IN THE SUPREME COURT OF THE STATE OF NEVADA

OTIS ROSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42139

FILED

JUN 02 2004

JANETTE K. ALOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On November 15, 2001, the district court convicted Ross, pursuant to a guilty plea, of two counts of robbery and one count of attempted robbery. The district court sentenced Ross to serve two terms of 24 to 120 months and one term of 12 to 36 months in the Nevada State Prison. The terms were imposed to run consecutively. No direct appeal was taken.

On November 26, 2002, Ross filed a proper person post-conviction petition for a writ of habeas corpus in the district court.[1] The State opposed the petition. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent Ross. The district court conducted an evidentiary hearing. On October 1, 2003, the district court denied Ross' petition. This appeal followed.

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[1]We note that the district court found good cause for Ross' delay in filing his petition, and we conclude that the district did not abuse its discretion. See NRS 34.726(1).

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In his petition, Ross made several claims of ineffective assistance of 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 was deficient, and that the petitioner was prejudiced by counsel's performance.[2] Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact and is therefore subject to independent review.[3] However, the "purely factual findings of an inferior tribunal regarding a claim of ineffective assistance are entitled to deference on subsequent review of that tribunal's decision."[4]

Ross specifically contended that his counsel was ineffective for (1) failing to inform the court that Ross was a mental health patient, (2) failing to request a mental competency hearing pursuant to NRS 178.455, (3) allowing Ross to enter into a guilty plea agreement despite his mental incompetence, and (4) failing to file a motion to dismiss the charges based on misidentification of the defendant.

The district court found that trial counsel was not ineffective. The record on appeal indicates that Ross' trial counsel, Kirk Kennedy, testified that Ross did not appear to be mentally incompetent and that if Ross had appeared incompetent he would have pursued an incompetence

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[2]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

[3]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

[4]Id.

defense.[5] The district court noted that Ross choose not to participate at the evidentiary hearing, did not question trial counsel on his performance and, therefore, did not show that counsel's performance was deficient or that he suffered any prejudice. The district court found that trial counsel had no basis to move for dismissal of the charges based on the witnesses' misidentification of Ross, and concluded that trial counsel was not deficient for failing to do so.[6] Following the hearing, the district court ordered that three doctors examine Ross to determine his mental competency and whether he was malingering. Louis Mortillaro, Ph.D., determined that Ross was malingering. John Paglini, Psy.D., and Greg Harder, Psy.D., both determined that Ross was probably malingering. As such, trial counsel's testimony and the professional opinions of the three doctors demonstrate that the district court's factual findings are supported by substantial evidence and, therefore, are not clearly wrong.[7] Accordingly, we conclude that counsel was not deficient.

Ross also claimed that the district court "abused its discretion by not holding a competency hearing, or inquiring into the mental status

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[5]We note that the record on appeal also contains Kennedy's affidavit. However, there is no evidence that this affidavit was offered to Ross. We conclude that it was not properly before the district court and, therefore, we have not considered it. See NRS 34.790(3).

[6]Our review of the record on appeal reveals that Ross' robberies and attempted robbery were caught on video surveillance tape and that Ross' identity could be established from these tapes. As such, Ross was not prejudiced by trial counsel's failure to move for dismissal on grounds that witnesses had misidentified him.

[7]See Riley, 110 Nev. at 647, 878 P.2d at 278.

of petitioner." However, because this claim could have been raised on direct appeal, we conclude that it is waived.[8]

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Moore is not entitled to relief and that briefing and oral argument are unwarranted.[9] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Otis Ross
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[8]See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

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