

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD A. BARRIENTOS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42379

FILED

OCT 15 2004

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

On January 30, 2001, the district court convicted appellant, pursuant to a jury verdict, of one count of first degree murder with the use of a deadly weapon and one count of attempted murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole and two consecutive terms of fifty-three to two hundred and forty months. The latter terms were imposed to run concurrently with the former. This court affirmed appellant's judgment of conviction on direct appeal.¹ The remittitur issued on September 17, 2002.

Appellant filed, with the assistance of appointed post-conviction counsel, a timely post-conviction petition for a writ of habeas corpus. The State opposed the petition. On November 25, 2003, the district court denied appellant's petition. This appeal followed.

¹Barrientos v. State, Docket No. 37459 (Order of Affirmance, August 21, 2002).

In his petition, appellant claimed that he received 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 fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.² The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.³ "Tactical decisions are virtually unchallengeable absent extraordinary circumstances."⁴

First, appellant claimed that his trial counsel was ineffective for failing to move for a mistrial when juror misconduct was discovered. Appellant asserted that prior to deliberations a number of jurors observed appellant's name on the morning calendar of another department. Appellant argued that the jurors could have inferred that appellant had other criminal cases pending against him. Trial counsel failed to voir dire the jurors or file a motion for mistrial on this basis.

We conclude that the district court did not err in determining that this claim lacked merit. Appellant cannot demonstrate prejudice because the underlying issue was previously considered and rejected on direct appeal. Appellant's trial counsel filed a motion for a new trial, and in that motion trial counsel argued that it could be inferred that the jurors were tainted because they had viewed the calendar. The district court

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

³Strickland, 466 U.S. at 697.

⁴Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

denied the motion, and on direct appeal, this court concluded that the district court did not abuse its discretion in denying appellant's motion. This court based its conclusion on the fact that the "issue of innocence or guilt was not close and the character of the error does not weigh in favor of a finding that Barrientos was prejudiced." Appellant failed to demonstrate that his trial counsel was ineffective for filing a motion for a new trial rather than a motion for a mistrial. Appellant failed to demonstrate that there was a reasonable probability of a different outcome if trial counsel had taken any other action. Therefore, we conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.

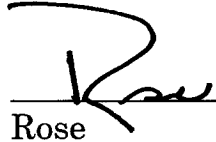
Second, appellant claimed that his trial counsel was ineffective because only two witnesses were called to testify for the defense. Appellant claimed that the value of the witnesses called was insignificant.

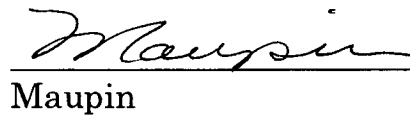
We conclude that the district court did not err in determining that this claim lacked merit. Appellant failed to support this claim with specific facts; appellant failed to identify the potential witnesses or the content of their testimony.⁵ Thus, appellant failed to demonstrate that there was a reasonable probability that the outcome of the trial would have been different if additional witnesses were called or if the two defense witnesses were not called. Therefore, we conclude that appellant failed to demonstrate that his trial counsel was ineffective in this regard.


⁵See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁷


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Kathy A. Hardcastle, District Judge
Richard A. Barrientos Jr.
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁷It was unclear if the record on appeal contained all of the documents considered by the district court. Consequently, on May 24, 2004, this court directed the clerk of the district court to transmit additional petitions if they existed. The clerk responded that additional petitions were filed in a different district court case, and the clerk attached copies of those petitions for this court's review. The clerk of the district court has sufficiently cleared up any confusion about the record on appeal.