

IN THE SUPREME COURT OF THE STATE OF NEVADA

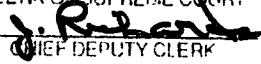
BRYAN K. ROBINSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42632

**FILED**

**AUG 30 2004**

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant Bryan Robinson's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On December 30, 1998, the district court convicted Robinson, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon, two counts of attempted murder with the use of a deadly weapon, and one count of conspiracy to commit murder.<sup>1</sup> The district court sentenced Robinson to serve multiple terms totaling two consecutive life terms in the Nevada State Prison without the possibility of parole plus two consecutive terms of 53 to 240 months. This court dismissed Robinson's appeal from his judgment of conviction and sentence.<sup>2</sup> The remittitur issued on August 1, 2000.

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<sup>1</sup>The district court entered an amended judgment of conviction on March 17, 1999.

<sup>2</sup>Robinson v. State, Docket No. 33679 (Order Dismissing Appeal, July 7, 2000).

On August 18, 2003, Robinson 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 and 34.770, the district court declined to appoint counsel to represent Robinson or to conduct an evidentiary hearing. On December 16, 2003, the district court denied Robinson's petition on the merits.<sup>3</sup> This appeal followed.

In his petition, Robinson first raised several claims of ineffective assistance of trial counsel. 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.<sup>4</sup> A petitioner must further establish there is a reasonable probability that the results of the proceedings would have been different if counsel had not erred.<sup>5</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>6</sup>

First, Robinson claimed that his trial counsel was ineffective for failing to file a pre-trial petition for a writ of habeas corpus to challenge the sufficiency of the evidence presented at the preliminary hearing. A review of the record reveals that Robinson's trial counsel filed a pre-trial petition for a writ of habeas corpus on February 13, 1997, in

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<sup>3</sup>The district court did not abuse its discretion in determining that Robinson provided good cause to excuse his untimely petition. See Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

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

<sup>5</sup>Id.

<sup>6</sup>Strickland, 466 U.S. at 697.

which he argued that insufficient evidence was presented at the preliminary hearing to bind Robinson over for trial on charges of murder, attempted murder, and conspiracy to commit murder. The district court, however, denied the petition. Thus, Robinson's claim is belied by the record,<sup>7</sup> and we affirm the order of the district court with respect to this claim.

Second, Robinson contended that his trial counsel was ineffective for: (1) failing to locate and interview several witnesses who would have supported Robinson's claim of innocence, (2) failing to object to instances of prosecutorial misconduct, and (3) failing to prepare and present an adequate defense. Robinson failed to support these claims with specific facts, however, or articulate how his counsel's performance was defective in these areas.<sup>8</sup> Consequently, the district court did not err in denying Robinson relief on these claims.

Third, Robinson alleged that his trial counsel was rendered ineffective by the district court's use of an illegal statutory aggravator and the use of a death-qualified jury. Although Robinson raised these claims in the context of ineffective assistance of trial counsel, he failed to provide any facts to support a claim that his counsel committed an error.<sup>9</sup> To the extent that Robinson is directly challenging the district court's allowance of the statutory aggravating factor and the use of a death-qualified jury, we conclude that these claims should have been raised on direct appeal,

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<sup>7</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

<sup>8</sup>See id. at 502, 686 P.2d at 225.

<sup>9</sup>See id.

and Robinson did not excuse his failure to do so.<sup>10</sup> Moreover, as an alternate and independent ground to deny relief, these claims are entirely without merit. Although the district court granted Robinson's motion to strike the aggravating factor, this court determined that the district court abused its discretion in doing so and ordered the district court to submit the aggravating circumstance to the jury at the penalty phase.<sup>11</sup> Further, the State sought to have the death penalty imposed against Robinson, and Robinson failed to articulate how the use of a death-qualified jury was improper. For these reasons, we affirm the order of the district court with respect to these claims.

Fourth, Robinson claimed that the prosecutor made prejudicial remarks during trial and during his closing argument. This claim is outside the scope of a post-conviction petition for a writ of habeas corpus and should have been raised on direct appeal.<sup>12</sup> Therefore, the district court did not err in denying Robinson relief on this claim.

Next, Robinson argued that his appellate counsel was ineffective. To establish 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.<sup>13</sup> "To establish prejudice based on the deficient

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<sup>10</sup>See NRS 34.810(1)(b)(2).

<sup>11</sup>State v. District Court, Docket No. 33056 (Order Granting Petition for Writ of Mandamus or Prohibition, September 25, 1998).

<sup>12</sup>See NRS 34.810(1)(b)(2).

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

assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."<sup>14</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>15</sup>

First, Robinson contended that his appellate counsel labored under an actual conflict of interest because he also acted as Robinson's trial counsel. In support of this argument, Robinson claimed that his appellate counsel failed to raise issues concerning his own incompetence at trial. Ineffective assistance of counsel claims are not appropriately raised on direct appeal, however.<sup>16</sup> Moreover, Robinson did not provide any specific facts concerning his appellate counsel's alleged conflict of interest.<sup>17</sup> As such, we affirm the order of the district court with respect to this claim.

Second, Robinson claimed that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence to uphold his convictions.<sup>18</sup> Our review of the record reveals adequate evidence from which a rational jury could find Robinson guilty of conspiracy to commit murder, first-degree murder with the use of a deadly weapon, and two

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<sup>14</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

<sup>15</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).

<sup>16</sup>See Fezell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

<sup>17</sup>See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

<sup>18</sup>To the extent that Robinson raised this claim independently from his ineffective assistance of counsel claim, we conclude that it is 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).

counts of attempted murder, such that his appellate counsel was not ineffective in failing to raise this issue on appeal. Conspiracy is an agreement between two or more persons to commit a criminal or unlawful act, and is generally established by inference from the conduct of the parties.<sup>19</sup> Further, "[i]t is settled in this state that evidence of participation in a conspiracy may, in itself, be sufficient evidence of aiding and abetting an act in furtherance of the conspiracy to subject the participant to criminal liability as a principal."<sup>20</sup> Here, evidence was introduced at trial that Robinson knocked Tracy Kennedy unconscious and subsequently he and his co-defendant, Derrick Hilliard, chased Jacques Tellis down an alleyway while shooting at him. Robinson and Hilliard then returned to where Kennedy was lying on the ground and Hilliard shot him multiple times. Next, Hilliard shot and wounded Kennedy's friend, Dennis Henderson. Based on this evidence, we conclude that Robinson failed to demonstrate that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence, and the district court did not err in denying Robinson relief on this claim.

Lastly, Robinson argued that the district court erred in permitting evidence concerning Kennedy's state of mind, and the prosecutor made impermissible references to gang activity throughout the trial. However, these claims were raised and rejected by this court on direct appeal. The doctrine of the law of the case prevents further litigation of these issues and "cannot be avoided by a more detailed and

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<sup>19</sup>Thomas v. State, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998).


<sup>20</sup>Lewis v. State, 100 Nev. 456, 460, 686 P.2d 219, 221-22 (1984).


precisely focused argument."<sup>21</sup> Therefore, we affirm the order of the district court with respect to these claims.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Robinson is not entitled to relief and that briefing and oral argument are unwarranted.<sup>22</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>23</sup>

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Jackie Glass, District Judge  
Bryan K. Robinson  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>21</sup>Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

<sup>22</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>23</sup>We have reviewed all documents that Robinson 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.