IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHANIE BALSAMO A/K/A STEPHANIE WALLACE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58246

FILED

FEB 24 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

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 and motions for return of seized property.[1] Eighth Judicial District Court, Clark County; Jack B. Ames, Judge; Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Petition for a writ of habeas corpus

In her petition, filed on September 3, 2010, appellant first alleged that she received ineffective assistance of trial counsel. To prove ineffective assistance of trial counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the

[1]This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

This court originally entered an order of affirmance in this case on November 17, 2011. Because that order did not address the denial of appellant's post-conviction petition for a writ of habeas corpus, this court vacated its prior order.

proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

First, appellant claimed that trial counsel was ineffective for failing to challenge "the variance between the indictment and the evidence adduced at trial." Appellant failed to support this claim with any specific factual allegations which, if true, would entitle her to relief. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Accordingly, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to challenge jury instructions four and six, which explained the elements of burglary. Appellant failed to demonstrate that counsel was deficient or that she was prejudiced. Counsel objected to the instructions, and was successful in having one of the jury instructions rephrased with language more favorable to appellant. Further, both instructions were an accurate reflection of the statutory elements of burglary. See NRS 205.060. Accordingly, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to object to and have a charge against Michael Balsamo removed from the verdict form used in her case. This claim was belied by the record on appeal. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. None of the language in the verdict form refers to Michael Balsamo. Accordingly, the district court did not err in denying this claim.

Fourth, appellant claimed that counsel was ineffective for failing to challenge the audit reports used to calculate the restitution amount of $3,274.00. Appellant failed to demonstrate that counsel was deficient or that she was prejudiced. Beyond appellant's own bare and

naked claims that the audit reports were inaccurate, and that appellant actually hit a legitimate jackpot in the midst of her illegal activity, appellant failed to allege any specific inaccuracies in the audit reports or in the calculation of restitution. See id. Accordingly, the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to argue that counts 46, 47, and 48 were duplicative. Appellant failed to support this claim with any specific facts demonstrating that these counts were duplicative. See id. Accordingly, the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to inform appellant of the grand jury hearing or to allow her to attend. Appellant failed to demonstrate how the result of trial would have been different had she attended the grand jury hearing. See Echavarria v. State, 108 Nev. 734, 745, 839 P.2d 589, 596 (1992) (noting that a subsequent jury conviction serves to cure any irregularities in the grand jury proceedings). Accordingly, the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for failing to suppress certain videotape evidence, or to object to narrative explanations of alleged cheating occurring in the videotapes. Appellant failed to demonstrate that she was prejudiced. This court concluded on direct appeal that the testimony was relevant and properly admitted. See Balsamo v. State, Docket No. 52235 (Order Granting Petition for Rehearing, Reinstating Appeal, and Affirming in Part and Reversing in Part, May 10, 2010). Accordingly, the district court did not err in denying this claim.

Eighth, appellant claimed that trial counsel was ineffective for failing to obtain a plea agreement in this case. Appellant failed to demonstrate that counsel was deficient. While it appears there was some discussion between counsel and the State about the possibility of a plea negotiation, the State ultimately decided not to offer a deal. Trial counsel was not responsible for the independent decision of the State. Accordingly, the district court did not err in denying this claim.

Next, appellant claimed that she received ineffective assistance of appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

First, appellant claimed that appellate counsel failed to effectively communicate with her or accept her phone calls. Appellant failed to demonstrate how the result of the appeal would have been different had she engaged in additional discussion with appellate counsel. Accordingly, the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel was ineffective for failing to argue that after this court overturned multiple convictions for use of a cheating device or conspiracy to use a cheating device, insufficient evidence existed to support her convictions for

burglary. Appellant failed to demonstrate that she was prejudiced. Despite appellant's contentions, the State was not required to prove that appellant actually committed a larceny in the establishment entered. Rather, the State was only required to prove that appellant entered the establishment with the intent to commit a larceny. See NRS 205.060(1). Even after certain counts of actual use of a cheating device were overturned, multiple facts, including appellant's possession of a cheating device, were sufficient to support the jury's finding of guilt on the burglary counts. Accordingly, the district court did not err in denying this claim.[2]

Third, appellant claimed that appellate counsel failed to argue that insufficient evidence supported her conviction of counts 46, 47, and 48 (possession of a cheating device). Appellant further argued that appellate counsel was ineffective for failing to include her conviction for count 46 in the fast track statement. Appellant failed to demonstrate that counsel was deficient or that she was prejudiced. Counsel specifically argued on direct appeal that these convictions for possession of a cheating device were not supported by sufficient evidence, and this court rejected this argument. Balsamo v. State, Docket No. 52235 (Order Granting Petition for Rehearing, Reinstating Appeal, and Affirming in Part and Reversing in Part, May 10, 2010). While it appears that due to a typographical error, counsel mistakenly referred to "count 46" as "count 45," it was clear from the context of the brief that counsel was referring to the conviction for possession of a cheating device, and this court analyzed the claim as such

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[2]To the extent appellant attempted to argue the underlying merits of this claim, this claim could have been raised on direct appeal, and appellant did not demonstrate good cause for her failure to do so. See NRS 34.810(1)(b)(2). Accordingly, this claim is waived.

