

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARCUS WEATHERSPOON A/K/A  
MARKUS WEATHERSPOON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42761  
**FILED**

OCT 06 2004

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT  
THE JUDGMENT OF CONVICTION

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

On July 13, 2001, the district court convicted Weatherspoon, pursuant to a jury verdict, of conspiracy to commit robbery, burglary while in possession of a firearm, robbery with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon, first-degree kidnapping, attempted murder with the use of a deadly weapon, battery on an officer causing substantial bodily harm, conspiracy to commit robbery and/or kidnapping, two counts of discharging a firearm at or into a vehicle, and unlawful taking of a vehicle without consent of owner (gross misdemeanor).<sup>1</sup> On appeal, this court reversed Weatherspoon's

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<sup>1</sup>An amended judgment of conviction and a second amended judgment of conviction were filed on July 24, 2001 and January 7, 2003, respectively.

convictions for first-degree kidnapping with the use of a deadly weapon and battery on an officer causing substantial bodily harm.<sup>2</sup> The district court sentenced Weatherspoon to serve a term of life in the Nevada State Prison with the possibility of parole after 60 months, plus multiple concurrent and consecutive terms totaling 264 to 720 months' imprisonment.

On August 29, 2003, Weatherspoon filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Weatherspoon filed a reply. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent Weatherspoon. On January 15, 2004, the district court conducted an evidentiary hearing, and subsequently denied Weatherspoon's petition. This appeal followed.

In his petition, Weatherspoon 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>3</sup> A petitioner must further establish a reasonable probability that, in the absence of counsel's errors, the results of the proceedings would have been different.<sup>4</sup> The court can

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<sup>2</sup>Weatherspoon v. State, Docket No. 38505 (Order Affirming in Part, Reversing in Part and Remanding, October 8, 2002).

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

<sup>4</sup>Id.

dispose of a claim if the petitioner makes an insufficient showing on either prong.<sup>5</sup> The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>6</sup>

First, Weatherspoon claimed that his trial counsel was ineffective for failing to question James Krylo, the State's firearms expert, about Officer Rossi's weapon. Specifically, Weatherspoon argued that Officer Rossi fired several shots at Weatherspoon and his co-defendants, and Krylo could have corroborated this. We conclude that this claim is without merit. Krylo did not examine Officer Rossi's gun, and consequently would not have been able to answer specific questions concerning Officer Rossi's use of his weapon the night of the robbery.<sup>7</sup> Therefore, Weatherspoon did not establish that his counsel acted unreasonably in failing to question Krylo about Officer Rossi's weapon, and we affirm the order of the district court with respect to this claim.

Second, Weatherspoon contended that his trial counsel was ineffective for failing to have a firearms expert examine Officer Rossi's weapon to determine if he fired it the night of the robbery. Weatherspoon's trial counsel, Stephen Amesbury, testified during the evidentiary hearing that he did not have Officer Rossi's weapon tested because there was no evidence that Officer Rossi fired his gun during the

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<sup>5</sup>Strickland, 466 U.S. at 697.

<sup>6</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

<sup>7</sup>See NRS 50.025(1).

incident.<sup>8</sup> Moreover, a firearms expert would not have been able to determine the precise time the gun was last fired. We conclude that the district court's determination that this claim lacked merit was supported by substantial evidence and was not clearly wrong.<sup>9</sup> As such, we affirm the order of the district court with respect to this claim.

Third, Weatherspoon alleged that his trial counsel was ineffective for failing to present to the jury a handwritten affidavit from his co-defendant, Darnell Harris, in which Harris accepted full responsibility for the crimes. Attorney Amesbury testified that Harris had not yet been tried for the crimes, and invoked his Fifth Amendment right and declined to testify at Weatherspoon's trial. Amesbury believed the handwritten affidavit was hearsay and not admissible under any exceptions to the hearsay rule.<sup>10</sup> We conclude that Amesbury did not act unreasonably in this instance. Moreover, Terrence Winn, another of Weatherspoon's co-defendants, testified at Weatherspoon's trial that Harris forced Weatherspoon to participate in the crimes. As such, Weatherspoon did not demonstrate that the outcome of his trial would have been altered by the admission of Harris' affidavit. Therefore, we affirm the order of the district court with respect to this claim.

