction 3 stated that the defendant's presumption of innocence "places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense."⁹ We conclude that McCall did not demonstrate that this issue would have likely succeeded on appeal, and therefore affirm the order of the district court with respect to this claim.

Second, McCall contended that his appellate counsel was ineffective for failing to argue that jury instruction 14 impermissibly omitted the elements that the State must prove beyond a reasonable doubt in order to convict him of first-degree kidnapping. A review of the record on appeal, however, reveals that jury instruction 13 listed the elements of first-degree kidnapping pursuant to NRS 200.310. Further, jury instruction 3, as previously stated, required the State to prove every element beyond a reasonable doubt. Therefore, the language McCall alleged was improperly omitted from jury instruction 14 was present in other jury instructions. Accordingly, McCall failed to demonstrate that an appeal of this issue would have been successful, and the district court did not err in denying this claim.

Third, McCall alleged that his appellate counsel was ineffective for failing to challenge his habitual criminal adjudication. McCall claimed that the district court erred in failing to make particularized findings that it was "just and proper" to adjudicate him a habitual criminal. We conclude that McCall's claim is without merit. A sentencing court must exercise discretion and weigh the appropriate

⁹Emphasis added.

factors before adjudicating a defendant a habitual criminal pursuant to NRS 207.010.¹⁰ Nevada law does not require, however, that a sentencing court "make 'particularized findings' that it is 'just and proper' to adjudicate a defendant as a habitual criminal."¹¹ "[A]s long as the record as a whole indicates that the sentencing court was not operating under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication and that the court exercised its discretion, the sentencing court has met its obligation under Nevada law."¹² Here, the record of McCall's sentencing and subsequent re-sentencing reveals that the district court heard arguments from counsel and understood the discretionary nature of habitual criminal adjudication. As such, McCall failed to demonstrate that the district court erred in adjudicating him a habitual criminal, such that an appeal of this issue would have been successful. Thus, the district court did not err in denying this claim.

Fourth, McCall contended that his appellate counsel was ineffective for failing to challenge jury instruction 43.¹³ This claim

¹⁰Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000).

¹¹Id. This court further stated that to the extent that the Ninth Circuit in Walker v. Deeds, 50 F.3d 670 (9th Cir. 1995) construed Nevada law to the contrary, this interpretation was incorrect. Id. at 332-33, 996 P.2d at 893.

¹²Id. at 333, 996 P.2d at 893-94.

¹³Jury instruction 43 was as follows:

Fingerprint evidence alone may under certain circumstances support a conviction. However, where the prosecution's theory is based on the premise that the defendant handled certain objects while committing the crime in question,

continued on next page . . .

appears to be based on the mistaken belief that the district court refused to include language from the Ninth Circuit case of Mikes v. Borg¹⁴ in the instruction. A review of the record, however, reveals that McCall's trial counsel argued that the jury instruction concerning fingerprint evidence should contain language from Mikes, and the district court subsequently included this language in jury instruction 43.¹⁵ Trial counsel's only objection to the jury instruction was that it did not contain the phrase "beyond a reasonable doubt" in the final paragraph. Because jury instruction 3 required the State to prove every element beyond a reasonable doubt, we conclude that an appeal of the district court's refusal to include these words in jury instruction 43 would not have had a

... continued

the evidence must be sufficient evidence from which you could reasonably infer that the fingerprints were in fact impressed at that time and not at some earlier date.

In order to meet this standard, reasonable doubt, the prosecution must present evidence sufficient to permit you to conclude that the objects on which the fingerprints appear were inaccessible to the defendant prior to the time of the commission of the crime.

Thus, if fingerprints of the defendant are found where the crime was committed, and circumstances rule out the possibility that they might have been imprinted at a different time than when the crime occurred, a conviction may be warranted.

¹⁴947 F.2d 353 (9th Cir. 1991).

¹⁵See id. at 356-57.

reasonable probability of success.¹⁶ Therefore, McCall did not establish that his appellate counsel was ineffective on this issue, and we affirm the order of the district court with respect to this claim.

