

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN LEE BAILEY,

No. 36990

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

AUG 10 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT

BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On July 24, 1997, appellant was convicted of two counts of sexual assault. The district court sentenced appellant to serve two consecutive prison terms of life with the possibility of parole after ten years. Appellant filed a direct appeal contending that the sentence imposed upon him constituted cruel and unusual punishment. This court affirmed appellant's conviction.¹ Thereafter, appellant filed a post-conviction petition for a writ of habeas corpus. After conducting an evidentiary hearing, the district court denied appellant's petition.² This appeal followed.

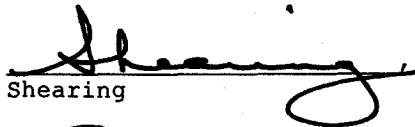
¹Bailey v. State, Docket No. 30949 (Order Dismissing Appeal, May 14, 1998).

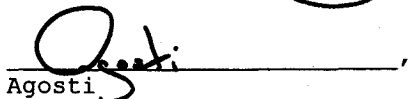
²Prior to conducting the evidentiary hearing, the district court dismissed appellant's claim that his counsel was ineffective in failing to argue that the two counts of sexual assault were merged. We conclude that the district court did not err in dismissing appellant's claim because it was repelled by the record. See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). Counsel was not ineffective for failing to raise the issue of merger because two distinct acts of sexual assault occurred. Namely, appellant engaged in both vaginal and anal intercourse with victim, and therefore the merger doctrine was inapplicable. See Wicker v. State, 95 Nev. 804, 603 P.2d 265 (1979); Deeds v. State, 97 Nev. 216, 626 P.2d 271 (1981).

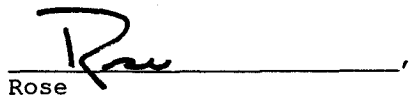
In the petition, appellant alleged that his trial and appellate counsel were ineffective and that his plea was not knowing.³ The district court found that counsel was not ineffective and that his guilty plea was knowing and voluntary. The district court's factual findings are entitled to deference when reviewed on appeal.⁴ Appellant has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, appellant has not demonstrated that the district court erred as a matter of law.

Accordingly, for the reasons stated in the attached order, we

ORDER the judgment of the district court AFFIRMED.


Shearing J.


Agosti J.


Rose J.

cc: Hon. Connie J. Steinheimer, District Judge
Attorney General
Washoe County District Attorney
Karla K. Butko
Washoe County Clerk

³Appellant also argued in the petition that the district court abused its discretion in sentencing because it relied on suspect evidence. This claim has been waived because it could have been raised on direct appeal. See Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994).

⁴See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

OCT 11 AM 9:00

BY [Signature]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE

* * *

MELVIN LEE BAILEY,

Petitioner,

v.

Case No. CR97P1342

JACKIE CRAWFORD, WARDEN,
LOVELOCK CORRECTIONAL CENTER,

Dept. No. 4

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT

On September 7, 2000, the parties, by and through their respective counsel, JOSEPH R. PLATER, for the Respondent, and KARLA BUTKO, for the Petitioner, appeared before the court on petitioner's Petition for Writ of Habeas Corpus (Post-Conviction). After having heard and considered the evidence, the court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. By way of criminal complaint, petitioner was charged with two counts of sexual assault. Maizie Pusich of the Washoe County

1 5. Petitioner claims that his counsel failed to investigate the
2 veracity of the victim, as she has made prior allegations of
3 molestations by other men. He also alleges that the victim was
4 coerced by police and prosecutors.

5 6. The court rejects this claim. Although petitioner presented
6 a letter from the victim regarding charges against two other men,
7 the court does not find that the reference was necessarily to sex
8 crimes. In addition, without more, the court cannot determine
9 that the allegations, whatever they were, were false. Further,
10 there was no evidence that the police or the prosecutor coerced
11 the victim in any fashion to fabricate or exaggerate the charges
12 against petitioner. The victim also testified at the evidentiary
13 hearing as to the crimes petitioner committed against her. The
14 court found the victim credible. Finally, petitioner did not
15 offer any evidence that the victim's veracity could have been
16 challenged in any other respect. Accordingly, this claim fails
17 for a lack of proof.

18 7. Petitioner next claims that his counsel should have argued
19 that the victim did not want the court to sentence petitioner to
20 consecutive sentences. The evidence repels this claim. Although
21 the victim sent a letter to petitioner after sentencing in which
22 she expressed remorse about petitioner's sentences, she expressed
23 her sentiments only because of her fear of petitioner. The
24 victim feigned sympathy for petitioner because petitioner's
25 friends, who lived next to the victim in Sacramento, continually
26 threatened to harm the victim and her family after the court

1 petition. These claims are denied either because petitioner
2 abandoned them, the record repels them, or there was no credible
3 evidence presented to support them.

4 CONCLUSIONS OF LAW

5 1. Petitioner received the effective assistance of counsel as
6 outlined in Strickland v. Washington, 466 U.S. 668 (1984), and
7 its Nevada progeny.

8 2. Petitioner freely, voluntarily, and intelligently entered his
9 guilty pleas.

10 JUDGMENT

11 Accordingly, for the foregoing reasons, the court
12 hereby denies the Petition for Writ of Habeas Corpus (Post-
13 Conviction).

14 DATED this 9 day of October, 2000.

15
16 Connie J. Steinheimer
17 DISTRICT JUDGE
18
19
20
21
22
23
24
25
26