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<sup>8</sup>Officer Rossi testified at trial that he did not use his gun during the incident, and the only bullet casings found at the scene came from the weapon of Weatherspoon's co-defendant.

<sup>9</sup>See Riley, 110 Nev. at 647, 878 P.2d at 278.

<sup>10</sup>See NRS 51.065.

Fourth, Weatherspoon contended that his trial counsel was ineffective for failing to present to the jury handwritten letters Weatherspoon wrote to Harris, in which Weatherspoon begged Harris not to harm him. We conclude that this claim is similarly without merit. Amesbury testified that he did not want the letters admitted because they were inflammatory and would have prejudiced Weatherspoon's case; Amesbury believed that in the letters, Weatherspoon was asking Harris not to harm him by testifying against him at trial. We conclude that Amesbury did not act unreasonably in failing to have the letters introduced into evidence, and we affirm the order of the district court with respect to this claim.

Fifth, Weatherspoon claimed that his trial counsel was ineffective for failing to call Gloria Banks as a witness. Weatherspoon contended that Banks had knowledge of the roles played by each of co-defendants in the case. Amesbury testified that it was a strategic decision not to call Banks as a witness because he did not believe her testimony would have aided Weatherspoon's defense. We conclude that Weatherspoon failed to demonstrate that his counsel acted unreasonably in this instance. Therefore, Weatherspoon did not establish that his counsel was ineffective on this issue, and the district court did not err in denying the claim.

Sixth, Weatherspoon alleged that his trial counsel was ineffective for failing to object to the testimony of co-defendant Tamika Beavers. Weatherspoon contended that Amesbury should have objected to her testimony because Beavers pleaded guilty and negotiated a reduced sentence in exchange for testifying against her co-defendants. We note

that Amesbury cross-examined Beavers extensively about her agreement with the State to testify against her co-defendants. Weatherspoon did not articulate a valid basis on which his counsel should have objected to Beavers' testimony.<sup>11</sup> We therefore conclude that Weatherspoon failed to demonstrate that his counsel was ineffective, and we affirm the order of the district court with respect to this claim.

Seventh, Weatherspoon argued that his trial counsel was ineffective for failing to call Annie Williams as a witness. Weatherspoon contended that Williams was with Beavers at a convenience store the night of the crimes, and would have impeached Beavers' testimony that she never went to the convenience store that evening. We conclude that Weatherspoon failed to demonstrate that the outcome of his trial would have been altered if Williams had provided such testimony. Thus, we affirm the order of the district court in this regard.

Next, Weatherspoon claimed 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>12</sup> "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."<sup>13</sup>

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<sup>11</sup>See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

<sup>12</sup>See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

<sup>13</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>14</sup>

Weatherspoon contended that his appellate counsel was ineffective for failing to argue that he was forced to aid in the commission of the crimes due to threats of violence. We conclude that this claim is without merit. During his trial, Weatherspoon testified that he was forced to commit the crimes by his co-defendants, but the jury did not find his duress defense credible. We conclude that Weatherspoon failed to demonstrate that this issue had a reasonable probability of success on appeal, and we affirm the order of the district court with respect to this claim.

Lastly, Weatherspoon contended that: (1) he was charged with multiple convictions based on the single act of shooting Officer Rossi; (2) the evidence was insufficient to uphold his remaining kidnapping conviction; and (3) the exclusion of the only African-American juror violated his right to a fair trial. This court already considered these claims on direct appeal, however. The doctrine of the law of the case prevents further litigation of these issues, and "cannot be avoided by a more detailed and precisely focused argument."<sup>15</sup> Therefore, the district court did not err in denying Weatherspoon relief on these claims.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Weatherspoon is not entitled to relief and


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<sup>14</sup>Jones v. Barnes, 463 U.S. 745, 751 (1983).


<sup>15</sup>Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

that briefing and oral argument are unwarranted.<sup>16</sup> However, our review of the judgment of conviction reveals an error. The second amended judgment of conviction states that Weatherspoon was convicted of first-degree kidnapping with the use a deadly weapon (count IV), although this court reversed that conviction on direct appeal. We therefore conclude that this matter should be remanded to the district court for the correction of this error. Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

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

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<sup>16</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).