Fifth, McCall claimed that the State failed to turn over exculpatory evidence prior to his trial. McCall alleged that police conducted a photo line-up with victim Aurora Panglinan after she was burglarized, and Panglinan identified Michael Conner as her assailant. McCall's trial counsel specifically requested and received a photograph of Conner more than a year after McCall's trial. This claim is outside the scope of a post-conviction for a writ of habeas corpus and should have been raised on direct appeal.¹⁷ The State provided McCall with Conner's photograph prior to the filing of McCall's opening brief in his direct appeal. McCall therefore did not demonstrate good cause for failing to raise this claim earlier.¹⁸ Moreover, as a separate and independent ground to deny relief, this claim is without merit. Panglinan testified at trial that because the room was completely dark when she was burglarized, she could not identify McCall as the assailant. A fingerprint expert testified, however, that McCall's fingerprints were found on a window screen and interior wall of the Panglinan residence, as well as Panglinan's jewelry box. Because the case against McCall in the Panglinan burglary was based on fingerprint evidence—rather than

¹⁶We additionally note the presence of a seemingly misplaced reference to the reasonable doubt standard in the second paragraph of jury instruction 43.

¹⁷See NRS 34.810(1)(b)(2).

¹⁸See id.

witness identification—McCall failed to demonstrate that he was prejudiced by the State's failure to turn over Conner's photograph.¹⁹ Additionally, McCall failed to establish that Panglinan even identified Conner in a photo line-up. For these reasons, we affirm the order of the district court with respect to this claim.

Sixth, McCall contended that: (1) the trial court erred in failing to instruct the jury that if McCall's fingerprints were not found at the crime scene, the jury must find him not guilty; (2) the State failed to prove beyond a reasonable doubt that McCall's fingerprints were left at the crime scenes at the time the burglaries were committed; and (3) the State's case was insufficient because all of the victims could not positively identify him as the assailant. These claims are outside the scope of a post-conviction petition for a writ of habeas corpus, and McCall did not demonstrate good cause for failing to raise them earlier.²⁰ Accordingly, the district court did not err in denying these claims.

Seventh, McCall claimed that this court's opinions in both Carr v. State,²¹ and Geiger v. State²² work to impermissibly shift the burden of proof to the defendant with respect to fingerprint evidence. This claim was raised on direct appeal, however, in the context of a challenge to the sufficiency of the evidence. The doctrine of the law of the case prevents further litigation of this issue and "cannot be avoided by a more

¹⁹See Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

²⁰See NRS 34.810(1)(b).

²¹96 Nev. 936, 620 P.2d 869 (1980).

²²112 Nev. 938, 920 P.2d 993 (1996).

detailed and precisely focused argument."²³ Therefore, the district court did not err in denying this claim.

Eighth, McCall contended that this court committed various errors with respect to his direct appeal. McCall claimed that this court: (1) misapplied the "most favorable light" concept of sufficiency of the evidence; (2) unreasonably ignored the Ninth Circuit corroboration requirement in "fingerprint-only" cases; (3) failed to address the "time of notice requirement" for use of prior recorded testimony of an absent witness; (4) erroneously concluded that the outcome of the trial with respect to the Delgado burglary would not have been altered if McCall had been able to impeach Delgado with his criminal activities; and (5) failed to address the trial court's refusal to grant the defense a continuance when McCall's trial counsel learned that Delgado's preliminary hearing testimony was to be used at trial. A review of the record reveals that these claims were raised and rejected by this court in a petition for en banc reconsideration. Further, these claims were not appropriately raised in the district court, as the district court cannot review decisions of this court. Accordingly, the district court did not err in denying McCall relief on these claims.

McCall lastly claimed that this court erroneously stated in its order of affirmance that victim Cesar Igayac identified his assailant as a black man, when in fact Igayac told a 9-1-1 operator that the intruder was a white man. We initially note that this claim should have been raised in a petition for rehearing rather than a post-conviction petition for a writ of


²³Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

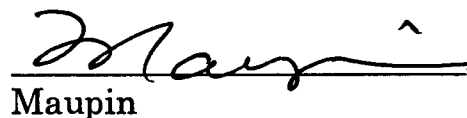
habeas corpus,²⁴ as the district court cannot review a claim of error involving this court. Moreover, this claim is meritless; the record reveals that at trial, Igayac testified that his assailant was a black man. Therefore, we affirm the order of the district court with respect to this claim.

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

ORDER the judgment of the district court AFFIRMED.²⁶

 C.J.
Shearing

 J.
Rose

 J.
Maupin

²⁴See NRS 34.810(1)(b); NRAP 40.

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

²⁶We have reviewed all documents that McCall 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 McCall 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.

cc: Hon. Kathy A. Hardcastle, Chief District Judge
Eighth Judicial District Court, Department 11
Derek Alvin McCall
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk