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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRIAN K. O' KEEFE,
#1447732

Defendant.

No. 49329

CASE NO: C202793

DEPT NO: XV

FILED

MAY 23 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Alvarado
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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 4/11/2007
TIME OF HEARING: 8:30 A.M.

THIS CAUSE having come on for hearing before the Honorable Sally Loehrer, on the 11 day of April, 2007, the Petitioner not being present, Proceeding In Forma Pauperis, the Respondent being represented by DAVID ROGER, District Attorney, by and through Ercan Iscan, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, and not having entertained oral argument now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On June 3, 2004, a Criminal Complaint was filed in open court charging Brian Kerry O'Keefe, (hereinafter "Defendant") with one count of Battery With Intent To Commit A Crime (Felony – NRS 200.400); four counts of Sexual Assault (Felony – NRS 200.364, 200.366); and two counts of Attempt Sexual Assault (Felony – NRS

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200.364, 200.366). An Information was filed on July 6, 2004, charging Defendant with one count of Battery With Intent To Commit A Crime (Felony – NRS 200.400); three counts of Sexual Assault (Felony – NRS 200.364, 200.366); one count of Attempt Sexual Assault (Felony – NRS 193.330, 200.364, 200.366); and one count of Burglary (Felony –NRS 205.060).

2. Defendant pled not guilty to the charges alleged against him. Trial commenced on October 25, 2004 and concluded on October 28, 2004. The jury returned a verdict of guilty for count one - Battery (Misdemeanor); and count six - Burglary (Category B Felony). In addition to financial fees, Defendant was sentenced on count six to a minimum of twenty-four (24) months and a maximum of one hundred twenty (120) months in the Nevada Department of Corrections. Defendant's sentence was Suspended and he was placed on probation for an indeterminate period not to exceed five (5) years. For count one Defendant sentenced to credit for time served.
3. The Judgment of Conviction was filed on January 3, 2005.[1]
4. Defendant's Notice of Appeal was filed on February 1, 2005. The Nevada Supreme Court affirmed Defendant's conviction.[2] The remittitur was issued on February 17, 2006.
5. Defendant filed a Petition for Writ of Habeas Corpus on February 5, 2007.
6. Defendant filed a Supplement to his Petition on February 15, 2007.
7. On March 20, 2007, this court took the matter under advisement and subsequently found the writ to be without merit and ordered writ denied.
8. Defendant did not receive ineffective assistance of counsel.
9. Counsel was not ineffective for failing to object to proper jury instructions.
10. Counsel was not ineffective for failing to make futile objections.
11. Counsel was not ineffective for failing to call witnesses.

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[1] In addition to the present case, Defendant was adjudged guilty of Battery Constituting Domestic Violence (Felony) in case C207835 and is currently serving a sentence of a maximum of sixty (60) months and a minimum of twenty-four (24) months in the Nevada Department of Corrections, with three hundred eleven (311) days credit for time served. Sentence to run consecutive to C202793.

[2] See Order of Affirmance No. 44644 (Jan. 23, 2006).

12. Counsel was not ineffective for failing to call an expert witness.

13. Defendant's bare allegations do not warrant relief.

14. Counsel was not ineffective for allegedly failing to conduct a thorough investigation.

15. Issues that a defendant should have raised on direct appeal are considered waived.

16. The district court does not have jurisdiction to reconsider issues decided by the Nevada Supreme Court.

CONCLUSIONS OF LAW

1. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." It has long been recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 1449, n.14 (1970)) See also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). The principles for assessing claims of ineffective assistance of counsel were established in Strickland v. Washington, which "announced a now-familiar test." Roe v. Flores-Ortega, 528 U.S. 470, 476 (2000). A defendant making an ineffectiveness claim must show both that counsel's performance was deficient, which means that "counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 688, and that the deficient performance prejudiced the defendant, which means that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; See Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann, 397 U.S. 759, 771.

2. In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is

pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, if counsel's strategy decision is a "tactical" decision it will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

3. Based on the above law, the court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by "strong and convincing proof" that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996), citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981); Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991). The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977). Furthermore, the Defendant has the burden of proving ineffectiveness by a preponderance of the evidence. See Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).
4. This analysis does not mean that the court "should second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

5. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), citing Strickland, 466 U.S. at 690, 104 S.Ct. at 2066; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

6. Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing Strickland, 466 U.S. at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. citing Strickland, 466 U.S. at 687-89, 694.

7. As a general principle, counsel cannot be deemed ineffective for failing to make futile objections. Ennis v. State, 122 Nev. Adv. Op. 60, 137 P.3d 1095 (2006).

8. Trespass is not a lesser included offense of burglary. Smith v. State, 120 Nev. 944, 102 P.3d 569 (2004).

9. Under Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002), defense counsel and not Defendant has the "immediate-and ultimate-responsibility" of deciding what witnesses, if any, to call, and what defenses to develop.

10. A defendant claiming ineffective assistance from the failure to call expert witnesses should allege specifically what these experts could have done to make a different result reasonably probable. Evans v. State, 117 Nev. 609, 645, 28 P.3d 498, 522 (2001). Overall, the decision to allow the admission of expert testimony lies within the sound discretion of the trial court. Brown v. State, 110 Nev. 846, 852, 877 P.2d 1071, 1075 (1994).

11. In Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), the Court held

that claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.; see, NRS 34.735(6).

12. A defendant who contends that his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533, 538 (2004). Also, "[w]here counsel and the client in a criminal case clearly understand the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources." Id. at 538.

13. Nevada Revised Statute 34.810 (1) (b) (2) clearly states:

> 1. The court shall dismiss a petition if the court determines that:
> (b) The petitioner's conviction was a result of a trial and the grounds for the petition could have been:
> (2) Raised in a direct appeal or a prior petition for writ of habeas corpus or post conviction relief...

14. The Nevada Supreme Court affirmed NRS 34.810(1)(b) when it stated "this court will consider as waived those issues raised in a post-conviction relief application which might properly have been raised on direct appeal, where no reasonable explanation is offered for petitioner's failure to present such issues." Warden v. Sparks, 91 Nev. 627, 629, 541 P.2d 651, 652 (1975) (quoting Johnson v. Warden, 89 Nev. 476, 477, 515 P.2d 63, 64 (1973). Furthermore, the Court clarified what grounds NRS 34.810(1)(b) does and does not apply to when it held "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered raised in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1999).

15. "The law of first appeal is the law of the case on all subsequent appeals which the facts are substantially the same." Bejarano v. State, 106 Nev. 840, 841, 801 P.2d

1388, 1389 (1990). "The doctrine of law of the case cannot be avoided by a more detailed and precisely focused argument substantially made after reflection upon previous proceedings." Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 798-99 (1975). Where an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Pellegrini v. State, 117 Nev. 860, 888, 34 P.3d 519, 538 (2001) (holding "[u]nder the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief"); see also McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996). The law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same; this doctrine cannot be avoided by more detailed and precisely focused argument. Hall, *supra.* In essence, the doctrine of the law of the case forecloses Defendant from reviving his claims.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 16th day of May, 2007.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY
ERCAN ISCAN
Deputy District Attorney
Nevada Bar #009592

CLERK OF THE COURT

MAY 18 '07

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