(count 45 related to the conspiracy to use a cheating device). Accordingly, the district court did not err in denying this claim.

Fourth, appellant claimed that appellate counsel was ineffective for failing to argue that after this court overturned multiple convictions for use of a cheating device and conspiracy to use a cheating device, the amount of restitution assessed should have been reduced, because she was not convicted of as many charges. Appellant failed to demonstrate that counsel was deficient or that she was prejudiced. As appellant's convictions for burglary on each alleged date remained valid, the amount of restitution remained appropriate. Accordingly, the district court did not err in denying this claim.

Fifth, appellant claimed that appellate counsel was ineffective for failing to "appeal" this court's partial affirmance on direct appeal to the federal District Court for the District of Nevada or file a petition for a writ of certiorari with the United States Supreme Court. Appellant failed to demonstrate that counsel was deficient or that she was prejudiced. Appellant failed to demonstrate with any specific factual argument, beyond that already argued on direct appeal, how either of these courses would have had any reasonable probability of success. In addition, appellant's right to the effective assistance of counsel was limited to appellant's first appeal, and counsel was not obligated to pursue the matter further. See Evitts v. Lucey, 469 U.S. 387, 394 (1985). Accordingly, the district court did not err in denying this claim.[3]

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[3]To the extent appellant attempted to re-argue her direct appeal claims, these claims were procedurally barred, and appellant failed to demonstrate good cause to overcome the procedural bar. See NRS 34.810(1)(b)(2). These claims are also barred by the doctrine of law of the case. See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

Sixth, appellant claimed that appellate counsel was ineffective for failing to provide her with her entire case file. Appellant failed to demonstrate that she was prejudiced. Appellant failed to allege with specificity which sections of her case file were missing, and how these missing sections were necessary to the preparation of her instant post-conviction petition. Accordingly, the district court did not err in denying this claim.

Finally, appellant claimed that insufficient evidence existed to support her remaining convictions for burglary, use of a cheating device, conspiracy to use a cheating device, and possession of a cheating device. To the extent this court determined on direct appeal that sufficient evidence supported appellant's convictions for use of a cheating device, conspiracy to use a cheating device, and possession of a cheating device, these claims are barred by the doctrine of law of the case, which cannot be avoided by a more detailed or precisely focused argument. See Hall, 91 Nev. at 316, 535 P.2d at 799. To the extent appellant raised these claims for the first time, these claims could have been raised on direct appeal, and appellant failed to demonstrate good cause for her failure to do so. See NRS 34.810(1)(b)(2). Accordingly, these claims have been waived. Therefore, the district court did not err in denying these claims.

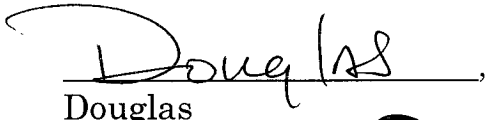
Motions for the return of seized property

In addition to her post-conviction petition for a writ of habeas corpus, appellant filed motions for the return of seized property on October 14, 2010, and March 30, 2011. In her motions, appellant claimed that she was entitled to the return of certain seized property pursuant to NRS 52.385. We conclude that the district court did not err in denying appellant's motions, as the provisions of NRS 52.385 apply only to a person "other than the one accused of the crime of which the property is

evidence." NRS 52.385(1). Appellant is accused of multiple crimes of which the property is evidence. Therefore, the district court did not err in denying appellant's motions.

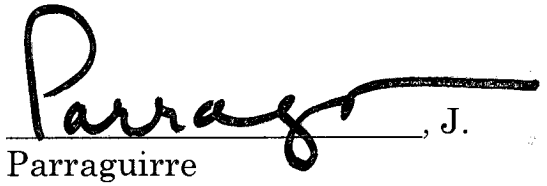
For the reasons stated above, we

ORDER the judgments of the district court AFFIRMED.[4]



_____, J.
Douglas

_____, J.
Hardesty



_____, J.
Parraguirre

cc: Chief Judge, The Eighth Judicial District Court
Hon. Jack B. Ames, Senior Judge
Hon. Stefany Miley, District Judge
Stephanie Balsamo Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[4]We have reviewed all documents that appellant 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. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.