

IN THE SUPREME COURT OF THE STATE OF NEVADA

SPENCER LAVERN ANDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42017

FILED

JAN 10 2005

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Spencer Lavern Anderson's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Anderson was originally convicted, pursuant to a jury verdict, of one count of conspiracy to commit robbery and one count of robbery. At Anderson's trial, the evidence showed that Anderson's companion Karen Brown approached the front door of the victim, who was an acquaintance of Anderson and Brown. When the victim opened her front door, Anderson jumped over the fence and he and Brown forced their way into the home.

Once inside, Anderson directed Brown to gather up various items, including the victim's identification, ATM card, two blank \$25 money orders, an energy assistance check, a portable stereo, a can of loose change, and a 24-roll pack of toilet paper. The victim testified that Anderson held her at gunpoint while Brown collected the items. A gun was never found, and the jury found Anderson guilty of robbery without the use of a deadly weapon.

Upon his conviction, the district court adjudicated Anderson a habitual criminal and sentenced him to a prison term of 20 years for the conspiracy count and a consecutive term of 20 years for the robbery count.

This court affirmed Anderson's conviction on direct appeal.¹ The remittitur issued on May 18, 1999.

While his direct appeal was pending, Anderson filed a proper person petition for a writ of habeas corpus. District Judge Jack Lehman, mistakenly believing that he lacked jurisdiction to consider the petition while the direct appeal was pending, took the petition off the district court calendar without resolving it. Subsequently, on March 16, 2000, Anderson filed a proper person petition for a writ of habeas corpus. The second petition contained all the issues from the first petition, along with additional issues.

The district court appointed counsel for Anderson, and counsel filed a supplement to the petition. After conducting an evidentiary hearing, the district court denied the petition. This appeal followed.²

On appeal, Anderson first contends that the district court erred at sentencing by adjudicating Anderson a habitual criminal. Specifically, Anderson argues that the district court abused its discretion and that the prior convictions were either stale or too remote to be used. This contention was raised in the proper person brief submitted by Anderson in his direct appeal. In the order affirming the judgment of

¹Anderson v. State, Docket No. 28679 (Order Dismissing Appeal, April 20, 1999).

²Although the district court's order does not explicitly resolve the first petition filed, as noted above, the issues raised in the first petition were raised in the second petition. We therefore conclude that the district court's order effectively resolves both petitions.

conviction, this court concluded that this issue was without merit. It is thus barred by the doctrine of the law of the case.³

Anderson next contends that trial and appellate counsel were ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors prejudiced the defense.⁴ To establish prejudice based on the deficient assistance of trial counsel, a defendant must show that but for counsel's mistakes, there is a reasonable probability that the outcome of the trial would have been different.⁵ To establish prejudice based on the deficient assistance of appellate counsel, a defendant must show that the omitted issue would have a reasonable probability of success on appeal.⁶ The court need not consider both prongs of the ineffective-assistance test if the defendant makes an insufficient showing on either prong.⁷

Anderson contends that trial counsel was ineffective for failing to call various witnesses. First, Anderson argues that trial counsel told him that Anderson's co-conspirator Karen Brown should disappear, and that trial counsel refused to call Brown as a witness. Trial counsel testified, however, that he spoke with Brown prior to trial and that

³Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

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

⁵Strickland, 466 U.S. at 694.

⁶Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

⁷Strickland, 466 U.S. at 697.

counsel and Anderson decided that her testimony would not be helpful to the defense. The district court found trial counsel's testimony to be credible.

Anderson also argues that counsel should have called various neighborhood tavern patrons and bartenders to testify that the victim "was a bad and unreliable person," and is "a boisterous, vile and combative woman when she is drinking." We conclude that counsel's failure to call unnamed people who might have testified as to the victim's character does not constitute ineffective assistance of counsel. Anderson testified at his trial that the victim drank regularly and was not allowed in some of the bars in the neighborhood. The victim herself testified that she had a drinking problem. We conclude that Anderson has failed to demonstrate that further testimony as to the character of the victim would have changed the outcome of the trial.

Anderson further argues that counsel should have called John Marquez as a witness. Initially, Anderson's argument was that Marquez could have testified that he saw Anderson leaving the victim's home on the date of the crime and that Anderson was not carrying a large package of toilet paper. However, at the evidentiary hearing, Anderson testified that he saw someone walking down the street on the day in question, but he did not know if the other person saw him and could not say for sure whether the other person was, in fact, Marquez. We conclude that Anderson has not demonstrated that he was prejudiced by the failure to call Marquez as a witness.

Anderson next contends that trial counsel failed to conduct adequate investigation. Specifically, Anderson argues that trial counsel failed to investigate sufficiently the effects of alcohol on the victim, who

was an epileptic and was taking Dilantin. At the evidentiary hearing, trial counsel testified that he was a psychologist, and had experience working with epileptics. He further testified that the theory of the defense was that the victim was a chronic alcoholic and a liar. Trial counsel made a tactical decision not to present evidence of the neurological effects of mixing alcohol and Dilantin because he did not believe that the evidence would prove helpful to the case. Trial counsel felt that it was better to present general evidence of the fact that the victim drank regularly while taking prescription medication because he was concerned that an individual examination of the victim might reveal that the alcohol did not have as deleterious an effect on her as is the case in someone who is not a chronic alcoholic. Tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances.⁸ We conclude that counsel's performance was not deficient.

Appellant also contends that appellate counsel failed to raise meritorious issues on direct appeal. Specifically, appellant argues that appellate counsel should have raised the issues of sufficiency of the evidence and ineffective assistance of counsel. We conclude, however, that neither issue had a reasonable probability of success on appeal, and appellant has therefore not demonstrated prejudice. Accordingly, the district court did not err by finding that appellate counsel was not ineffective.


Finally, in the section of the fast track statement entitled "Issues on Appeal," Anderson lists the following claims which were presented in the petition below: (1) the imposition of sentences for each of


⁸See Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

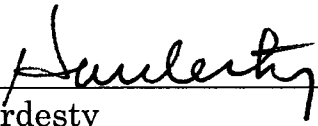
the counts violates the proscription against double jeopardy; (2) the district court was without jurisdiction to adjudicate Anderson a habitual criminal; (3) the State lacked jurisdiction to charge and try Anderson with conspiracy to commit robbery; (4) testimony of the State's witnesses was perjured; (5) the prosecutor committed acts of misconduct; and (5) Anderson's character was attacked throughout the trial by both the State and defense counsel. Anderson merely lists the issues but makes no argument regarding the district court's denial of these claims. Nonetheless, we note that these claims could all have been raised on direct appeal and the district court therefore correctly denied the petition as to those claims.⁹

Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

⁹NRS 34.810(1)(b)(2); see also Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (holding that direct appeal claims not raised on direct appeal are waived in subsequent proceedings), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

cc: Hon. Lee A. Gates, District Judge
Gary E. Gowen
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk