

IN THE SUPREME COURT OF THE STATE OF NEVADA

IROC AVELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44433

FILED

MAR 22 2005

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On November 21, 2002, the district court convicted appellant, pursuant to a jury verdict, of robbery with the use of a deadly weapon, battery with the intent to commit a crime and possession of a firearm by an ex-felon. The district court sentenced appellant to serve two consecutive terms of thirty-six to ninety months in the Nevada State Prison for the robbery count, a concurrent term of twenty-four to ninety months for the battery count, and a concurrent term of thirteen to sixty months for possession of a firearm by an ex-felon. This court affirmed appellant's judgment of conviction on direct appeal.¹

On November 24, 2003, appellant filed a motion for a new trial in the district court. The State opposed the motion. On February 26,

¹Aveli v. State, Docket No. 40597 (Order of Affirmance and Limited Remand to Correct the Judgment of Conviction, September 22, 2003). On October 20, 2003, the district court entered an amended judgment of conviction.

2004, the district court denied the motion. This court affirmed the order of the district court on appeal.²

On August 27, 2004, appellant 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 appellant or to conduct an evidentiary hearing. On December 6, 2004, the district court denied appellant's petition. This appeal followed.

In his petition, appellant raised several claims of ineffective assistance of trial 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.³ The court need not consider both prongs if the petitioner makes an insufficient showing on either prong.⁴

First, appellant claimed that his trial counsel was ineffective for: (1) failing to follow-up leads that could have demonstrated his actual innocence; (2) failing to present an affidavit or expert testimony from Metro robbery detective Cliff Mogg who would have cleared appellant of the robbery charge; and (3) lacking preparation and procedure. Appellant

²Avelli v. State, Docket No. 42946 (Order of Affirmance, December 10, 2004).

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.

failed to provide any specific facts in support of these claims, and thus, he failed to demonstrate that his trial counsel was ineffective.⁵

Second, appellant claimed that his trial counsel was ineffective for failing to present an affidavit or expert testimony from the doctor that treated appellant for the purpose of establishing that the victim did not need bandages and stitches and that the victim broke his arm because of his own stumble. We conclude that appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to establish that testimony from the treating doctor had a reasonable probability of altering the outcome of the trial. The victim testified that he did not need stitches for the injuries received to his head. There was testimony presented that the victim was bleeding from his wounds. The victim further testified that he broke his arm when he fell against the stairs on the landing after appellant had struck him in the chest, choked him and hit him over the head with a gun. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to challenge different descriptions of the weapon during the proceedings. Specifically, appellant noted that: (1) the victim referred to a gun in the police report; (2) "the grand jury hearing says 'assuming' a gun"; (3) the indictment stated a revolver was used; and (4) the victim testified during trial that a semiautomatic weapon was used. Appellant claimed that these inconsistencies permitted the district court to coerce the victim's testimony to state that a semiautomatic weapon was used. Appellant claimed his trial counsel was further ineffective for requesting a

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

Franks hearing on the inconsistencies.⁶ Appellant failed to demonstrate that his trial counsel's performance was unreasonable or that he was prejudiced. Appellant failed to demonstrate that a challenge to the inconsistencies had a reasonable probability of altering the outcome of the trial. The specific type of weapon was inconsequential. The victim testified that appellant pulled out a semiautomatic gun, threatened his life and made a demand for his wallet and Rolex watch, and hit him in the head with the gun.⁷ Appellant failed to demonstrate that any inconsistent terms relating to the gun coerced the testimony of the victim. Appellant failed to demonstrate that a Franks hearing was necessary or would have changed the outcome of the proceedings. Finally, we note that the record reveals that the indictment was amended to remove and replace the word "revolver" with "semiautomatic firearm." Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to challenge dishonest evidence that was illegally obtained from the State of Kansas. The allegedly dishonest evidence related to a gun seized by Kansas troopers at a vehicle stop. Appellant claimed that his trial counsel was ineffective for failing to file his motion for a new trial within seven days of the verdict. This court considered and rejected the underlying claim on appeal from the denial of appellant's motion for a new trial. This court specifically determined that the district court did not abuse its discretion in denying the motion for a new trial and recognized

⁶Franks v. Delaware, 438 U.S. 154 (1978).

⁷At the crime scene, the police found a butt plate to the magazine for a .40 caliber Smith and Wesson semiautomatic gun. Cartridges were also found at the scene for a .40 caliber gun.

that production of the gun was not necessary where the victim testified about the gun's use during the crime. Because this court has already rejected the underlying challenge to the gun seized in Kansas, appellant cannot demonstrate that his trial counsel's performance prejudiced him. Appellant further failed to demonstrate that there was a reasonable probability of a different outcome if the motion for a new trial had been filed within seven days from the verdict. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for allowing the district attorney to amend the charges during the trial. Appellant failed to provide any specific facts in support of this claim, and thus, we conclude that appellant failed to demonstrate that his counsel was ineffective.⁸ To the extent that appellant was referring to the amendment to include a notice of the State's intent to seek habitual criminal adjudication, appellant's counsel objected to the amendment. However, the State was properly permitted to amend the indictment to include a notice of intent to seek habitual criminal adjudication.⁹ Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that the State committed vindictive, malicious prosecutorial misconduct, that the district court committed misconduct, and that perjury and subornation of perjury were permitted during the trial. Appellant further claimed that the district court abused its discretion in allowing the State to admit allegedly illegally obtained

⁸See Hargrove, 100 Nev. 498, 686 P.2d 222.

⁹See NRS 207.016.

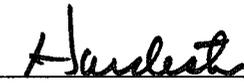
evidence from Kansas without authorization from Kansas and in allowing Kansas troopers to testify about his arrest. These claims were waived as they could have been raised on direct appeal, and appellant failed to demonstrate good cause for his failure to do so.¹⁰ To the extent that these claims involve issues previously considered and rejected by this court, the doctrine of the law of the case prevents further litigation of the issues and cannot be avoided by a more precisely focused and detailed argument.¹¹

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.¹² Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹³


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

¹⁰See NRS 34.810(1)(b).

¹¹See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

¹²See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹³We have received appellant's proper person petition to file an opening brief. We deny the request.

cc: Hon. Joseph T. Bonaventure, District Judge
Iroc Aveli
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk