IN THE SUPREME COURT OF THE STATE OF NEVADA

DARREN RAY TOWNSEND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42503

FILED

AUG 23 2004

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant Darren Townsend's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On November 24, 1998, the district court convicted Townsend, pursuant to a jury verdict, of two counts of possession of stolen property, and one count of carrying a concealed weapon (gross misdemeanor). The district court additionally adjudicated Townsend a habitual criminal. The district court sentenced Townsend to serve two concurrent terms of life in the Nevada State Prison with the possibility of parole after ten years, and a concurrent term of one year in the Clark County Detention Center. This court affirmed Townsend's judgment of conviction, and subsequently denied petitions for rehearing and en banc reconsideration.[1] The remittitur issued on February 5, 2001.

[1]Townsend v. State, Docket No. 33469 (Order of Affirmance, December 21, 2000); Townsend v. State, Docket No. 33469 (Order Denying Rehearing, January 18, 2001); Townsend v. State, Docket No. 33469 (Order Denying En Banc Reconsideration, May 9, 2001).

On January 29, 2002, Townsend filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750, the district court appointed counsel to represent Townsend. The district court conducted a limited evidentiary hearing on November 21, 2003, and denied Townsend's petition on December 12, 2003. This appeal followed.

In his petition, Townsend first raised several claims of ineffective assistance of trial counsel.[2] 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.[3] A petitioner must further establish that in the absence of counsel's errors, there is a reasonable probability that the results of the proceedings would have been different.[4] The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.[5] The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.[6]

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[2]To the extent that Townsend raised any of the following claims independently from his ineffective assistance of counsel claims, they are waived. 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).

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

[4]Id.

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

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

Townsend first contended that his trial counsel was ineffective due to an actual conflict of interest. Specifically, he alleged that his trial counsel represented Townsend's co-defendant at the time she entered into an agreement with the State to testify against Townsend.

In certain limited situations a petitioner is not required to demonstrate the prejudicial effect of his counsel's actions.[7] "An actual conflict of interest which adversely affects a lawyer's performance will result in a presumption of prejudice to the defendant."[8] The existence of an actual conflict of interest must be established on the specific facts of each case, but "[i]n general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties."[9]

In the instant case, attorney Kirk Kennedy testified that he began representing Townsend and his co-defendant, Teresa Provenzano, in March 1998. Kennedy stated that he did not believe a conflict existed in representing both Townsend and Provenzano because his strategy was to negotiate both cases. Kennedy further testified that his representation of Provenzano concluded during the summer of 1998. At that time, Provanzano retained attorney Carmine Colucci. On September 21, 1998, Provenzano signed an agreement to testify against Townsend in exchange for a dismissal of the charges against her. Both Colucci and Kennedy testified that Kennedy was not involved in negotiations with the State concerning Provenzano's agreement to testify against Townsend. As such, the district court's determination that Kennedy did not actively represent

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[7]Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992).

[8]Id.

[9]Id. (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

conflicting interests is supported by substantial evidence and is not clearly wrong.[10] Consequently, the district court did not err in denying this claim.

Second, Townsend claimed that his trial counsel was ineffective for failing to investigate previous felony convictions used to enhance his sentence, or present evidence concerning the constitutional invalidity of these previous convictions. We conclude that this claim is without merit. Townsend failed to articulate what investigation his trial counsel should have conducted in this area; further, Townsend provided no support whatsoever for his claim that his prior convictions were constitutionally infirm.[11] As such, he failed to demonstrate that his trial counsel was ineffective, and we affirm the order of the district court with respect to this issue.

Third, Townsend alleged that his trial counsel was ineffective for failing to hire a psychological expert who would have testified that "it was not just and proper for [Townsend] to be adjudicated a habitual criminal and that he could have benefited from a drug treatment program and psychological counseling." We conclude that this claim is similarly meritless. First, Townsend failed to demonstrate that any psychological expert would have provided such testimony. Further, even assuming the existence of such an expert, Townsend informed the district court prior to sentencing that his actions were the result of a drug addiction. Thus, Townsend did not establish that the results of his sentencing hearing would have been different if his trial counsel had procured testimony from

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

[11]See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

a psychological expert, and the district court did not err in denying the claim.

Townsend next raised multiple claims of ineffective assistance of appellate counsel.[12] To demonstrate ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.[13] "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."[14] Appellate counsel is not required to raise every non-frivolous issue on appeal.[15]

First, Townsend contended that his appellate counsel was ineffective for failing to appeal his habitual criminal adjudication. Specifically, Townsend argued that the State failed to prove the existence of the prior convictions beyond a reasonable doubt, or prove that Townsend was the person who committed the prior offenses. We conclude that Townsend is not entitled to relief on this claim. First, Townsend did not allege with any particularity how his prior convictions were

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[12]Townsend additionally argued that his trial counsel was ineffective on the following claims. Consistent with the reasoning discussed below, we conclude that Townsend failed to demonstrate that his trial counsel was ineffective on these issues.

[13]See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

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

[15]Jones v. Barnes, 463 U.S. 745, 751 (1983).

constitutionally invalid.[16] Additionally, the district court and Townsend's trial counsel were provided with certified copies of Townsend's previous felony convictions.[17] Prior to the imposition of Townsend's sentence, the prosecutor argued for habitual criminal adjudication and listed Townsend's previous convictions. When asked whether he had anything to state on his behalf, Townsend admitted that he had a prior conviction for attempted coercion, as well as "a lot of thefts." Because Townsend failed to demonstrate that this issue had a reasonable probability of success on appeal, we affirm the order of the district court with respect to this claim.

Second, Townsend claimed that his appellate counsel was ineffective for failing to argue that the State sought to enhance his sentence in retaliation for Townsend's exercise of his rights to self-representation, a speedy trial, and a trial by jury. Townsend has a lengthy criminal record and has previously been adjudicated a habitual criminal; he did not provide adequate facts to support a claim that the State sought to enhance his sentence for an improper purpose.[18] Thus, Townsend did not establish that this issue would have likely succeeded on appeal, and the district court did not err in denying the claim.

Third, Townsend alleged that his appellate counsel was ineffective for failing to argue that the district court did not make specific

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[16]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

[17]See NRS 207.016(5) (providing that "a certified copy of a felony conviction is prima facie evidence of conviction of a prior felony"); McAnulty v. State, 108 Nev. 179, 181, 826 P.2d 567, 569 (1992).

[18]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

findings that it was "just and proper" to adjudicate him a habitual criminal.

A sentencing court must exercise discretion and weigh the appropriate factors before adjudicating a defendant a habitual criminal pursuant to NRS 207.010.[19] Nevada law does not require, however, that a sentencing court "make 'particularized findings' that it is 'just and proper' to adjudicate a defendant as a habitual criminal."[20] "[A]s long as the record as a whole indicates that the sentencing court was not operating under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication and that the court exercised its discretion, the sentencing court has met its obligation under Nevada law."[21] Here, the record of Townsend's sentencing reveals that the district court heard arguments from counsel and understood the discretionary nature of habitual criminal adjudication. As such, Townsend failed to demonstrate that an appeal of this issue would have been successful, and the district court did not err in denying this claim.

Fourth, Townsend claimed that his appellate counsel was ineffective for failing to appeal the constitutionality of NRS 207.016(3). Townsend argued that each of his prior convictions was constitutionally invalid, but NRS 207.016 (3) prevented him from making this argument to the district court. With respect to previous convictions used for enhancement purposes, this court has held, "[i]f the record raises a presumption of constitutional infirmity, the state must present evidence to

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[19]Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000).

[20]Id.

[21]Id. at 333, 996 P.2d at 893-94.

prove by a preponderance that the prior conviction was constitutionally obtained."[22] Even if the record does not raise a presumption of constitutional infirmity, "the defendant is nonetheless free to present evidence tending to rebut the presumption of regularity afforded to a criminal conviction."[23] Consequently, Townsend failed to demonstrate that NRS 207.016 prevented him from arguing that his prior convictions were constitutionally invalid, such that an appeal of this issue would have been successful. We therefore affirm the order of the district court with respect to this claim.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Townsend is not entitled to relief and that briefing and oral argument are unwarranted.[24] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[25]

_____, J.
Rose

_____, J.
Maupin

_____, J.
Douglas

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[22]Dressler v. State, 107 Nev. 686, 698, 819 P.2d 1288, 1296 (1991).

[23]Id.

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

[25]We have reviewed all documents that Townsend 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.

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