

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN A. AMOS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42914

FILED

OCT 08 2004

ORDER OF AFFIRMANCE

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

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

On July 24, 2002, the district court convicted Amos, pursuant to a jury verdict, of burglary while in the possession of a firearm and robbery with the use of a deadly weapon. The district court sentenced Amos to serve a term of 120 months in the Nevada State Prison for the burglary conviction, with a minimum parole eligibility of 26 months and a concurrent term of 120 months for the robbery conviction, with a minimum parole eligibility of 26 months and an equal and consecutive term for the use of a deadly weapon. This court affirmed the judgment of conviction and sentence.¹ The remittitur issued on April 15, 2003.

On December 23, 2003, Amos 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

¹Amos v. State, Docket No. 39990 (Order of Affirmance, March 20, 2003).

district court declined to appoint counsel to represent Amos or to conduct an evidentiary hearing. On March 11, 2004, the district court denied Amos' petition. This appeal followed.

In his petition, Amos alleged that the trial court erred in denying his motion for mistrial based on the improper admission of evidence. Specifically, Amos asserted that the district court erroneously admitted the hearsay testimony of Las Vegas Metropolitan Police Officers Jeff Goodwin and Paul Deangelis. However, Amos raised this precise issue in his direct appeal, and we rejected his claim. The doctrine of law of the case precludes us from further consideration of this issue.²

Next, Amos raised several claims of ineffective assistance of counsel against his trial counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, Amos must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different.³ The district court may dispose of a claim if the petitioner makes an insufficient showing on either prong.⁴

First, Amos asserted that his counsel was ineffective for failing to file a motion in limine to preclude Officer Deangelis from testifying regarding uncharged bad acts Amos committed in the aftermath of the robbery. However, as noted above, we concluded in Amos' direct

²See Pellegrini v. State, 117 Nev. 860, 888, 34 P.3d 519, 538 (2001).

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

⁴Strickland, 466 U.S. at 697.

appeal that Officer Deangelis' testimony was proper. Moreover, Amos offered no support for his claim other than to say that his counsel's failure to file a motion in limine constituted ineffective assistance.⁵ Additionally, Amos asserted that his counsel was ineffective for failing to request a hearing pursuant to Petrocelli v. State.⁶ However, Amos failed to identify what issues he desired counsel to present at such a hearing. Thus, we conclude his counsel was not ineffective in this regard.

Second, Amos contended that his counsel was ineffective for failing to object to or file a motion to suppress the in-court identifications of Amos as the robber by witnesses Ora Shields and Mary Johnson.⁷ He argued that the in-court identifications were impermissibly tainted by an unduly suggestive one-on-one show-up. Specifically, Amos argued that the procedure was unduly suggestive because, at the one-on-one show-up, police car headlights were directed toward him while he stood handcuffed and shirtless in front a police car. The applicable standard for pre-trial identifications is whether, considering the totality of the circumstances, "the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was

⁵See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁶101 Nev. 46, 692 P.2d 503 (1985).

⁷Amos provided no facts or argument challenging the identifications made by three other witnesses. Even assuming the identifications were flawed, for the reasons set forth below, we conclude that Amos has not demonstrated that he was prejudiced by his counsel's failure to object or file a motion to suppress their testimony.

denied due process of law."⁸ This court analyzes this issue in a two-step inquiry: (1) whether the procedure was unnecessarily suggestive; and (2) whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure.⁹

The record belies Amos' claim concerning Shields.¹⁰ Shields testified at the preliminary hearing that she could not identify the robber. At trial, Shields was unavailable to testify due to an illness, therefore her preliminary hearing testimony was read into the record. Shields did not participate in any out-of-court lineup. Consequently, we conclude that Amos failed to demonstrate that his counsel was ineffective on this issue.

We conclude that Amos was not denied due process with respect to Johnson's pretrial and in-court identifications.¹¹ Even assuming that the one-on-one show-up was unnecessarily suggestive, we conclude that Amos failed to demonstrate that he suffered prejudice from counsel's failure to object to or file a motion to suppress Johnson's testimony in this regard.¹² Defense counsel thoroughly cross-examined Johnson regarding

⁸Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) (quoting Stovall v. Denno, 388 U.S. 293, 301-02 (1967)).

⁹Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 550 (1990).

¹⁰See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

¹¹See Wright, 106 Nev. at 650, 799 P.2d at 550; Jones, 95 Nev. at 617, 600 P.2d at 250.

