

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY EMMANUEL WHITE,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondent.

No. 42243

FILED

JUL 8 2004

BY *Janette M. Bloom*
JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order denying appellant Jerry White's post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

On January 16, 2001, the district court convicted White, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and conspiracy to commit robbery. The district court sentenced White to serve two consecutive terms of life in prison without the possibility of parole for the murder, a concurrent term of 35 to 156 months for robbery, and a concurrent term of 13 to 60 months for conspiracy. This court affirmed the district court's judgment.¹

On July 28, 2002, White filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. As provided for in NRS 34.750 and 34.770, the district court appointed counsel to represent White and conducted an evidentiary hearing. On

¹White v. State, Docket No. 37422 (Order of Affirmance, March 8, 2002).

October 15, 2003, the district court entered an order denying White's petition. This appeal followed.

In his petition, White made numerous claims of ineffective assistance of trial and appellate 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 The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong.³ To demonstrate prejudice, "the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different."⁴

To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that petitioner was prejudiced by the deficient performance.⁵ Appellate counsel is not required to raise every nonfrivolous issue on appeal in order to be effective.⁶ To show prejudice, a petitioner must show that the omitted issue would have had a reasonable probability of success on appeal.⁷

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

³Strickland, 466 U.S. at 697.

⁴Kirksey, 112 Nev. at 988, 923 P.2d at 1107.

⁵Id. at 998, 923 P.2d at 1113.

⁶Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

⁷Kirksey, 122 Nev. at 998, 923 P.2d at 1114.

First, White contends that trial counsel was ineffective for failing to seek jury instructions regarding diminished capacity and heat-of-passion. He claims that evidence of his alcohol consumption and the victim's homosexual advances justified these instructions. "[W]hen a defendant's theory of the case is supported by evidence, the defendant has the right to a jury instruction on the theory of his case."⁸ Our review of the record on appeal reveals that White's theory of the case was that he did not kill the victim. Therefore, White was not entitled to the jury instruction regarding diminished capacity and heat-of-passion. Accordingly, we conclude that trial counsel was not deficient for failing to seek these jury instructions.

Second, White contends that trial counsel was ineffective for not attempting to impeach codefendant Michael Woomer's testimony with his prior inconsistent statements. White claims that Woomer's testimony and his statements to the police were inconsistent and contradictory. However, White does not allege specific inconsistencies or contradictions in Woomer's testimony and his statements to the police. White therefore failed to allege sufficient facts that, if true, would entitle him to relief on this claim.⁹ Accordingly, we conclude that White does not demonstrate that trial counsel was deficient for failing to impeach Woomer's testimony with his prior statements.

Third, White contends that trial counsel was ineffective for failing to challenge the deadly weapon enhancement. Specifically, White

⁸Milton v. State, 111 Nev. 1487, 1492, 908 P.2d 684, 687 (1995); see also Vincent v. State, 97 Nev. 169, 170, (1981).

⁹See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

claimed that the baseball bat was not a deadly weapon as defined by NRS 193.165 and, therefore, the deadly weapon enhancement should not have applied. NRS 193.165(5)(b) defines a "deadly weapon" as "[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used . . . is readily capable of causing substantial bodily harm or death." Because the baseball bat was a device that was used as a club to cause the death of the victim, it was a deadly weapon as defined by NRS 193.165. Accordingly, we conclude that trial counsel was not deficient for failing to challenge the deadly weapon enhancement.

Fourth, White contends that trial counsel was ineffective for failing to object to the reasonable doubt jury instructions. Specifically, White claims that jury instructions number 5 and number 52 quantified the standard of reasonable doubt. Jury instruction number 5 provided the statutory definition of reasonable doubt as required by NRS 175.211, and jury instruction 52 instructed the jury as to rules governing how the jury should consider the evidence in the case. These instructions did not quantify the standard of reasonable doubt. Moreover, we have previously held that the statutory prohibition against giving other than the statutory definition of "reasonable doubt" does not prohibit the district court from giving the jury instructions governing its consideration of the evidence in the case.¹⁰ Accordingly, trial counsel was not deficient for failing to object to the jury instructions.

Fifth, White contends that trial counsel was ineffective for failing to have the baseball bat excluded from evidence on grounds that the State failed to preserve the chain of custody, and that appellate

¹⁰State v. Potts, 20 Nev. 389, 399, 22 P. 754, 757 (1889).

counsel was ineffective for not raising this issue on appeal. We previously have stated "[i]t is not necessary to negate all possibilities of substitution or tampering with an exhibit, nor to trace its custody by placing each custodian upon the stand."¹¹ Rather, a proper chain of custody is established where it is "reasonably certain that no tampering or substitution took place, and the doubt, if any, goes to the weight of the evidence."¹² Our review reveals nothing to suggest that any tampering with or substitution of the baseball bat occurred. Accordingly, White failed to demonstrate that trial and appellate counsel were deficient on this issue.

Sixth, White contends that trial counsel was ineffective for failing to adequately advise White concerning his right to testify. However, White does not state how or why trial counsel's advice was inadequate. Therefore, he fails to allege sufficient facts that, if true, would entitle him to relief on this claim.¹³

Seventh, White contends that trial counsel was ineffective for not allowing the jury to pass sentence. However, White fails to state how or why trial counsel was ineffective for advising White to forgo the jury and to have the district court pass sentence. Therefore, White fails to allege sufficient facts that, if true, would entitle him to relief on this claim.¹⁴

¹¹Sorce v. State, 88 Nev. 350, 352, 497 P.2d 902, 903 (1972).

¹²Id. at 352-53, 497 P.2d at 903.

¹³See Hargrove, 100 Nev. 498, 686 P.2d 222.

¹⁴See id.

Eighth, White contends that trial and appellate counsel were ineffective for failing to preserve issues for appeal or confer with each other. However, he fails to state which issues counsel failed to preserve and demonstrate that these issues had a reasonable probability of success on appeal, nor does he show that the result of the trial would have been different had trial and appellant counsel conferred with each other. Again he fails to allege sufficient facts that, if true, would entitle him to relief on this claim.¹⁵

Ninth, White contends that appellate counsel was ineffective for failing to raise the issue of whether the district court erred in rejecting a proposed jury instruction on manslaughter. As discussed above, a defendant has the right to a jury instruction on the theory of his case, if it is supported by evidence. Because White's theory of the case was that he did not kill the victim, he was not entitled to the jury instruction regarding manslaughter. Accordingly, appellate counsel was not deficient for failing to raise this issue on direct appeal.

Tenth, White contends that trial and appellate counsel were ineffective for failing to cite federal constitutional right violations when presenting the issue of whether the district court erred by not excluding codefendant Woomer's testimony. However, White fails to demonstrate that the outcome would have been different if counsel had raised the issue as a violation of his rights under the United States Constitution.

In addition to his claims of ineffective assistance of counsel, White raises a number of claims which he had previously raised on direct appeal. He contends that the district court erred when it (1) allowed

¹⁵See id.

Woomer to testify even though he had motive to lie and feign memory loss, (2) admitted into evidence Woomer's prior out-of-court statements, (3) admitted into evidence highly prejudicial photographs, (4) instructed the jurors that they did not need to reach unanimity regarding a theory of homicide as long as they were unanimous on a guilty verdict of first degree murder, (5) admitted a victim impact statement which referenced White's potential for future dangerousness, and (6) allowed persons other than those defined as victims under NRS 176.015 to testify at the sentencing hearing. Our decision in White's direct appeal is the law of this case, and further litigation of these issues is not permitted.¹⁶ Therefore, the district court did not err in dismissing these claims.

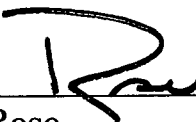
White also raises a number of claims which he had not raised on direct appeal. He contends that the district court erred when it (1) admitted evidence of other bad acts; (2) rejected proposed jury instructions on manslaughter, accessory to murder, and accessory to robbery; (3) found that a baseball bat was a deadly weapon; (4) failed to establish the existence of a proper chain of custody before admitting the baseball bat into evidence; (5) improperly instructed the jury on reasonable doubt, robbery, first degree murder and felony murder, premeditation, and implied malice; and (6) failed to adequately canvass White regarding his right to testify. These are claims that White could have raised on direct appeal from his judgment of conviction, but did not. White therefore

¹⁶Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

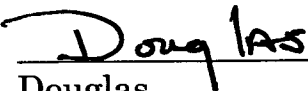
waived these claims for the purposes of subsequent proceedings for post-conviction relief.¹⁷

For the reasons set forth above, we conclude that White failed to demonstrate that the district court erred in denying his petition for a writ of habeas corpus. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Andrew J. Puccinelli, District Judge
Matthew J. Stermitz
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk

¹⁷See NRS 34.810(1)(b)(2); Bolden v. State, 99 Nev. 181, 183, 659 P.2d 886, 887 (1983).