IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY EDWARD PETTY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41918

FILED

MAY 28 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On May 8, 1998, the district court convicted Petty, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced Petty to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole after twenty years. On appeal, this court concluded that the district court abused its discretion in excluding evidence of the victim's violent character, and reversed and remanded the matter for a new trial.[1] On January 8, 2001, Petty was again convicted, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and sentenced to two consecutive terms of life in the Nevada State Prison with the possibility of parole after

[1]Petty v. State, 116 Nev. 321, 997 P.2d 800 (2000).

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twenty years. This court affirmed Petty's judgment of conviction and sentence on appeal.[2] The remittitur issued on July 2, 2002.

On April 11, 2003, Petty filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Petty filed several replies. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Petty or to conduct an evidentiary hearing. On July 21, 2003, the district court denied Petty's petition. This appeal followed.

In his petition, Petty first contended that his trial counsel was ineffective.[3] 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.[4] A petitioner must further establish that there is a reasonable probability that in the absence of counsel's errors, the results

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[2]Petty v. State, Docket No. 37405 (Order of Affirmance, June 5, 2002).

[3]To the extent that Petty raised any of the following issues independently from his ineffective assistance of counsel claims, we conclude that they should have been raised on direct appeal and are therefore waived. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

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

of the proceedings would have been different.[5] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[6]

Petty claimed that his trial counsel was ineffective for waiving his right to a speedy trial. Petty invoked his right to a speedy trial when he first appeared in the district court following this court's reversal and remand of his original first-degree murder conviction. A trial date was set—with Petty's consent—two days beyond the 60-day period prescribed by NRS 178.556. Subsequently, the State sought a continuance of the trial date because counsel and witnesses were unavailable; Petty's trial counsel did not oppose the continuance because of concerns regarding Petty's competency. Petty's trial thereafter commenced approximately 150 days after Petty made his initial appearance in court. In his petition, Petty argued that trial counsel's concern for his competency was a sham, as Petty was never given a competency evaluation. Petty further contended that the true reason trial counsel waived the 60-day rule was to coerce Petty into negotiating with the State.

We conclude that this claim is without merit. First, Petty did not establish that his trial counsel waived his right to a speedy trial for an improper purpose. As such, trial counsel's concerns regarding Petty's competency constituted good cause to waive Petty's right to a speedy trial.[7]

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[5]Id.

[6]Strickland, 466 U.S. at 697.

[7]See Huebner v. State, 103 Nev. 29, 31, 731 P.2d 1330, 1332 (1987) (providing that 60-day rule under NRS 178.556 is mandatory only when there is a lack of good cause for delay); Schultz v. State, 91 Nev. 290, 292, 535 P.2d 166, 167 (1975) (holding that trial counsel is authorized to waive 60-day rule).

Further, Petty failed to demonstrate that his Sixth Amendment right to a speedy trial was violated.[8] Petty did not allege with any specificity how he was prejudiced by the delay in the commencement of his trial.[9] For these reasons, we conclude that Petty failed to establish that his trial counsel acted unreasonably in consenting to a 90-day delay in Petty's trial, or that Petty was prejudiced by the delay. Thus, we affirm the order of the district court with respect to this claim.[10]

Petty next raised several claims of ineffective assistance of appellate counsel. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test."[11] Appellate counsel is not required to raise every non-frivolous issue on appeal.[12] "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."[13]

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[8]See U.S. Const. amend. VI.

[9]See Barker v. Wingo, 407 U.S. 514, 530 (1972) (delay must be presumptively prejudicial to warrant further inquiry); Sessions v. State, 111 Nev. 328, 332 n.4, 890 P.2d 792, 794 n.4 (1995).

[10]Petty additionally claimed that his appellate counsel was ineffective for failing to appeal the district court's abuse of discretion in accepting the waiver of Petty's right to a speedy trial. For the reasons discussed above, we conclude that Petty did not establish that his appellate counsel was ineffective on this issue.

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

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

[13]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

First, Petty claimed that his appellate counsel was ineffective for failing to appeal the district court's exclusion of evidence concerning the victim's violent character—the same issue that resulted in the reversal of Petty's first conviction. Our review of the record on appeal reveals that this claim is entirely without merit. Three witnesses testified to the victim's propensity for violence. Although the district court did prohibit one witness from answering a juror question concerning a specific instance of the victim's conduct, an appeal of this issue would not have had a reasonable probability of success. NRS 48.055 prohibits character evidence in the form of testimony regarding specific instances of conduct, except during cross-examination. Additionally, whether to allow juror questions is within the sound discretion of the district court.[14] Therefore, Petty did not demonstrate that his appellate counsel was ineffective on this issue, and the district court did not err in denying the claim.

Next, Petty alleged that his appellate counsel was ineffective for failing to argue on direct appeal that the prosecutor's comments concerning Petty's failure to testify constituted plain error. A review of the record on appeal reveals that trial counsel moved for a mistrial after the prosecutor made allegedly improper comments on Petty's failure to testify. The district court denied the motion, and appellate counsel unsuccessfully raised this issue on direct appeal. Because Petty's trial counsel objected to the prosecutor's comments, it was not necessary for

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[14]Flores v. State, 114 Nev. 910, 913, 965 P.2d 901, 902 (1998).

appellate counsel to argue plain error.[15] Thus, Petty did not demonstrate that his appellate counsel was ineffective on this issue, and we affirm the order of the district court with respect to this claim.[16]

Petty lastly argued that his appellate counsel was ineffective for failing to notify him that remittitur had issued from his direct appeal until nine months had elapsed. Petty contended that he was prejudiced because the statutory time period for filing a petition for a writ of habeas corpus was effectively shortened to three months.[17] We conclude that Petty did not demonstrate that his appellate counsel was ineffective on this issue. Petty failed to articulate how appellate counsel's actions prejudiced his direct appeal. As such, the district court did not err in denying this claim.

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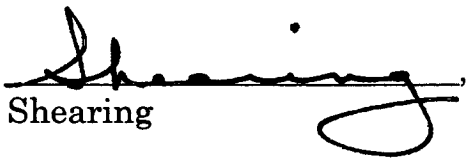
[15]See NRS 178.602 (providing that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court").

[16]Petty also argued that the trial court erred in refusing to grant a mistrial after the prosecutor made allegedly improper comments on Petty's failure to testify. This court already considered this claim on direct appeal. 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." Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

[17]See NRS 34.726(1) (providing that unless there is a showing of good cause for the delay, a petition for a writ of habeas corpus that challenges the validity of a judgment or sentence must be filed within one year of this court's issuance of remittitur from a direct appeal).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Petty is not entitled to relief and that briefing and oral argument are unwarranted.[18] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[19]



_____, C.J.
Shearing

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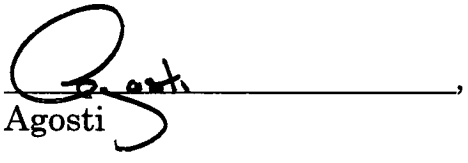
Becker



_____, J.
Agosti

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

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[18]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[19]We have reviewed all documents that Petty 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 Petty 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.