¹²See Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996) (holding that when an ineffective assistance claim is based upon counsel's failure to file a motion to suppress evidence, the defendant must show that the claim was meritorious and that there was a reasonable likelihood that the exclusion of the evidence would have changed the result of a trial).

the one-on-one show-up, thereby exposing any deficiencies in the procedure to the jury, which was charged with evaluating the weight and credibility of such testimony.¹³ Moreover, the State presented other evidence sufficient to support Amos' convictions for robbery and burglary, including evidence that a loaded gun, a hooded, black and maroon Phoenix Coyotes jacket, a scarf and \$330.00 in cash were found in Amos' car. Two witnesses, including Johnson, identified the Phoenix Coyotes jacket, the scarf and the gun as being in the robber's possession at the time of the robbery. In addition, after the robbery, Amos refused to stop his car when a police officer signaled him to do so, and fled on foot after running his car up onto a curb. The police apprehended Amos soon after the robbery within a mile of the crime scene. We conclude that Amos failed to demonstrate that his counsel was ineffective in this regard.

Amos also argued that his counsel was ineffective for failing to preclude Johnson and Shield's in-court identification of him because their view of him at the preliminary hearing in a prison uniform and restraints impermissibly tainted their in-court identifications. It is not entirely clear from the record how Amos was dressed during the preliminary hearing; however there is some support in the record that Amos appeared at the hearing wearing a prison uniform. At the preliminary hearing, Johnson identified Amos as the robber and stated that he was wearing a blue uniform. However, Amos failed to explain how Johnson's view of him handcuffed and dressed in a prison uniform tainted her in-court identification of him as the robber.¹⁴ Moreover, defense counsel cross-

¹³See Steese v. State, 114 Nev. 479, 498, 960 P.2d 321, 333 (1998).

¹⁴See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

examined Johnson on this issue. As noted above, Shields never identified Amos in-court, and Amos provides no support whatsoever suggesting that her testimony was tainted even if she did observe Amos in handcuffs and a prison uniform at the preliminary hearing.¹⁵ Consequently, we conclude that Amos' claim of ineffective assistance of counsel on this issue is without merit.

Third, Amos claimed that his counsel was ineffective for failing to pursue a physical line-up. However, Amos failed to demonstrate that conducting a physical line-up would have led to a result favorable to the defense. Consequently, we conclude Amos failed to demonstrate that his counsel's performance was deficient or that he was prejudiced by this omission.

Fourth, Amos argued that his counsel was ineffective for failing to request a hearing pursuant to State v. Dessureault¹⁶ to challenge Johnson and Guzik's in-court identification of Amos. Amos failed to demonstrate the applicability of Dessureault, an Arizona decision, to his case. Therefore, we conclude counsel was not ineffective for failing to request such a hearing.

Lastly, Amos claimed that his counsel was ineffective for failing to call an investigating officer to testify on Amos' behalf. Amos alleged that the unnamed investigating officer would have testified at trial regarding "evidence of the falsification of witness testimony . . . in that Danielle Guzik's testimony was taken by an officer not involved in the case." Although it is not entirely clear from Amos' petition, presumably,

¹⁵Id.

¹⁶453 P.2d 951 (1969).

the "testimony" to which Amos is referring is the witness statement Guzik provided to the police shortly after the robbery. Amos also argued that the unidentified investigating officer would have testified that the amount of money stolen during the robbery was different than the amount recovered from Amos upon his apprehension. Amos' bare allegations regarding the purported testimony of an unnamed investigating officer provided insufficient support for his claim.¹⁷ Therefore, we conclude Amos did not demonstrate that his counsel's performance was deficient or that the absence of the unnamed investigating officer's testimony rendered the jury's verdict unreliable.

Amos also claimed that his appellate counsel was ineffective. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in Strickland v. Washington, 466 U.S. 668 (1984)."¹⁸ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹⁹ "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."²⁰

First, Amos claimed that appellate counsel was ineffective for neglecting to frame his direct appeal issues as constitutional violations. Amos argued that appellate counsel's failure to "federalize" his direct

¹⁷See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

¹⁸Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

¹⁹See Jones v. Barnes, 463 U.S. 745, 751 (1983).

²⁰Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

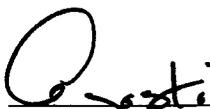
appeal issues placed him at a disadvantage in seeking post-conviction relief in federal court. However, Amos did not identify whatsoever which direct appeal issues he believed implicated the United States Constitution or demonstrate that the results of his direct appeal would have been different had counsel "federalized" his issues. Consequently, we conclude Amos' claim is without merit.

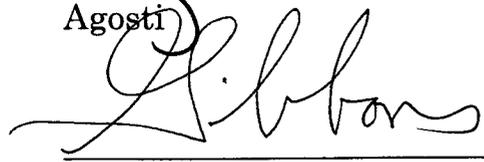
Second, Amos complained that his appellate counsel was ineffective for failing to consult with Amos regarding what issues would be raised on direct appeal. However, Amos failed to specify in his petition any issues he desired his counsel to raise that were not raised in his direct appeal. Therefore, we conclude that Amos has not demonstrated that his appellate counsel's performance was deficient.²¹

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

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

²¹See id.

²²See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

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